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Weil

Alert
SEC Disclosure and Corporate Governance

SEC Confirms that Company Announcements of Key Information via Social Media Outlets Can Be Regulation FD-Compliant

- ***Caution***: SEC applies the framework of the 2008 guidance on use of corporate websites to use of social media
- Therefore, companies will have to make sure their Twitter, Facebook, or other social media outlets are "recognized channels of distribution"

@SEC_News Issues Guidance on the Use of Social Media . . . #calmdown, not a #greenlight for companies to start tweeting material information[1]

In a sign of the times, on April 2, 2013, the US Securities and Exchange Commission (SEC or Commission) issued guidance for using social media channels to distribute material nonpublic information to the investing public in compliance with Regulation Fair Disclosure (Regulation FD). The guidance, which comes in the relatively unusual form of a Report of Investigation (Report) pursuant to Section 21(a)[2] of the Exchange Act of 1934, as amended (Exchange Act), clarifies that:

- Regulation FD applies to social media posts of material nonpublic information; and
- Companies may use social media channels such as Facebook and Twitter to announce key information in compliance with Regulation FD *provided that* investors have been alerted in advance about which social media channel will be used to disseminate such information in accordance with Commission guidance set forth in a 2008 interpretive release relating primarily to corporate website communications (discussed below).[3]

The Report stems from an inquiry the Division of Enforcement launched last year into whether a post by Netflix, Inc. CEO Reed Hastings on his personal Facebook page may have violated Regulation FD and Section 13(a) of the Exchange Act (for a description, see our client Alert, Applying Securities Laws to Social Media Communications, Dec. 2012).[4] Ultimately, the Commission determined not to pursue an enforcement action. However, because the investigation revealed market uncertainty regarding the applicability of Regulation FD to emerging technologies, the Commission issued the Report to provide guidance to issuers regarding how Regulation FD and the 2008 Commission Guidance on the Use of Company Web Sites (2008 Guidance)[5] apply to disclosures made through social media channels.

The good news is that the Report acknowledges that social media may be used by companies as an FD-compliant means of communicating

with investors, and that the Commission does not seek to "[inhibit] corporate communication through evolving social media channels," but instead "supports companies seeking new ways to communicate and engage with shareholders and the market." However, as discussed below, companies seeking to embrace social media outlets as channels for communicating material nonpublic information to investors should first carefully review the Commission's 2008 Guidance and all company policies relating to Regulation FD compliance, insider trading, disclosure controls (including those relating to "mandatory" Form 8-K reporting[6]), and the protection of confidential information. For those companies that want to be "first out of the box" with social media communications, there now is a more defined path forward, albeit one with certain hurdles to leap that may not have been obvious at first blush if one simply were to read the title of the Commission press release accompanying the issuance of the Report – SEC Says Social Media OK for Company Announcements if Investors Are Alerted.[7]

Social Media Disclosures Triggering Regulation FD

Regulation FD seeks to level the playing field in the market for corporate securities by prohibiting the selective disclosure of material nonpublic information to persons who are likely to trade on that information. Specifically, the regulation provides that when an issuer, or a person acting on its behalf,[8] selectively discloses material nonpublic information to any person enumerated in the regulation,[9] the issuer must distribute that same information – either prior to or simultaneously with the selective disclosure – in a manner reasonably designed to achieve effective broad and non-exclusionary distribution to the public. The Report makes clear that Regulation FD applies to social media posts in the same manner as any other web-based corporate communication, emphasizing that

> [i]f an issuer makes a disclosure to an enumerated person, including to a broader group of recipients through a social media channel, the issuer must consider whether that disclosure implicates Regulation FD. This would include determining whether the disclosure includes material, nonpublic information. Further, if the issuer were to elect not to file a Form 8-K [to effect immediate, FD-compliant disclosure], the issuer would need to consider whether the information was being disseminated in a manner "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." (Footnotes omitted)

Broad, Non-Exclusionary Distribution of Information to the Public

Although the 2008 Guidance was directed primarily at the use of corporate websites for the disclosure of material, nonpublic information (so-called "pull" technology), the Commission notes that today's evolving social media channels are extensions of the "push" technologies (e.g., email alerts and RSS feeds) and "interactive" communication tools (e.g., blogs) specifically identified in the 2008 Guidance. As such, the Report states, "the 2008 Guidance is equally applicable to current and evolving social media channels of corporate communication."

