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12

SOCIAL MEDIA AND REGULATION FD IN A POST-NETFLIX WORLD

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Social Media and Regulation FD in a Post-Netflix World[1]

SEC Confirms that Company Announcements of Key Information via Social Media Outlets may be Regulation FD-Compliant – So Now What?

- ***Caution***: SEC applies the framework of its 2008 interpretive guidance, aimed primarily at corporate web sites, to social media channels
- Therefore, companies that decide to use social media to communicate with investors and/or analysts will have to make sure their Twitter, Facebook or other social media outlets are "recognized channels of distribution"

This Spring, the U.S. Securities and Exchange Commission ("SEC" or "Commission") issued interpretive guidance to public companies on how to use social media channels to distribute material non-public information to the investing public without violating the ban on selective disclosure imposed by the SEC's Regulation Fair Disclosure ("Regulation FD"). The guidance, which came in the relatively unusual form of a Commission Report of Investigation relating to Netflix, Inc. and its CEO, Reed Hastings, was issued pursuant to Section 21(a) of the Securities Exchange Act of 1934, as amended ("Exchange Act")("Netflix 21(a) Report").[2] Two key points are made in the Netflix 21(a) Report, as follows:

- Regulation FD applies to corporate communications made via social media and other emerging forms of electronic communications in the same way it applies to corporate web sites. As a result, "company communications made through social media channels *could* constitute selective disclosures and, therefore, require careful Regulation FD analysis";[3] and

- Companies that decide proactively to use social media channels, such as Facebook and/or Twitter, to release material, non-public information without running afoul of Regulation FD must follow the Commission guidance set forth in a 2008 interpretive release relating primarily to corporate web site communications ("2008 Guidance").[4] Or, as the Commission put it, "the principles outlined in the 2008 Guidance – ***and specifically the concept that the investing public should be alerted to the channels of distribution a company will use to***

[1] By Catherine T. Dixon, a partner of Weil Gotshal & Manges LLP, in the Washington, D.C. office. This article is current as of September 1, 2013, and is based on a Weil client alert authored by members of the Public Company Advisory Group, dated April 12, 2013 (available at http://www.weil.com). This article provides general information and should not be used or taken as legal advice for specific situations, which depend on the evaluation of precise factual circumstances. The views expressed here reflect those of the author and not necessarily the views of Weil, Gotshal & Manges LLP.

[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 Netflix 21(a) Report represents the second time that the SEC chose to issue interpretive guidance on Regulation FD in lieu of instituting an enforcement proceeding; 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] SEC Press Release No. 2013-51 (Washington, D.C., April 2, 2013)(emphasis added), available at http://www.sec.gov/news/press/2013/2013-51.htm.

[4] 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. Other channels of communication discussed in the 2008 Guidance include e-mail, corporate blogs and RSS feeds.

disseminate material information – apply with equal force to corporate disclosures made through social media channels."[5]

So what does all this mean, and what are companies doing differently, if anything? Simply put, the Commission reminded public companies in the Netflix 21(a) Report that corporate social media communications demand the same basic securities law analysis applicable to any other type of corporate communication transmitted outside of the four corners of SEC-mandated filings or submissions. This is true regardless of whether a particular communication is published in a company press release, posted on the company's web site, communicated during a company earnings call or webcast, or "pushed" electronically by e-mail or other, still-evolving social media tools to an audience that may include investors and/or market professionals. The only sure-fire method for demonstrating instant, FD-compliant dissemination of material, non-public corporate information is the same as it has been since Regulation FD became effective in 2000 – file or furnish that information by means of a Form 8-K.[6] The informal, spontaneous nature of social media doesn't alter the reality that the Commission considers these forms of communication to be "written" statements potentially giving rise to liability under the federal securities laws.[7]

A central lesson of the Netflix 21(a) Report is this: an electronic communication of important corporate information can be conveyed (or "pushed") to a fairly large group of subscribers or other recipients pursuant to one or more social media channels, yet still fall short of satisfying Regulation FD's "public disclosure" element.[8] If such a communication is found in hindsight to contain material, non-public information about the company, its transmission therefore could be problematic from a Regulation FD perspective – whether considered in isolation or in conjunction with simultaneous or subsequent non-FD compliant disclosures of the same information.[9] Accordingly, while a company certainly can choose not to use social media for investor relations purposes, the facts underpinning the SEC's Netflix 21(a) Report make it clear that public companies are well-advised to re-examine (if they haven't already done so) their current policies and procedures with a view toward determining at a minimum who is authorized to speak for the company on various social media platforms and for what purpose, and whether investors or analysts might be among the recipients of information released via these platforms.

Notwithstanding the exuberant title of the SEC press release accompanying the Netflix 21(a) Report – *"SEC Says Social Media OK for Company Announcements if Investors Are Alerted"* – companies to date appear to be taking a relatively cautious approach in this area, utilizing social media as a supplement to other, more established forms of investor communication. There may be several different reasons for this apparent caution, including (but not necessarily limited to) institutional

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[5] *Netflix* 21(a) Report at 5 (emphasis added).

[6] *See id.* at 6 (citation omitted; emphasis added)("[I]f the issuer were to elect **not** to file a Form 8-K, 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.'"); *compare* Rule 101(e)(1) *with* 101(e)(2), Regulation FD.

[7] Depending on the facts and circumstances, other provisions of the federal securities laws may come into play; e.g., the Securities Act of 1933, as amended, and/or the proxy and tender offer rules under the Exchange Act, respectively.

