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SEC Issues New Regulation FD Guidance on Social Media Use

On April 2, the Securities and Exchange Commission issued a Report of Investigation to clarify that a public company may disclose material information via social media outlets such as Facebook and Twitter. However, to comply with Regulation FD the company must first fully inform investors about which social media channels it will use and the type of information that will be disclosed, consistent with the SEC staff's 2008 Guidance on the Use of Company Web Sites.

The Netflix Report of Investigation

The SEC's inquiry, described in the report, related to a posting by Netflix CEO Reed Hastings on his personal Facebook page. On July 3, 2012, Mr. Hastings' post stated, "Netflix monthly viewing exceeded 1 billion hours for the first time ever in June." Netflix did not file a Form 8-K with the SEC, issue a press release or publicize this information in any other manner. Although Mr. Hastings' Facebook page had more than 200,000 subscribers, neither Netflix nor Mr. Hastings had before used Mr. Hastings' personal Facebook page to provide significant information about Netflix.

Investors gradually became aware of the information posted by Mr. Hastings on his Facebook page, when various sources publicized the news. As a result, Netflix's stock price rose from $70.45 at the time of Mr. Hastings' post to $81.72 at the close of trading the next day.

Both Hastings and Netflix asserted that the Facebook post did not contain material information and, in addition, because it was broadcast to more than 200,000 Facebook users, the post did not constitute selective disclosure.

In its report, the SEC stated that although potential Regulation FD violations are assessed on a case-by-case basis, under similar facts, this type of disclosure "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." However, the SEC determined not to pursue an enforcement action against Mr. Hastings or Netflix because it recognized the market was uncertain about Regulation FD's application to social media use. The SEC instead sought to clarify its social media policy in the report.

Regulation FD requires companies to make broad and non-exclusionary disclosure of material information to the public. The purpose of Regulation FD is to provide all investors with equal and timely access to the same information. The report clarifies that social media is merely an extension of technologies like e-mail alerts, RSS feeds and blogs?-- technologies identified in the SEC's 2008 Guidance on the Use of Company Web Sites. Accordingly, the report states that Regulation FD applies to social media in the same way it applies to company websites. The report further provides that the 2008 Guidance governs a company's proper use of social media and that such social media must be a "recognized channel of distribution" used to communicate with investors. To determine whether a social media outlet is, in fact, a "recognized channel of distribution," a company must carefully consider the non-exclusive list of factors enumerated in the 2008 Guidance. Such factors include:

- whether and how companies inform investors and the markets that a company has a website and will post important information on its website;
- whether the company has a pattern or practice of posting information on its website;

- whether the website is designed to efficiently lead the public to company information, including information specifically addressed to investors, and whether the information is prominently disclosed in a known and routinely used location, and whether the information is presented in a readily accessible format;
- the extent to which information posted on the website is frequently picked up by the market and media and reported, and the extent to which the company has advised the media about availability of the information;
- the steps taken to make the website and information accessible for wide distribution or to advise the market of its availability, including through the use of "push" technology like RSS feeds or other distribution channels;
- whether the company keeps its website current and accurate;
- whether the company uses additional methods to disclose information, and to what extent those other methods are the predominant means used to disseminate information; and
- the nature of the information.

Further, the SEC has cautioned companies that a "deviation from their usual practices for making public disclosure" may impact the SEC's assessment of whether actions taken were reasonable to ensure broad and non-exclusionary distribution to the public.

In the report, the SEC emphasized that a company that wishes to use social media channels to disseminate material, nonpublic information should, in advance, alert its investors, the market and the media as to (1) which forms of social media channels it expects to use, and (2) the types of information that may be disclosed through these social media channels.

Practical Guidance

- If a company decides to use social media to disclose material, nonpublic information to investors, it must first sufficiently notify the public which social media channels will be routinely used and what types of information will be communicated. Such information should be disclosed on the company's website, in its periodic reports and in its press releases, to provide the market and investors an opportunity to subscribe or take any other steps necessary to be in a position to receive such information from the social media channels.
- Beware of social media postings from an officer's personal social media account?-- regardless of how widely the site is followed by the public?-- absent prior disclosure that the site will be used in this manner. Although the SEC declined to pursue enforcement actions against Mr. Hastings and Netflix, the report suggests that under similar facts, it would find a Regulation FD violation in the future.
- Companies should carefully review their social media policies, guidelines and/or training programs to ensure there are adequate controls and procedures in place regarding disclosure of company information through social media channels.