

## SEC Report Opens Door to Use of Social Media

### Overview

On April 2, 2013, the U.S. Securities and Exchange Commission (the “SEC”) issued a Report of Investigation (the “Social Media Report”) clarifying that a company subject to Regulation Fair Disclosure (“Regulation FD”) may use social media channels, such as Facebook and Twitter, to disseminate material, non-public information to the general public in compliance with Regulation FD if investors have been previously notified of the specific social media channels that will be used to disseminate the information and the social media channel is a “recognized channel of distribution.”<sup>1</sup>

### Regulation FD and the SEC’s 2008 Guidance

Regulation FD, adopted in 2000, prohibits the selective disclosure of material, non-public information by public companies or persons acting on their behalf to limited groups and promotes the full and “fair disclosure” of this information to the general public in an attempt to eliminate any unfair trading advantage resulting from selective disclosures.

In August 2008, the SEC issued guidance for Regulation FD<sup>2</sup> (the “2008 Guidance”) in response to the prevalence of corporate websites that permits a company to use its website to disseminate information in compliance with Regulation FD if the company has determined that its website is a “recognized channel of distribution” for such information. Whether a company’s website constitutes a “recognized channel of distribution” will depend on both the steps the company has taken to alert the market to its website and disclosure practices, and also the marketplace’s use of the company’s website. The 2008 Guidance was intended to emphasize the importance of making investors, the market and the media aware of the channels a company expects to use to disclose material information.

<sup>1</sup> See “Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings,” Exchange Act Rel. No. 34-69279 (Apr. 2, 2013), available at <http://www.sec.gov/litigation/investreport/34-69279.pdf>.

<sup>2</sup> “Commission Guidance on the Use of Company Websites,” Exchange Act Rel. No. 34-58288 (Aug. 7, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

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## **Netflix, Inc. Investigation**

On July 3, 2012, Netflix, Inc.'s ("Netflix") Chief Executive Officer, Reed Hastings, posted a message to his personal Facebook page congratulating the Netflix team on streaming one billion hours in one month for the first time. The post caught the attention of the SEC staff, which notified Netflix in December 2012 of its intention to recommend SEC enforcement action for the Facebook post. Following an SEC investigation, the SEC chose not to pursue an enforcement action against Netflix as impermissible selective disclosure in violation of Regulation FD due to "market uncertainty about the application of Regulation FD to social media." Rather, the SEC issued its Social Media Report which offers new guidance designed to curb some of this uncertainty.

## **The SEC's Social Media Report Clarifies the 2008 Guidance and Regulation FD**

The SEC's Social Media Report approves the use of social media channels, such as Facebook and Twitter, to disseminate material, nonpublic information to the general public in compliance with Regulation FD if investors have been previously notified of the specific social media channels that will be used to disseminate the information and the social media channel is a "recognized channel of distribution."

The Social Media Report clarifies that the SEC believes that its 2008 Guidance provides the appropriate framework for analyzing the application of Regulation FD to disclosures made through social media channels, even though most social media channels that are predominantly used today did not exist in their current form in 2008. The SEC states that a company must "examine rigorously" the factors stated in the 2008 Guidance when determining whether a particular social media channel is a "recognized channel of distribution" for communicating with investors. Two relevant considerations from a non-exclusive list of factors in the 2008 Guidance are: (1) whether and how companies let investors and the markets know that the company has an alternative method of distribution, such as through a corporate website or corporate Facebook page, and that such parties should look at these alternative company channels for information, and (2) whether the company has made investors and the markets aware that it will post important information through these alternative channels and whether it has a pattern or practice of posting such information on these alternative channels.

With respect to posting company information on an officer's personal social media site such as Reed Hastings of Netflix did on his personal Facebook page, the SEC indicates that it would not deem such a posting to be compliant with Regulation FD without any advance notice to investors that the social media channel may be used for that purpose, regardless of the fact that an officer may have a large number of subscribers, friends or other social media contacts. The Social Media Report states that the breadth of audience reached through social media channels is not determinative in the analysis of whether a particular communication channel will satisfy Regulation FD. If a company chooses to use social media outlets to primarily disclose material information, the company must take steps to provide the market advanced notice about (1) which social media channel(s) the company intends to use and (2) the types of information that may be disclosed through such channels. On April 10, 2013, Netflix became the first company



to adopt this method of disclosure when it filed a Form 8-K listing five social media channels it may employ to disseminate material information.

### **Considerations Stemming from the Social Media Report**

We expect that most public companies will continue to incorporate social media in their existing disclosure process using a dual-disclosure process instead of relying on social media channels as their primary method for disseminating material, non-public information. For instance, a company may want to consider disseminating information through its Facebook and Twitter accounts at the same time it files a Form 8-K or issues a press release. Since the distribution of the information through a Form 8-K or press release is already Regulation FD-compliant, there is no need for a company to also notify investors that it intends to use social media channels as well to re-post the information. However, if a company is considering using social media as the primary channel for complying with Regulation FD distribution of information, some issues to consider are set forth below.

- *Alert the market about which social media channel(s) you intend to use to disseminate material, non-public information.*
  - The SEC recommends that a company identify the specific social media channels it intends to use on its corporate website. Providing a hyperlink to the social media account gives investors an opportunity to subscribe, join or register to receive the important information. Public companies may also consider disclosing their intentions and including hyperlinks to these social media channels in their press releases and current periodic securities filings.
- *Updating social media policies.*
  - Reasons to update
    - Companies may take this opportunity to re-evaluate and update their social media policies. Effective social media policies can help prevent unwanted disclosures from appearing on social media channels, which may become even more important as the SEC's green light to use social media for investor communications may encourage some new unwanted followers or subscribers, such as trolling plaintiffs' lawyers. Companies may also want to consider incorporating social media disclosures into their record retention policy.
  - Define "social media"
    - In updating social media policies, companies may give special consideration to the definition of "social media." The SEC broadly defines "social media" to include, among other things, "blogs, microblogs, wikis, photos and video sharing, podcasts, social networking, and virtual worlds." "Social media" is defined broadly to allow it to adapt to the ever evolving nature of social technology.
  - Personal social media accounts
    - We also suggest companies consider prohibiting individual corporate officers from using their personal social media accounts to comply with Regulation FD. This prohibition would eliminate additional complexity, monitoring and other compliance issues for the company.



- *Consider risks inherent in the usage of social media.*
  - Companies should assess the dangers in disclosing through social media channels.
    - For instance, the risk for potential rogue investors to employ fake corporate Twitter and Facebook accounts in an attempt to influence the market.
    - The risk that followers of these social media channels will react negatively (in a public manner on these channels) to company information disclosed through such channels.
- *Consider whether there may be benefits to certain businesses or industries by disclosing material information through social media channels.*
  - Certain business or industries, such as the technology field, may be more receptive to disclosures through social media. Other businesses or industries with less tech-savvy investors should consider whether disclosing solely through social media channels would hinder the spread of material information.
  - Consider whether any advantage of disclosure through social media channels is outweighed by the risks mentioned above in determining whether or not to disclose solely through social media channels.

### **Conclusion: How Open is the Door to Social Media Usage?**

The SEC's Social Media Report was a clear communication that the SEC does not want to be seen as a barrier to companies adopting social media approaches to investor communications, stating that "we encourage companies to seek out new forms of communication to better connect with shareholders." For now, however, we recommend that companies not use social media as the sole source of dissemination. Instead, we recommend a dual-disclosure method for companies seeking to employ social media to disseminate information. How widespread the use of social media becomes to disseminate material corporate information will depend upon the embrace of the methods by investor relations professionals working in conjunction with lawyers to ensure compliance.