[8] Netflix 21(a) Report at 6

[9] As the Commission explained (*id.*), "the rule [Regulation FD] makes clear that public disclosure of material, nonpublic information must be made in a manner that conforms with Regulation FD whenever such information is disclosed to any group that includes one or more enumerated persons[,]" such as investors and/or market professionals. The definition of the term "enumerated persons" is discussed in note 18, below.

investors' preference for accessing material corporate information through more conventional media,[10] the Commission's existing rules requiring submission of quarterly and other historical earnings releases under cover of Form 8-K,[11] and the difficulties associated with measuring the extent to which disclosures made through social media channels are being assimilated into the total informational mix relating to a company and its securities. Although not emphasized in the Netflix 21(a) Report, the 2008 Guidance requires companies to do more than merely alert investors to the intended use of a given social media channel to effect regular (as opposed to occasional or sporadic) public dissemination of information those investors would consider important – companies also must be able to demonstrate that investors are actually using that channel for its designated purpose on a sustained and consistent basis. In short, a company must be able reasonably to conclude, upon application of the multi-factor analysis first propounded in the 2008 Guidance and carried forward in the Netflix 21(a) Report, that a given social media channel has become a "recognized channel of distribution" equivalent to a Form 8-K, a press release, or even a posting on the IR page of a corporate web site. This necessarily will take some time and effort on the part of companies and investors alike.

Following a discussion of the Netflix 21(a) Report, this article examines early corporate responses to the Commission's latest guidance, then recapitulates the highlights of the Commission's last interpretive release, the 2008 Guidance, and considers its possible application to social media. The article concludes with some practical suggestions for companies that are taking the opportunity provided by the refined analytical framework outlined in the Netflix 21(a) Report to re-assess their existing policies and procedures relating to social media communications with investors and the broader securities market.

The Netflix 21(a) Report

The Netflix 21(a) Report resulted from an investigation launched last year by the SEC's Division of Enforcement, focusing on whether a post by the CEO of Netflix, Inc. to his personal Facebook page in early July 2012 – announcing that the company for the first time had streamed one billion hours of content during the previous month -- may have involved selective disclosure of material corporate information contrary to Regulation FD and Section 13(a) of the Exchange Act.[12] According to the

[10] A recent survey of investor relations professionals sponsored by the National Investor Relations Institute ("NIRI") indicated that a large majority of those surveyed "are not using social media for IR primarily due to lack of interest in the medium by the investment community." Joint Press Release of NIRI and Corbin Perception, "*NIRI and Corbin Perception Release Studies of Social Media Use in Corporate Investor Communications at 2013 NIRI Annual Conference"* (June 10, 2013)*, 2013),* available at http://www.niri.org/Media/News-Releases/NIRI-and-Corbin-Perception-Release-Studies-of-Social-Media-Use-in-Corporate-Investor Communications-.aspx. Corbin Perception separately surveyed 87 "global buy-side professionals" and found that 92% of those who responded do not consider information gleaned from social media sites to be particularly reliable (i.e. either somewhat or not at all reliable). However, a substantial plurality of buy-side respondents (43%) indicated that they would increase use of corporate social media web sites following the Commission's Netflix 21(a) Report. *See id.* About 49% of professional investors said that they use social media in their research *(id.)*; this may or may not mean that such investors necessarily would be receptive to receiving material information from companies pursuant to social media rather than other, more established channels, such as press releases, SEC filings/submissions, or even corporate web sites. Of course, much will depend on how companies themselves respond to the Commission's latest guidance – these are still early days, as discussed below. In this connection, about 49% of those IR professionals surveyed who advised that they are not using social media for IR purposes intend to re-assess the issue within the next 12 months. *See id.* (Note that, while the joint NIRI-Corbin Perception press release cited above discloses the buy-side professionals sample size, it is silent with respect to the size of the IR professionals sample).

[11] Item 2.02 of Form 8-K. Other types of information the Commission deems *per se* material must be reported on Form 8-K within four business days of the triggering event, such as (for example) a material impairment (Item 2.06), change in control (Item 5.01) or the departure of a director (Item 5.02).

[12] Netflix 21(a) Report at 1, 4. Netflix disclosed the existence of the Enforcement Division investigation via a Form 8-K furnished to the SEC on December 6, 2012 (disclosing the receipt of a Wells Notice from the Division staff by each of the company and its CEO).

Commission, neither the CEO nor Netflix had previously published "company metrics" on the CEO's personal Facebook page. Netflix had never informed shareholders that the CEO's Facebook page would be used to disclose important corporate information. Nor was the CEO's post accompanied or preceded by Netflix's disclosure that the company had reached this "streaming milestone", either pursuant to a press release, a posting on the company's own web site or Facebook page, or a Form 8-K.[13] The CEO's failure to consult with the company's CFO, or legal or IR personnel, also was noted by the Commission. Without explicitly identifying the disputed information as "material" for FD purposes, the Commission further observed that the company's per-share stock price rose from $70.45 when the CEO posted the disputed information, to $81.72 at the close of the next trading day. The Commission seemingly gave short shrift to the fact that the CEO's Facebook page had over 200,000 subscribers at the time of his post, some of whom were equity research analysts, shareholders, reporters and bloggers, pointing out that Netflix had "consistently directed the public to its own Facebook page, Twitter feed, and blog and to its own web site for information about [the company,]" and that the CEO himself had "stated for the public record that 'we [Netflix] don't currently use Facebook and other social media to get material information to investors; we usually get that information out in our extensive investor letters, press releases and SEC filings."[14]