When information is deemed 'public' for purposes of Regulation FD

In the 2008 Guidance, the SEC stated that to determine whether information posted on a website could be deemed "public" for FD purposes, such that a later selective disclosure of such information would not violate the regulation, a company must consider whether and when:

- A company website is a "recognized channel of distribution";
- Posting of information on a company website disseminates the information in a manner making it available to the securities marketplace in general; and
- There has been a reasonable waiting period for investors and the market to react to the posted information.[10]

As noted, the Commission stated in the Report that these same considerations should be applied to analysis of the dissemination of important corporate information via social media platforms.

'Recognized channel of distribution'

The 2008 Guidance offered a non-exhaustive list of factors (discussed below) to be considered in evaluating whether a corporate website constitutes a recognized channel of distribution. Per the Report, the Commission expects issuers to "examine rigorously" the factors indicating whether a particular social media channel is a "recognized channel of distribution." It should be noted, however, that the central focus of the Report's inquiry is on one of those factors – whether the company has made investors, the market, and the media aware of the channels of distribution it expects to use, so that these parties know where to look for disclosures of material information. Thus, in addition to alerting investors to its use of a particular social media platform, a company seeking to establish that platform as a recognized channel of distribution will have to apply all of the other relevant factors described in the 2008 Guidance (as set forth above).

Providing appropriate notice to investors of the specific social media channels a company will use

Consistent with the 2008 Guidance, the Commission suggests in the Report that companies disclose on their corporate websites the specific social media channels they intend to use to disseminate material nonpublic information, so that investors can take the steps necessary to receive important disclosures (e.g., subscribing, joining, registering, or reviewing that particular social media account). Companies also can include the same information in their SEC filings and press releases.

The Report strikes a particularly cautionary note on the personal social media sites of individuals employed by a public company, stating that, without adequate notice, these sites "would not ordinarily be assumed to be channels through which the company would disclose material corporate information." "This is true," according to the Report, "even if the individual in question has a large number of subscribers, friends, or other social media contacts, such that the information is likely to reach a broader audience over time."[11]

Interestingly, the Netflix saga came full circle on April 10, 2013, when the company seized on the Commission guidance contained in the Report by filing a Form 8-K to announce the social media channels through which it intends to disseminate company information that may be deemed to be material. Included in the list of five Netflix social media platforms is Reed Hastings' personal Facebook page, which was the subject of the Report's inquiry.[12]

Practical Implications

Despite the caption of the press release accompanying the Report – *SEC Says Social Media OK for Company Announcements if Investors Are Alerted* – the Report is certainly not a green light for companies to rush out immediately and disclose material nonpublic information via social media channels after merely notifying the markets of its intentions to do so. Behind the headline is the reality that companies considering whether to communicate with investors via social media will have to "examine rigorously" all of the other factors enumerated in the 2008 Guidance that must be weighed in evaluating whether a corporate website constitutes a recognized channel of distribution for Regulation FD purposes, and apply those factors to its chosen social media outlets. Among these factors is evidence of investor usage of a particular medium.

It is worth noting that, in the almost five years since the SEC released the 2008 Guidance, there does not appear to be a single domestic public company that has used its corporate website as the exclusive "recognized channel of distribution" for FD purposes, even though some have announced an intention to do so, and many have combined social media communications of important investor-related information with other FD-compliant tools such as a press release, webcast, conference call, and/or Form 8-K filing (Item 801) or submission (Item 7.01 and/or Item 2.02).[13] This could be attributable to the fact that the 2008 Guidance lacks specificity as to what, other than a Form 8-K or press release, constitutes a "recognized [social media] channel."

