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Opinion

SOCIAL MEDIA AND REGULATION FD

In her regular column, Holly Gregory examines guidance from the SEC on the application of Regulation FD to social media channels and identifies key issues to consider when disclosing material information through these channels.

Companies and their senior executives are increasingly using and participating in electronic forms of communication, including company websites and blogs, as well as newer forms of social media such as Facebook, Twitter, LinkedIn, Flickr, Foursquare, Pinterest and YouTube. These communication channels provide powerful and cost-effective means of connecting with customers, investors, the media and the public. However, they also increase the pressures on companies to communicate more frequently and to process and disseminate information more quickly.

The rapid growth and speed of change in electronic and social media channels has presented challenges for the Securities and Exchange Commission (SEC) and for public companies regarding the application of Regulation FD (Fair Disclosure). Regulation FD requires companies to disclose material information in a non-selective manner so that it reaches a broad audience.

The SEC has stated as a general principle that “where access is freely available to all, use of electronic media is at least equal to other methods of delivering information or making it available to investors and the market.” While various SEC rules and interpretive releases have promoted the use of company websites to communicate with and provide information to investors, it has been unclear how companies might use other forms of social media in compliance with Regulation FD.

The SEC has now clarified in a report related to a Facebook post by the CEO of Netflix, Inc. that under appropriate circumstances, companies may use social media channels, such as Facebook and Twitter, to disseminate material information to the public in compliance with Regulation FD. As with the use of company websites, the key is that investors must be alerted in advance about which channel the company will use to disseminate the information.

This article examines the new SEC guidance regarding social media, including its expected impact on corporate disclosure, and highlights key issues for companies to consider when using electronic and social media channels to disclose material information in compliance with Regulation FD.

THE NETFLIX INVESTIGATION AND REPORT

The SEC’s investigation of Netflix involved the following July 2012 post by the CEO of Netflix on his personal Facebook page:

“Congrats to Ted Sarandos, and his amazing content licensing team. Netflix monthly viewing exceeded 1 billion hours for the first time ever in June. When House of Cards and Arrested Development debut, we’ll blow these records away. Keep going Ted, we need even more!”

Netflix did not report the information in the post to investors through a press release or a Form 8-K filing. A company press release issued later that day also did not include this information. The CEO had not used his Facebook page to announce company performance in the past and the company had not announced an intention to provide this information through the CEO's Facebook page. Netflix's stock price, which had been rising, increased from \$70.45 at the time of the post to \$81.72 by the close of the following trading day.

The SEC issued Wells Notices but ultimately decided not to pursue an enforcement action against the CEO or the company. On April 2, 2013, the SEC issued a Report of Investigation (Report) pursuant to Section 21(a) of the Securities Exchange Act of 1934. In the Report, the SEC recognized the market uncertainty about the application of Regulation FD to social media and clarified that its 2008 *Commission Guidance on the Use of Company Web Sites* (2008 Guidance) applied.

The Report explains that although every case must be evaluated on its own facts, disclosure of material nonpublic information on the personal social media page of an individual corporate officer, without advance notice to investors that the social media site may be used for this purpose, is unlikely to qualify as an acceptable method of disclosure under Regulation FD. Personal social media pages would not ordinarily be assumed to be channels through which the company would disclose material information. The key to establishing the validity of a social media channel for Regulation FD compliance purposes is to provide advance notice to investors of the company's intent to use the channel for disclosing material information.

LESSONS FROM THE SEC'S 2008 GUIDANCE

The 2008 Guidance provided that in certain circumstances, posting material nonpublic information on a company website may be a sufficient method of public disclosure for Regulation FD compliance purposes. The 2008 Guidance emphasized that the goal of Regulation FD is to prevent "a privileged few" from gaining an informational edge due to superior access to corporate insiders and material information. Information is material if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" regarding the company or its securities.

To avoid selective disclosure, information must be disseminated in a manner calculated to reach the securities marketplace through recognized channels of distribution. In evaluating whether information is public, the 2008 Guidance indicates that companies must consider whether:

- A website (or other social media channel) is a recognized channel of information distribution. This will depend on the steps that the company has taken to alert the

THE NETFLIX SOCIAL MEDIA CHANNELS

In accordance with the SEC's guidance in the Report, on April 10, 2013, Netflix filed a Form 8-K noting that material information would be announced to investors through its investor relations website, SEC filings, press releases, public conference calls and webcasts. Netflix also encouraged investors to review the information on the following social media channels:

- The Netflix Blog (blog.netflix.com).
- The Netflix Tech Blog (techblog.netflix.com).
- The Netflix Facebook Page (facebook.com/Netflix).
- The Netflix Twitter Feed (twitter.com/Netflix).
- Reed Hastings' Public Facebook Page (facebook.com/reed1960).