Because the SEC investigation revealed considerable market uncertainty regarding the application of Regulation FD and the 2008 Guidance to the proliferation of social media platforms, the Commission ultimately opted to provide interpretive guidance rather than initiate enforcement proceedings. In this regard, the Commission signaled that it did "not wish to inhibit the content, form or forum of any such disclosure, and we are mindful of placing additional compliance burdens on issuers." To the contrary, the Commission took this opportunity to "encourage companies to seek out new forms of communication to better connect with shareholders." Striking a somewhat more cautionary note, however, the Commission reminded companies that "the analysis of whether Regulation FD was violated is always a facts-and-circumstances analysis based on the specific context presented."[15]

The Netflix 21(a) Report went on to "clarify and amplify" two critical points: (1) company "communications through social media channels require careful Regulation FD analysis comparable to communications through more traditional channels;" and (2) "the principles outlined in the 2008 Guidance – and specifically the concept that the investing public should be alerted to the channels of distribution a company will use to disseminate material information – apply with equal force to corporate disclosures made through social media channels."[16] Each point is addressed in more detail below.

In expanding upon the first point, the Commission acknowledged that Regulation FD was adopted to level the playing field in the market for corporate securities by prohibiting the selective disclosure, by or on behalf of a reporting company,[17] of material, non-public information to any "enumerated person" -- such as a favored large investor or market professional[18] -- without simultaneous or prior disclosure of the same information to the public at large. At the same time, as the Commission emphasized, "the [rule's] prohibition [against selective disclosure] does not turn on an intent or motive of favoritism."[19] In an apparent reference to the facts of this proceeding, the Commission observed that the dissemination of material, non-public information to a large group that includes both "enumerated" and "non-enumerated" persons would not preclude a finding that the speaker violated the rule's ban on selective disclosure. Instead, "the rule makes clear that public

[13] Netflix 21(a) Report at 1.

[14] *Id.* at 5.

[15] *Id.*

[16] *Id.*

disclosure of material, nonpublic information must be made in a manner that conforms with Regulation FD whenever such information is disclosed to any group that includes one or more enumerated persons."[20] In short, before an issuer makes a disclosure to an enumerated person who is part of a broader group through a social media channel, that issuer must consider whether such disclosure triggers the application of Regulation FD. Such consideration requires the issuer to determine whether the disclosure in question includes material, non-public information and, if so, whether the information is "being disseminated in a manner 'reasonably designed to provide broad, non-exclusionary distribution of the information to the public'" in the event the issuer elects not to file (or furnish) a Form 8-K.[21]

Turning to the second point identified above, relating to the "broad, non-exclusionary distribution" element of Regulation FD,[22] the Commission first explained why it believes the 2008 Guidance remains relevant to corporate social media usage some five years later. In the Commission's view, "[t]oday's evolving social media channels" are nothing more than an extension of the web-based communication platforms analyzed in the 2008 Guidance, because: (a) like corporate web sites, corporate-sponsored "social media pages are created, populated, and updated by the issuer;" and (b) the FD implications of early "push" (e-mail) and "interactive" communication tools (blogs) were analyzed in the 2008 Guidance.[23] Given the direct and immediate line of communication between issuer and investors that can be created through social media channels, the Commission "expect[s] issuers to examine rigorously the factors indicating whether a particular channel is a 'recognized channel of

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[17] For FD purposes, the following persons are deemed to be "acting on behalf of" a company (as set forth in Rule 101(c) of Regulation FD):

- "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.

[18] Regulation FD applies to selective disclosure of material, non-public information to any of the following persons enumerated in Rule 100(b)(1), absent the availability of one or more exceptions (such as an express confidentiality agreement) listed in Rule 101(b)(2):

- 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 this holder would purchase or sell those securities on the basis of the information.

[19] *Id.* at 6.

[20] *Id.*

[21] *Id.* at 6 & n. 20 (citing Rule 100(e)(1) & (e)(2) of Regulation FD). As the Commission explained in the 2008 Guidance, "posting information on a company's web site in a location and format readily accessible to the general public would not be 'selective' disclosure, [nevertheless] the information may not be 'public' for purpose of determining whether a subsequent selective disclosure [of the posted information] implicates Regulation FD." 2008 Guidance at 24.

[22] *See* Rule 101(e)(2) of Regulation FD.

[23] Netflix 21(a) Report at 7.

distribution' for communicating with their investors."[24] Note that although the "recognized channel of distribution" concept originally outlined in the 2008 Guidance is predicated on analysis of a number of different factors (which are discussed later in this article), the Commission largely confined its discussion in the Netflix 21(a) Report to the "advance notice" factor; that is, the adequacy of the "steps taken [by the issuer] to alert the market about which forms of communication a company intends to use for the dissemination of material, non-public information, including the social media channels that may be used and the types of information that may be disclosed through these channels…."[25]