Additionally, companies must be mindful that disclosures made via social media are subject to the antifraud provisions of the federal securities laws (as well as the anti-gun-jumping provisions of the Securities Act of 1933, as amended (Securities Act), and the proxy and tender offer rules under the Exchange Act, depending on the context in which disclosures are made). As a result, the company's existing disclosure controls and procedures should encompass communications made through social media posts by or on behalf of the company, and clearly prohibit the unauthorized disclosure of company-related information through such media. With this in mind, some companies may decide that the requirements for establishing a social media outlet as a recognized channel of distribution will be too difficult to administer, while others will embrace the opportunity to communicate with investors through these new and exciting means.

Practice Tips and Considerations[14]

The following are practice tips and considerations based on the 2008 Guidance for those companies seeking to establish social media channels as FD-compliant mechanisms for disclosing material nonpublic information to investors. Even for companies choosing *not* to use social media as their sole source of dissemination of corporate information, these tips will be useful going forward for those companies that decide to permit use of social media on a complementary basis with more traditional FD-compliant methods. We begin with a brief "refresher" on the 2008 website guidance, then turn to the application of this guidance to social media.

The 2008 Guidance – factors a company must consider in determining whether its website is a recognized channel of distribution and when information is 'disseminated'

- Whether and how companies let investors and the markets know that the company has a website and that they should look to the company's website for material information. For example, does the company include disclosure in its periodic reports (and in its press releases) of its website address, and routinely post important information on its website?
- Whether the company has made investors and the markets aware that it will post important information on its website, and whether it has a pattern or practice of posting such information on its website.
- Whether the company's website is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the website in the location known and routinely used for such disclosures, and whether the information is presented in a format readily accessible to the general public.
- The extent to which information posted on the website is regularly picked up by, and reported in, the market and readily available media, or the extent to which the company has advised newswires or the media about such information, along with the size and market following of the company involved. For example, in evaluating accessibility to the posted information, companies that are well-followed by the market and the media may know that the market and the media will pick up and further distribute the disclosures made on their websites. On the other hand, companies with less of a market following may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's website, and that they should look at the company website for current information about the company.
- The steps the company has taken to make its website and the information accessible, including the use of free "push" technology, such as RSS feeds, or releases through other distribution channels, either to distribute such information widely or advise the market of its availability. The SEC does not believe that it is necessary that push technology be used in order for the information to be deemed adequately disseminated, although that may be one factor to consider in evaluating the accessibility to the information.
- Whether the company keeps the content of its website current and accurate.

- Whether the company uses other methods in addition to its website to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information.
- The nature of the information.

Application of these factors to social media

In applying the Commission's 2008 Guidance to a particular social media platform, with the aim of establishing that platform as a recognized channel of distribution and an FD-compliant means of disseminating information, companies may wish to consider adopting the following practices:

- Review all company policies relating to Regulation FD compliance, insider trading, disclosure controls and procedures, and the protection of confidential information, and revise as necessary or appropriate to cover the new platform. Distribute revised policies to directors, officers, and other employees and have them certify that they have read and understand the materials.
  - Ensure that the insider trading policy's "blackout" periods apply to social media communications, at least with respect to directors, officers, and personnel with access to material nonpublic company information.
  - Ensure that disclosure controls and procedures cover "informal" electronic disclosure made by or on behalf of the company that ordinarily are not filed with or furnished to the SEC.
- Institute training at all levels of the company (including the board and senior management) on the use of social media, and consider adopting a standalone social media policy that is fully integrated with the company's Regulation FD and insider trading policy or policies.
  - A social media policy should cover such matters as compliance with Regulation FD, permitted and prohibited employee use, use of social media by executive officers, attribution of materially misleading statements or omissions, and required approvals for communications of company information.
- Establish a particular account (e.g., a separate Twitter account or Facebook page) to disseminate material company information and make sure that all material news releases are posted to that official account.
  - Note that using multiple social media outlets can present FD compliance concerns if, for example, material information is not posted simultaneously on all identified outlets – that is, if information is posted on one social media outlet in advance of others, investors subscribed to that particular outlet will have an informational advantage over investors who happen not to follow that outlet.
- Include references to the official account in all company press releases and SEC filings, and before the company begins using the new medium, announce that the company routinely intends to disseminate material company information via such account. For example:

  "The company intends to use its [insert official Twitter, Facebook other social media account] as a means of disclosing material nonpublic information and for complying with its disclosure obligations under Regulation FD. Accordingly, investors should monitor this account, in addition to following the company's press releases, SEC filings and public conference calls and webcasts."
- Know your investor demographics. Not all investors will be open to using subscription-based services, whether for privacy or cost reasons, or otherwise.
- Timely post information and ensure that information is current and accurate. Link such information to the company's IR webpage. Develop a regular practice of updating, deleting or archiving content on the official social

media account, in conjunction with the IR webpage and other investor-oriented areas of the company's website. This will help the company establish a recognized pattern or practice of posting information to its official social media account, and ensure appropriate vetting and the conformity of that information as disseminated through all "official" corporate communications vehicles.

- Take steps to increase the number of followers or subscribers, particularly media-related followers, to help ensure that posted material information is picked up and redistributed by the media.
- Monitor the number of subscriber/follower reposts of official company posts (e.g., how frequently company tweets are retweeted) to help determine when the account has become a recognized channel of distribution.
- Take a "belt-and-suspenders" approach to disseminating material nonpublic information until the particular social media outlet has been established as a recognized channel of distribution – that is, use social media to supplement the dissemination of information to the public by other, more conventional or accepted means (e.g., use Twitter to "tweet" highlights from a previously disseminated earnings release, including a link in the tweet to that release). Take measures to ensure that the supplemental social media post does not precede the public availability of the information via a Form 8-K or other FD-compliant means and that it goes no further than what's been said otherwise.
- Keep in mind that until the social media platform is established as a "recognized channel of distribution," its use presents a timing concern from an FD perspective – in other words, a social media post of material nonpublic information cannot precede the public availability of that information via an FD-compliant means (such as an 8-K).
- Also keep in mind, as discussed above, that some material events *must* be reported on Form 8-K.

The applicability of the antifraud provisions of the federal securities laws and other rules to social media communications

Social media posts are analyzed the same way as any other company disclosure and thus, as noted above, are subject to the antifraud rules, as well as Section 5 of the Securities Act, the proxy and tender offer rules, and such other provisions as (for example) Section 13(d) of the Exchange Act.

Practice Tips:

- The SEC cautioned in the 2008 Guidance that, while blogs or forums can be informal and conversational in nature, statements made there by the company or company spokespersons will not be treated differently from other company statements when it comes to the antifraud provisions of the federal securities laws. The same caution should be applied to company or company spokesperson statements posted on other social media channels, such as Facebook and Twitter. The company should have controls in place to monitor statements by company spokespersons on social media outlets to make sure that such statements are not misleading.
  - Note that when posting to social media outlets with character or content limitations (e.g., Twitter's 140-character limit), attempting to summarize material information within the confines of such restraints could present a risk of running afoul of the antifraud rules because of what is omitted. Moreover, these content limitations may force companies to truncate or omit the safe harbor provision in the Private Securities Litigation Reform Act (PSLRA).

Disclosure controls and procedures should cover company communications made via social media

Given the applicability of the federal antifraud rules and other provisions of the federal securities laws, including but certainly not limited to the mandatory line-item disclosure requirements of Form 8-K, a company's disclosure controls and procedures should be broad enough to monitor all social media communications made by or on behalf of the company for compliance not only with Regulation FD, but also with other securities law provisions that potentially give rise to disclosure and filing obligations.

Practice Tips:

- Review existing disclosure controls and procedures to ensure that they cover, or can be applied to, social media communications made by or on behalf of the company.
- Provide training to investor relations and communications personnel on complying with the Commission's rules concerning public dissemination of material information, and make them aware that the antifraud rules (and, potentially, other provisions of the federal securities laws), apply to communications made via social media.
- Have the disclosure committee or a subset of the committee (or functional equivalent) periodically review the company's social media channels to determine the type and scope of information being posted and whether the company is properly assessing the public dissemination factors discussed herein.

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1 A little social media humor. Note that the title is exactly at the Twitter 140-character limit.