It is worth noting that on April 11, 2013, Reed Hastings, the Netflix CEO, posted company information on his Facebook page.

market to the website or other social media channel and the company's disclosure practices, as well as the use by investors and the market of that channel.

- Posting of information on a company website disseminates the information in a way that makes it available to the securities marketplace in general. This will depend on:
 - the manner in which information is posted; and
 - the timely and ready accessibility of the information to investors and the markets.
- There has been a reasonable waiting period for investors and the market to react to the posted information.

This is a facts and circumstances analysis. The SEC recommended that for "important" information, and presumably material information is important, companies should consider taking additional steps to alert investors and the market that the information will be posted (for example, filing or furnishing the information to the SEC or issuing a press release). According to the 2008 Guidance:

"Adequate advance notice of the particular posting, including the date and time of the anticipated posting and the other steps the company intends to take to provide the information, will help make investors and the market aware of the future posting of information, and will thereby facilitate the broad dissemination of the information."

>> For more information on Regulation FD and the 2008 Guidance, search [Complying with Regulation FD \(Fair Disclosure\)](#) on our website.

EXPECTED IMPACT ON DISCLOSURE PRACTICES

Notwithstanding that the SEC has now clarified that the 2008 Guidance provides the analytical framework for disclosing material information through social media in compliance with Regulation FD, many companies are likely to continue to rely on Form 8-K to minimize the risk of liability for selective disclosure of material nonpublic information.

Since the release of the 2008 Guidance, very few companies have used their websites as the primary means of disclosing material information. One exception is Google. In April 2010, Google announced its intention “to make future announcements regarding its financial performance exclusively through its investor relations website.” However, the vast majority of companies have continued to rely on the SEC’s regulatory presumption that Form 8-K disclosure complies with Regulation FD. To the extent that some companies are using Twitter and other social media channels to communicate material information, they are generally also providing a link to a press release or Form 8-K.

As the use of electronic and social media channels for disclosure expands, it is likely that most companies will continue to rely for some time on the Form 8-K safe harbor given the protection it provides. Companies that are interested in exploring social media for disclosure purposes should consider taking advantage of Form 8-K protection until they are confident that their disclosure controls and procedures are adequate.

USING SOCIAL MEDIA CHANNELS FOR DISCLOSURE

When considering the use of electronic and social media channels for disclosing material information in compliance with Regulation FD, companies should think about:

- How to use these channels to disclose material information.
- How to clearly communicate that a particular channel will be relied on for the dissemination of material information.
- How to adjust internal disclosure controls and procedures accordingly.

➤➤ For more information on using social media in compliance with the securities and disclosure laws, search [Social Media Compliance with Securities and Disclosure Laws](#) on our website.

Companies that choose to rely on electronic or social media channels for disclosing material information should:

- **Ensure that the chosen channel is “non-exclusionary.”** The channel should be both widely available to the general public without any unusual or burdensome subscription requirements and not unduly cumbersome to monitor. While the channel can be one that requires a user to join, it should not require a monetary subscription or an unusual contractual obligation.

Companies that are interested in exploring social media for disclosure purposes should consider taking advantage of Form 8-K protection until they are confident that their disclosure controls and procedures are adequate.

- **Consider electronic alerts.** Companies can use technology to alert investors that information has been posted, through RSS or other feeds, and should also consider whether there are ways to facilitate searches related to the company’s disclosure.
- **Notify investors clearly and in advance.** Companies should take special care to communicate clearly and in advance the intent to use a particular channel, including by:
 - ensuring notification is consistent and included in periodic (annual and quarterly) reports, proxy statements, press releases and Forms 8-K, as well as on the company’s website homepage (whether or not the website is a chosen channel for Regulation FD-compliant disclosure);
 - providing notification prior to the first use of the channel for the disclosure of material information;
 - identifying chosen channel(s) with precision, for example by specifying the detailed electronic address (URL) or otherwise identifying the Facebook page or Twitter handle with specificity;
 - communicating the types of information that the company intends to disclose through a particular



Checklists

Visit [PRACTICALLAW.COM](#) for checklists, handy timelines, charts of key issues and flowcharts. These resources are continuously maintained by our attorney editors.