Referring to the 2008 Guidance, the Commission then highlighted possible approaches to providing the requisite notice to investors. The Commission suggested that "disclosures on corporate web sites identifying the specific social media channels a company intends to use for the dissemination of material non-public information," would give "the markets the opportunity to take the steps necessary to be in a position to receive important disclosures – e.g., subscribing, joining, registering, or reviewing that particular channel."[26] The Commission also seemed to be endorsing the use of periodic reports and press releases as effective advance notice mechanisms, while stressing that these "are some, but certainly not all, of the methods a company could use, with minimal burden, to enable evolving social media channels of corporate disclosure to be used as recognized channels of distribution in compliance with Regulation FD and the 2008 Guidance."[27]

There is another important lesson to be learned from the Netflix 21(a) Report – the Commission is highly skeptical of whether a public company can or should rely on the personal social media site of an individual officer, even the CEO, to convey important corporate information to investors in conformity with Regulation FD. Acknowledging that "every case must be evaluated on its own facts," the Commission indicated that "disclosure of material, nonpublic [corporate] information on the personal social media site of an individual corporate officer, without advance notice to investors that the site may be used for this purpose, is unlikely to qualify as a method 'reasonably designed to provide broad, non-exclusionary distribution of the information to the public' within the meaning of Regulation FD." Whether or not that officer 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," is irrelevant from a Regulation FD compliance perspective. The Commission stated flatly that "[p]ersonal social media sites of individuals employed by a public company would not ordinarily be assumed to be channels through which the company would disclose material corporate information."[28]

How are Public Companies Responding to the Netflix 21(a) Report?

Shortly after the Netflix 21(a) Report was issued in early April 2013, Netflix filed a Form 8-K to announce the resolution of the Commission's enforcement inquiry into the company and CEO pursuant to this Report, and to identify for investors the social media channels through which the company may disseminate company information that could be deemed material -- these were the CEO's public Facebook page, two corporate blogs and the company's Facebook page and Twitter feed. As reflected in the pertinent language of this Form 8-K (filed with the SEC on April 10, 2013, and excerpted below), the company appears to be preserving maximum flexibility with respect to future reliance on any form of

[24] *Id.* (citing the 2008 Guidance at 20-22).

[25] *Id.*

[26] *Id.*

[27] *Id.* In the 2008 Guidance (at 23), the Commission suggested that, before important information is posted on a company's web site, such information should be filed with or furnished to the SEC via EDGAR, or published in a press release.

[28] Netflix 21(a) Report.

social media (whether alone or in combination with other methods) to effect widespread public disclosure of material, non-public corporate information:

> 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.

Other companies seem to be taking what one commentator has described as a similar "shot-gun" approach in the wake of the Netflix 21(a) Report – disclosing in a Form 8-K, press release and/or corporate web site, "various several social media channels where material nonpublic information may become public."[29] It is impossible to predict, just a few months after the Commission spoke in the Netflix 21(a) Report, whether any of these companies (or others) will succeed in persuading the necessary critical mass of investors, market professionals and media to turn regularly to a particular social media forum for news of material corporate developments. Much will depend on a company's own consistency in using such a forum to disseminate material, non-public information, as well as widespread investor and market acceptance – which must be monitored and measured over a reasonable period of time.[30] Until then, companies are likely to continue to do what they appear to have been doing before the Netflix 21(a) Report was issued -- experimenting with different social media tools in combination with existing, FD-compliant media; for example, by issuing tweets during earnings conference calls transmitted via the Internet that contain a link to the earnings release and, in some instances, the "live" earnings webcast itself.[31]

Companies interested in learning more about what it takes, beyond satisfying the advance investor notification element highlighted in the Netflix 21(a) Report, for a newly designated corporate social media channel to qualify as a "method (or combination of methods) of disclosure … reasonably designed to provide broad, non-exclusionary distribution of the [material] information to the public[,]"[32]

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[29] *See "SEC Finally Addresses Interaction of Regulation FD and Social Media,"* 38 The Corporate Counsel 3 (March-April 2013), available in PDF at http://www.electronicthecorporatecounsel.com/Issues/CC_pdfs/TCC0413.pdf. A running list of companies that have announced an intention to release important corporate information via one or more social media channels in the wake of the Netflix 21(a) Report (available to subscribers only at http://www.thecorporatecounsel.net/member/FAQ/EmployeeBloggers/#9), is now (as of September 1, 2013) up to 19 companies, including Netflix.

[30] In this regard, as one IR expert warned, "[t]here's a real risk that investor relations professionals will be left behind as more investors – buy-side, sell-side, institutional or retail – become accustomed to using social media in their work flows." Dominic Jones, *Survey finds social media gap between investors, companies* (June 11, 2013)(discussing the NIRI/Corbin Perception surveys cited in note 10, above), available at http://irwebreport.com/20130611/iros-vs-investors-social-media/.

[31] *See, e.g., "Tweets, Likes and Other Disclosures: Social Media and the New Corporate Message"* (Lexis-Nexis, July 22, 2013)(describing PepsiCo's practice, since "early 2013," of sending out multiple messages from its official Twitter account on the same day the company issues its quarterly earnings release; these tweets contain snippets of information from the report, including profit numbers and comments from the CEO, accompanied by a link to the full earnings release), available at http://www.thisisreallaw.com/hot-topics/2013/07/22/tweets-likes-disclosures.html.

[32] Rule 101(e)(2) of Regulation FD.

should consult the more detailed interpretive guidance set forth in the Commission's 2008 Guidance. To that end, the next section of the article focuses on the specific elements of the 2008 Guidance in an effort to facilitate an evaluation of how these elements interact within the Commission's recently updated Regulation FD analytical framework.