2 *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings*, Release No. 34- 69279 (Apr. 2, 2013), available at: http://www.sec.gov/litigation/investreport/34-69279.pdf. Section 21(a) of the Exchange Act authorizes the Commission to investigate violations of the federal securities laws, and, in its discretion, "to publish information concerning any such violations." The Report is the second Section 21(a) report on Regulation FD; the first report involved an inquiry into Motorola, Inc. *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Motorola, Inc*., Release No. 34-46898 (Nov. 25, 2002), available at: http://www.sec.gov/litigation/investreport/34-46898.htm.

3 Companies should keep in mind their existing Form 8-K disclosure obligations relating, for example, to the submission of historical earnings releases (Item 2.02), and disclosure of material impairments (Item 2.06), change in control (Item 5.01) and other material events that require the filing of a Form 8-K.

4 To our knowledge, the Netflix incident marked the first time the Division issued a Wells Notice based on a social media communication. Of course, there may have been prior situations in which a company did not – in contrast with Netflix – publicize its receipt of a Wells Notice relating to possible Regulation FD violations arising from such communications.

5 *Commission Guidance on the Use of Company Web Sites*, Release No. 34-58288 (Aug. 7, 2008), available at: http://www.sec.gov/rules/interp/2008/34-58288.pdf.

6 *See* Endnote 3, above.

7 *See SEC Says Social Media OK for Company Announcements if Investors Are Alerted* (Apr. 2, 2013), available at: http://www.sec.gov/news/press/2013/2013-51.htm

8 For FD purposes, the following persons are deemed to be "acting on behalf of" a company:

- "Senior officials" of the company, meaning any director, executive officer, IR or PR officer, or person with similar functions; and
- Any other officer, employee, or agent of the company who regularly communicates with investors and/or securities professionals.

9 FD was adopted to address the selective disclosure of material nonpublic information to those persons whose trading on the basis of such information was reasonably foreseeable. Accordingly, it applies to communications with the following:

- Brokers or dealers and their associated persons,
- Investment advisers, certain institutional investment managers, and their associated persons,
- Investment companies, hedge funds, and affiliated persons, and
- Any holder of a company's securities under circumstances in which it is reasonably foreseeable that the person would purchase or sell those securities on the basis of the information.

10 Per the 2008 Guidance, the factors to consider as to whether there has been a reasonable waiting period for investors and the market to react to information posted via website include:

- The size and market following of the company;
- The extent to which investor-oriented information is regularly followed;
- The steps the company has taken to make investors and the market aware that it uses its website as a key source of important information about the company; and
- The nature and complexity of the information.

11 This statement may have been included in the Report in response to Mr. Hastings argument in defense of his actions that "posting to over 200,000 people is very public." *See* Weil client Alert by Christopher Garcia and Melanie Conray, *Applying Securities Laws to Social Media Communications* (Dec. 2012).

12 The Netflix 8-K, available at: http://www.sec.gov/Archives/edgar/data/1065280/000119312513149406/d519782d8k.htm, also included the following statement:

The SEC's Report of Investigation provided guidance to issuers such as Netflix regarding the use of social media to disclose material non-public information. In this regard, investors and others should note that we announce material financial information to our investors using our investor relations website (http://ir.netflix.com), SEC filings, press releases, public conference calls and webcasts. We use these channels as well as social media to communicate with our subscribers and the public about our company, our services and other issues. It is possible that the information we post on social media could be deemed to be material information. Therefore, in light of the SEC's guidance, we encourage investors, the media, and others interested in our company to review the information we post on the U.S. social media channels listed below. This list may be updated from time to time on Netflix's investor relations website.

13 Google issued an "advisory release" in April 2010 announcing that the company "intends to make future announcements regarding its financial performance exclusively through its investor relations website". A few other companies have reportedly emulated this practice. However, it does not appear that any company relies exclusively on its website as the sole mechanism for disseminating material information pursuant to the 2008 Guidance. Rather, these companies appear to use website disclosures as a supplement to information distributed through FD-compliant means.

14 *See also SEC Guidance on Use of Corporate Websites – Where Are We Four Years Later?* (Sept, 1, 2012) for the Course Handbook for Practicing Law Institute's 44th Annual Institute on Securities Regulation, co-authored by Weil Partners Catherine Dixon and P.J. Himelfarb, and Keir Gumbs.

If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any member of the firm's Public Company Advisory Group:

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