SOCIAL MEDIA: ACTION ITEMS FOR BOARDS

Boards play a key role in reviewing company policies and internal disclosure controls and procedures related to social media. In particular, boards should take the actions set out below to understand and effectively oversee the company's use of, and policies on, social media:

- Ensure that the company has strict, straightforward and well-understood governance policies that specifically address the use of websites and social media, including who communicates for the company and in what circumstances.
- Ensure that investor relations personnel and those charged with website management, and anyone with the authority to post on the company's behalf on any type of social media channel, receive training on compliance with applicable SEC rules, including Regulation FD and the antifraud rules.
- Instruct individual directors to use the same rules for social media that they use for individual contacts with shareholders and potential investors and avoid any ad hoc communication about the company.
- Discuss with management its strategic approach to social media, including how social media relates to corporate strategy and the opportunities presented by social media.
- Discuss with management the risks associated with social media and the processes that management uses to monitor social media and otherwise manage the risks.
- Identify who in the company is responsible for social media efforts, including the key members of management with expertise in social media issues and

the designated employees responsible for managing the company's social media accounts and online presence.

- Review company policies and internal controls related to social media from time to time to determine whether they provide workable guidance for those who are officially designated to speak for the company and for employees in their personal use of social media.
- Review shareholder relations and communications programs to determine whether the company is well-positioned to elicit information from electronic and social media channels about what key shareholders care about so as to enable the board and management to respond to legitimate shareholder concerns.
- Ensure that the company's investor communications policy is up-to-date and understood by directors, senior management and investor relations personnel so that messages are coordinated, boardroom confidentiality is protected and Regulation FD is complied with.
- Have the audit committee discuss with internal audit whether auditors are reviewing compliance with social media and communications policies.
- Encourage individual directors to follow relevant company-related social media, and strictly warn them against engaging in company-related communication on social media unless asked to do so for an agreed topic and message.

>> For more information on the board's role in overseeing the company's use of social media, search [Social Media: What Boards Need to Know](#) on our website.

channel and, to the extent possible, when to expect key disclosure; and

- recognizing that complexity and the potential for confusion is increased with the designation of multiple channels and, therefore, tailoring advance notifications and ongoing reminders (as well as disclosure controls and procedures) accordingly.
- **Address channel-specific challenges.** The company's disclosure controls and procedures should be designed to address the particular challenges presented by the selected channel. Disclosure controls and procedures should factor in the inherent rapid and often informal nature of social media and the limits that these channels may present for full disclosure and appropriate disclaimers. For example, where a company uses social

media to highlight information that is being disseminated to the public (such as using Twitter to "tweet" highlights from an earnings release), special care needs to be taken that the social media post does not precede the public availability of the information being provided by the other Regulation FD-compliant means. Additionally, companies must ensure that the very limited nature of some types of social media, for example the 140-character limitation of Twitter messages, does not result in misleading disclosure.

- **Obtain appropriate approvals.** The disclosure of material information, as well as posts on behalf of the company generally, should be approved by people who are knowledgeable about disclosure requirements under Regulation FD, proxy solicitation rules, antifraud rules and prospectus requirements, advertising laws and other applicable laws.

CHECKLISTS

The following related Checklists can be found on practicallaw.com

>> Simply search the resource title

[Social Media and the Securities Laws: Best Practices Checklist](#)

[Is it Material?: Asking the Right Questions Checklist](#)

[Website Posting Requirements Chart](#)

- **Continuously monitor the selected channels.** The company's disclosure controls and procedures should provide for the monitoring and periodic review of any channels used for disclosure. Consideration should be given to the type and scope of information being posted, how long it should be posted and whether it should be maintained in an archived area.
- **Communicate any changes in approach.** Companies should make sure to provide advance notification of any changes in their approach to the dissemination of material information.

Companies might consider whether it would be beneficial to first undertake a period of experimentation, in which disclosure through the electronic or social media channel is augmented with the belt and suspenders approach of continuing to issue press releases and Forms 8-K, before fully committing to a particular electronic or social media channel for Regulation FD-compliant disclosure. (If this is done, once the experimental phase is over, advance notification should highlight the change in approach.)

Even if a company uses social media only to amplify other recognized distribution channels, the company should still be cognizant of the timing of posts and ensure that they are coordinated properly.

Companies should also monitor the comments made on electronic and social media channels in which they participate and should respond quickly and appropriately when necessary in accordance with their established governance policies. Even if a company uses social media only to amplify other recognized distribution channels, the company should still

be cognizant of the timing of posts and ensure that they are coordinated properly.

In this environment of increasing shareholder influence, understanding the concerns of significant shareholders and engaging in dialogue with them is a critical corporate strategy. Likewise, given the value of corporate reputation in an environment where trust in a company can be fleeting, the value in tracking and understanding viewpoints of other key constituents continues to grow. Electronic and social media channels are powerful tools that can assist in both listening to and communicating with shareholders, but need to be handled with special care.

>> For model social media guidelines for a public company, search [Social Media Guidelines \(Public Company Long Form\)](#) and [Social Media Guidelines \(Public Company Short Form\)](#) on our website.

The views stated above are solely attributable to Ms. Gregory and do not reflect the views of Weil, Gotshal & Manges LLP or its clients.