Back to Basics of the 2008 Guidance: When Disclosure is Deemed "Public" Within the Meaning of Regulation FD

In the 2008 Guidance, the SEC formulated a three-part test for determining whether information posted on a company's web site could be considered "public" for Regulation FD purposes, so that a subsequent selective disclosure of such information would not violate the regulatory prohibition against such disclosure. (As discussed, the same test presumably applies to the dissemination of information via corporate social media channels). Specifically, a company should consider whether and when:

- A company web site (or social media channel) is a "recognized channel of distribution";
- Posting of information on a company web site (or social media channel) 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 (or otherwise disseminated) information.

Although not stated explicitly in the Netflix 21(a) Report, the same tripartite test presumably applies in the context of corporate social media communications. The first and third elements of this test, as the Commission has explained them further in the 2008 Guidance, are addressed below.

Recognized Channel of Distribution

As previously noted, the Commission stressed in the Netflix 21(a) Report the significance of the "advance investor notification" element of the "recognized channel of distribution" analysis set forth in the 2008 Guidance. However, this is just one of a non-exhaustive list of factors the Commission indicated (in the 2008 Guidance) may be relevant to a company's assessment of whether its web site (or any other form of communication, such as social media) will qualify as a "recognized channel of distribution." What follows is a complete list of the pertinent factors delineated in the 2008 Guidance:

- Whether and how companies let investors and the markets know that the company has a web site, and that they should look to the company's web site for material corporate information. For example, does the company include disclosure in its periodic reports (and in its press releases) of its web site address, and routinely post important information on its web site?
- Whether the company has made investors and the markets aware that it will post important information on its web site, and whether it has a pattern or practice of posting such information on that web site.
- Whether the company's web site is designed to lead investors and the market efficiently to information about the company and includes information specifically addressed to investors, whether the information is prominently disclosed on the web site 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 web site is regularly picked up and re-circulated by the market and readily available media, and the extent to which the company has advised newswires or the media about such information.
- The size and market following of the company involved. To illustrate, in evaluating the accessibility of web-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 web sites. That company also may have a "track record" of having its tweets re-tweeted multiple times and discussed in a national business newspaper such as the

Wall Street Journal. Conversely, companies with a smaller market following may need to take more affirmative steps to let investors and other important constituencies (i.e. the press) know that information is or has been posted on the company's web site (and/or disseminated via the company's Twitter account), and that they should look to this location for current, investor-oriented information about the company.

- The steps the company has taken to make its web site and the information accessible, including through the use of free "push" technology, such as RSS feeds, or releases through other distribution channels, either to circulate 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 of the information.
- Whether the company keeps the content of its web site current and accurate, enhancing its reliability. A pattern of using the company's IR web page to emphasize positive news while burying negative news raises serious questions under applicable antifraud provisions.[33]
- Whether the company uses other methods, in addition to its web site posting, 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 – does it relate to matters investors and market professionals are most interested in, such as earnings and other corporate performance metrics (e.g., monthly subscriber data)?

Reasonable Waiting Period

Even though the Commission did not allude to the "reasonable waiting period" element of the 2008 Guidance in the Netflix 21(a) Report, it is highly relevant from both an antifraud and a Regulation FD perspective.[34] Under the 2008 Guidance, the factors a company should consider in deciding whether there has been a reasonable waiting period for investors and the market to react to information posted on its web site 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 web site as a key source of important information about the company; the Commission suggests, for example, that companies alert investors to an important web posting in advance through a press release and/or Form 8-K; and
- The nature and complexity of the information.

With respect to how these factors should be applied in analyzing whether material information is "public," the Commission urged issuers to consider the facts relating to the "particular company and the particular type of information" in determining how quickly and completely information is assimilated by investors and the broader securities market. By way of illustration, the Commission observed that, "a large company that frequently uses its web site as a key resource for providing information, has taken

[33] Companies should keep in mind the Commission's view that the antifraud doctrine of "buried facts" applies to electronic disclosures, including those made pursuant to Internet-based platforms. Under this doctrine, a web-based disclosure would be considered materially false or misleading if its overall significance is obscured because material information is buried in a footnote or appendix, or otherwise difficult for investors to find and assess in light of the "total mix" of available information regarding the company and its securities. *See* 2008 Guidance at 28n. 68.

[34] While the Commission explicitly declined to address when information would be considered "public" for purposes of the insider trading prohibitions that the Commission and the courts have read into Exchange Act Section 10(b) and Rule 10b-5 thereunder, the agency did suggest that the case law in this area could offer useful guidance. *See id.* at 23-24.

steps to make investors and the market aware of this, and reasonably believes that its web site is well-followed by investors and other market participants, may get comfortable with a waiting period that is shorter than a waiting period for a company that is not in the same situation."[35]

The Elusive Distinction Between What is "Public" for Purposes of Avoiding an FD-Proscribed Selective Disclosure, and Effecting FD-Compliant "Broad, Non-exclusionary Distribution" to the Investing Public -- What Does it Mean for Effective Compliance Policies and Procedures Post-Netflix?

In both the Netflix 21(a) Report and the 2008 Guidance, the Commission drew a distinction between making a social media communication containing material, non-public information "public" to avoid Regulation FD problems associated with private, selective disclosures of that information by or on behalf of the company, on the one hand, and, on the other hand, using such a communication as the sole or primary mechanism for effecting FD-compliant disclosure of material, non-public information to investors and the markets at large. While the significance of this distinction may seem a bit abstruse, it may be helpful in establishing a compliance "baseline" for companies still weighing the various costs and benefits of harnessing social media as a means of communicating with investors. If the experience with corporate web sites following the Commission's publication of its 2008 Guidance is any indicator – few, if any, companies have used their web sites as the sole means of making "broad, non-exclusionary distribution" of material, non-public information to investors and the marketplace[36] -- many companies may prefer, at least in the near term, to tap social media as a useful, but supplemental, investor communication tool that builds on existing FD-compliant disclosure vehicles such as press releases and/or reports on Form 8-K.

Recent studies reveal that many corporate boards of directors are still grappling with understanding the risks and rewards of social media, and how these media might be used by their companies, if at all, to communicate with investors. Shortly after the Commission issued the Netflix 21(a) Report, Corporate Board Member and FTI Consulting conducted a survey of more than 550 directors and general counsel of public companies, in an effort to identify their "most prevalent areas of concern" in 2013. Several of the survey questions related to corporate social media usage. More than 20% of the directors surveyed said their companies did not have social media policies, and another 38% were unsure.[37] Only 16% of director respondents "have discussed the topic formally and feel confident their board has an understanding of the risks, 37% said the topic has been broached but they need more information to feel comfortable with the strategy and the risks, and 26% said their board has no plans to formally discuss social media issues."[38] These results are somewhat sobering, given the consensus among "many compliance experts" that "[a]fter the brouhaha surrounding CEO Reed Hasting's disclosure of a Netflix viewing milestone on Facebook last year … companies would be wise

[35] *Id.* at 23.

[36] An informed observer noted that, after the 2008 Guidance was issued, only a "handful" of companies "started putting out their earnings releases solely by use of their corporate web sites … [whereas] most relied on a combination of means for dissemination." Transcript of thecorporatecounsel.net webcast first recorded on May 8, 2013, entitled *"Social Media: Parsing the Hypos*," available at http://www.thecorporatecounsel.net/member/Webcast/2013/05_08/transcript.htm (subscription required)(Remarks of David Lynn, Editor, TheCorporateCounsel.net, Partner, Morrison & Foerster LLP, and former SEC Division of Corporation Finance Chief Counsel), at 2. Assuming historical earnings are involved, one of those "complementary" dissemination methods would have been an Item 2.02 Form 8-K.

[37] *See Law in the Boardroom 2013*, Corporate Board Member (Second Quarter 2013), available at https://www.boardmember.com/Magazine_Article_Details.aspx?id=9750&page=1.

[38] *Id.*

to have … a [social media] policy and review it periodically, and to ensure that they have lines of demarcation regarding social media marketing and material disclosures" targeting investors.[39]

A 2012 joint Conference Board/Stanford University Rock Center for Corporate Governance survey of corporate directors, CEOs and other senior executives yielded similar conclusions before news of the Commission's Netflix investigation hit the press.[40] Most respondents were familiar with major social media platforms such as Facebook, Twitter, LinkedIn and Google+ (total recognition rates were, respectively, 97.8%, 90.8%, 70.1% and 63.6%), and many had their own accounts (80.4% were on LinkedIn, and 67.9% on Facebook). Slightly more than three-quarters of respondents (76.4%) stated that their companies used social media to support business activities, with the predominant applications being marketing and customer service; only 14.4% of respondents' companies communicated with shareholders via social media channels.[41] Interestingly enough, a large majority (85.8%) indicated that their boards do not receive reports containing summary information and metrics tied to corporate social media usage, with 46.5% indicating that their companies do not collect such information. Finally, less than half of respondents (48.1%) said their companies have formal social media participation guidelines or policies for employees; the percentage is still lower for senior managers (43.2%).

Now that more time has passed since the Commission's Netflix 21(a) Report was issued, giving companies a better opportunity to consider the latest Regulation FD "rules of the road" governing corporate use of social media, the trends underpinning these data may evolve. There are early, encouraging signs; for example, Bloomberg announced this April that it would integrate corporate Twitter feeds into its widely used electronic terminals and enable subscribers to select feeds from specific companies. This aggregation service promises to facilitate access, at least to corporate Twitter feeds, by the numerous institutional investors and market professionals who rely on these terminals as a research tool.[42] Once again, however, we must wait and see how companies themselves respond to the Commission's updated social media guidance. In this connection, the two studies discussed above show that companies by and large could do more to measure the nature and extent of social media usage by intended (and unintended) recipient groups, determine whether and to what degree investors and/or analysts are among those groups (whether or not specifically targeted by the company), and adapt their existing communications policies and procedures as necessary or appropriate to ensure continued compliance with Regulation FD. Moreover, the data suggest that some boards of directors may have to become better-informed about their companies' social media strategies and risks in order to fulfill their oversight responsibilities in this emerging compliance area.

For some companies, the key objective of any self-examination prompted by the Netflix interpretive release may be simple -- to minimize the risk that their current applications of social media, for whatever purpose (e.g., marketing, customer service, IR) could lead to what the Commission

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[39] *Id.*

[40] David F. Larcker, Sarah M. Larcker and Brian Tayan, *What Do Corporate Directors and Senior Managers Know About Social Media?,* published in Director Notes, The Conference Board (Oct. 2012).

[41] This data point is consistent with the NIRI/Corbin Perception finding, in the immediate aftermath of the Netflix 21(a) Report, that most (72%) IR professionals do not use social media to communicate with investors. As discussed above in note 10, however, both IR officers and buy-side investors surveyed by NIRI and Corbin Perception are receptive to enhanced corporate usage of social media platforms.

[42] *See* Q4 Web Systems Whitepaper, *Public Company Use of Social Media for Investor Relations 2013, Part I Twitter and StockTwits* (August 2013)("Q4 Whitepaper"), at 8. According to the NIRI/Corbin Perception survey of global buy-side professionals, discussed in note 10, above, one of the major barriers to using social media for research (in addition to its questionable reliability) cited by respondents is the difficulty of sifting valuable corporate information from the "noise" generated by myriad social media channels.

regards as "non-public" disclosures of material corporate information that may raise serious questions under Regulation FD. Others may choose to go beyond this threshold compliance hurdle, with the objective of marshaling corporate social media tools to make the type of "broad, non-exclusionary distribution" of material, previously non-public information that alone (or in combination with other methods) will satisfy Regulation FD. The next section offers some practical suggestions designed to help companies achieve either objective (or both, if desired).

Practical Suggestions for Companies Living in a Post-Netflix World

In applying the lessons offered by the Netflix 21(a) Report and the 2008 Guidance to analysis of the costs and benefits of using new social media platforms to communicate important company information, companies may wish to consider any or all of the following suggestions:

- Review all company policies and procedures relating to Regulation FD compliance, insider trading, disclosure controls and procedures and the protection of confidential corporate information, and revise as necessary or appropriate to cover social media communications made by or on behalf of the company. The company may prefer a separate policy or set of standards governing corporate and personal social media usage. Whatever the company's preferred approach, the ultimate goal should be to ensure integration and consistency across all company policies and procedures that address the same types of communication.
    - As part of this comprehensive review, the company should consider whether there is any feasible way to segregate and/or distinguish social media communications targeting investors and the markets from those used in connection with other business functions (marketing, customer service, and the like). Many companies already do this with their web sites, which often feature a separate investor relations web page tailored specifically to the informational needs of investors and analysts. A recent study indicates that some companies are taking a similar approach by creating IR-dedicated Twitter accounts.[43]
- Focusing in particular on Regulation FD and insider trading policy provisions dealing with the definition of "material, non-public" corporate information under the federal securities laws, and limitations on the release of such information outside the company:
    - Decide which employees, officers and outside directors are authorized to communicate for the company via all corporate social media outlets that disseminate information that reasonably could be considered "material" from an investor's perspective. Although Regulation FD doesn't restrict communications with the press, many company policies extend to the release of material corporate information to the media in an effort to mitigate reputational risk and/or antifraud risk exposure. In so doing, companies should be very careful to avoid imposing restrictions on employee use of personal or corporate social media channels or blogs that could be viewed as illegal under federal labor law.[44]
    - Ensure that insider trading/Regulation FD "black-out" and/or "closed trading window" periods apply to all corporate and personal social media communications, at least with respect to those made by directors, officers and personnel with access to material non-public company information.

[43] *See* Q4 Whitepaper at 45.

[44] The core issue is whether corporate employers' social media policies (or their application to discipline individual employees for violations of these policies) unlawfully restrict employees' right to act collectively and in a concerted manner under Section 7 of the National Labor Relations Act, regardless of whether those employees belong to a union. *See, e.g.,* Office of the General Counsel, National Labor Relations Board, Memorandum OM 12-59, *Report of the Acting General Counsel Concerning Social Media Cases* (May 30, 2012), available at http://www.nlrb.gov/reports-guidance/operations-management-memos.

- Ensure that disclosure controls and procedures are adapted as necessary or appropriate to cover social media disclosures of potentially material corporate information made pursuant to company's web site and social media platforms, as well as blogs and any other forms of electronic corporate communication.
    - In the case of material corporate developments triggering Form 8-K line-item requirements – including but not limited to quarterly and annual earnings releases relating to completed fiscal reporting periods – a timely Form 8-K will have to be filed with or submitted to the SEC, as prescribed.
    - The antifraud provisions of the federal securities laws apply to all corporate social media communications, however informal and conversational they might seem. Controls therefore must be instituted to monitor such communications, preferably on a pre-release basis, to make sure they are not materially false or misleading by omission of a material fact. In the event a materially false or misleading statement is published via corporate social media (or via the personal blog or Facebook page of an authorized spokesperson, as the case may be), the company may have a duty to correct this statement under Exchange Act Section 10(b) and Rule 10b-5 thereunder – thus underscoring the importance of post-release monitoring of the total informational mix to assess the nature and extent of investor/analyst usage and/or response to corporate social media communications, as discussed further below.
    - Particular care should be taken with corporate social media that have character or content limitations. A tweet, for example, is limited to 140 characters, which makes it difficult to communicate material information accurately and completely unless hyperlinks are used; e.g., where necessary to ensure completeness and accuracy for antifraud purposes, and/or where the tweet contains "forward-looking statements" that should be accompanied by the "meaningful cautionary statements" enabling the company to invoke the protections of the PSLRA safe harbors [45] and/or the benefits of the "Bespeaks Caution" doctrine fashioned by the courts. Companies should be careful about linking to third-party social media (or other) communications, given the applicability of the antifraud doctrines of "entanglement" and "adoption."[46]
    - Don't overlook other potentially applicable federal securities law provisions; for example, depending on the context, a corporate tweet or other social media communication might be considered a "written" offer constituting illegal "gun-jumping" within the meaning of the Securities Act of 1933, as amended ("Securities Act"), a tender offer solicitation subject to filing and other requirements of the Exchange Act tender offer rules, or proxy soliciting material subject to filing with the SEC under the federal proxy rules. Compliance with Regulation G will be necessary if the communication contains non-GAAP financial measures. If posted during a private placement by the company, such a tweet also might be deemed a "general solicitation" that, while no longer barred *per se* by Regulation D, effectively could force a company to conduct the offering under the more onerous provisions of new Rule 506(c) of Regulation D under the Securities Act (assuming the private placement occurs after the September 23, 2013 effective date of the new rule).
    - If Regulation FD also is triggered by a social media communication made in any of the situations just described -- for example, during a private placement for which there is no

[45] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 749 (1995), adding safe harbors to the Securities Act (Section 27A) and the Exchange Act (Section 21E), respectively.

[46] 2008 Guidance at 31-36.

FD exception -- the "simultaneous public disclosure" requirements of this Regulation would dictate the timing of the FD-mandated dissemination of any material, non-public information contained in the tweet.[47]

- Institute training at all levels of the company (including the board and senior management) on the use of social media – both corporate and personal -- and circulate updated and/or new policies and procedures. Consider whether the board of directors is sufficiently well-informed with respect to the potential risks and benefits of the company's social media usage for any purposes, including but not limited to communicating with investors and analysts.
- Establish a particular corporate account (e.g., a separate Twitter account or Facebook page) to disseminate material company information and make sure that releases of such information are posted consistently to this "official" account. Some companies have created a dedicated IR feed so that investors don't have to wade through irrelevant information. Finally, try to avoid corporate reliance on management members' personal social media accounts to communicate important corporate information.
    - Keep in mind that using multiple social media outlets can present FD compliance concerns if, for example, material information is not posted regularly and simultaneously on all "official" company communication vehicles (and filed or furnished to the SEC, if required). If important corporate information is released pursuant to one social media outlet in advance of others, investors subscribing to that particular outlet will have an informational advantage over those investors who do not. Moreover, companies that make sporadic or inconsistent use of numerous different social media channels to release material corporate information may fail to achieve the widespread market following essential to fulfilling Regulation FD's "public" disclosure requirements.
- Include references to the official corporate social media account(s) in all company press releases, SEC filings and submissions (i.e. Form 8-K Item 2.02 earnings reports) and on the company's IR web page. Well before the company begins using any new social media channel, announce publicly that the company intends to disseminate material company information routinely through this account; this announcement preferably should be made by press release, Form 8-K and posting on the company's web site in the area dedicated to investor relations.
- Know your investor demographics, and keep in mind that the SEC is particularly concerned about leveling the informational playing field between institutional investors and retail investors. Not all investors will be open to using subscription-based services, whether for privacy or cost reasons, or otherwise. Above all, remember that documentary evidence of widespread investor usage may be requested by SEC staff members evaluating whether the company has satisfied the "recognized channel of distribution" and "reasonable waiting period" elements of the SEC-prescribed analysis for use of corporate web sites, blogs and any other form of social media adopted by the company as an "official" disclosure vehicle.
- Timely post information and, as noted above, ensure that its content is both current and accurate for purposes of the antifraud provisions of the federal securities laws. Link such information to the company's IR web page. Develop a regular practice of updating, deleting or archiving content on the official social media account, in conjunction with the IR web page and other investor-oriented areas of the company's web site. This will help the company establish a pattern or practice of posting information to its official social media account(s), and ensure

[47] If the tweet reasonably could be viewed as "non-intentional" – not an easy standard to meet (*see, e.g.,* Question 102.04 of Regulation FD Compliance & Disclosure Interpretations of the SEC's Division of Corporation Finance (2009), available at http://www.sec.gov/divisions/corpfin/guidance/regfd-interp.htm) -- the company would have a maximum period of 24 hours to ensure the necessary "broad, non-exclusionary distribution" of any material, non-public information contained in the tweet. *See* Rule 100(a)(2) of Regulation FD.

appropriate vetting and the conformity of that information as disseminated through all "official" corporate communication channels.

- Take steps to increase the number of followers or subscribers for the company's IR-related social media channel(s), particularly members of the national press, to help ensure that posted material information is picked up and re-disseminated widely to the U.S. securities markets. In this regard, consider ease of use, cost and privacy concerns, as well as investor demographics.
- Monitor the volume of subscriber/follower re-distributions of official company communications made through social media (e.g., how frequently company tweets are re-tweeted, and by whom), and media republications of information communicated in this manner, to facilitate the necessary determination of whether/when a corporate social media channel qualifies as a "recognized channel of distribution" within the meaning of Regulation FD.
- Take a "belt-and-suspenders" approach to disseminating material non-public corporate information until the particular social media channel has been established as a recognized channel of distribution – that is, use social media to supplement the dissemination of information to the public by more conventional methods that comply with Regulation FD (e.g., use Twitter to "tweet" highlights from a previously disseminated earnings release and link to the release, which as discussed must be submitted under cover of Form 8-K if completed fiscal periods are implicated). Take measures to ensure that the supplemental social media post does not precede the public availability of any material information via FD-compliant means, and that its informational content is consistent with the content of documents filed with, or submitted to, the SEC.

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