

April 2013

SECURITIES LAW ALERT

SEC ISSUES REPORT CONCERNING USE OF SOCIAL MEDIA BY PUBLIC COMPANIES TO DISCLOSE MATERIAL INFORMATION

In April 2013, the Securities and Exchange Commission ("SEC") issued a report (SEC Release No. 69279, April 2, 2013) indicating that public companies can use social media outlets like Facebook and Twitter to announce material information in compliance with Regulation Fair Disclosure (Regulation FD) so long as investors have been alerted in advance as to which social media will be used to disseminate such information.

Regulation FD prohibits public companies or persons acting on their behalf from selectively disclosing material non-public information where it is reasonably foreseeable that the recipients of such information will trade on the information before it is made available to the general public. The purpose of Regulation FD is to ensure that all investors have the ability to gain access to material information at the same time.

The report arises out of an inquiry the SEC launched into a post by Netflix CEO, Reed Hastings, on his personal Facebook page indicating that Netflix's monthly online viewing had exceeded one billion hours for the first time. Netflix did not report this information to investors through a press release or Form 8-K filing, and a subsequent company press release later that day did not include this information. Neither Hastings nor Netflix had previously used his Facebook page to announce company metrics, and they had never before taken steps to alert investors that Hastings' personal Facebook page might be used as a medium for communicating information about Netflix. The SEC inquiry focused on whether Netflix had violated Regulation FD.

Ultimately, the SEC did not commence an enforcement action or allege wrongdoing by Hastings or Netflix because the SEC believed there had been market uncertainty about the application of Regulation FD to social media. However, the SEC decided to issue the report to clarify its position on this issue.

The SEC's report confirms that Regulation FD applies to social media and other emerging means of communication used by public companies the same way it applies to company websites. The SEC's report explains that although every case must be evaluated on its own facts, disclosure of material, nonpublic 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 an acceptable method of disclosure under the securities laws. Social media sites maintained by a public company or its employees would not ordinarily be assumed to be channels through which the company would disclose material information.

The SEC issued guidance in 2008 (SEC Release No. 34-58288) clarifying that websites can serve as an effective means for disseminating information to investors if they've been made aware that's where to look for it. In the report, the SEC suggested that companies follow the 2008 guidance if they intend to use social media outlets to disclose material information. As explained in the SEC's 2008 guidance, "whether a company's web site is a recognized channel of distribution will depend on the steps that the company has taken to alert the market to its web site and its disclosure practices, as well as the use by investors and the market of the company's web site."

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The 2008 guidance offered a non-exhaustive list of factors to be considered in evaluating whether a corporate web site constitutes a recognized channel of information distribution. The central focus of this inquiry is whether the company has made investors, the market and the media aware of the channels of distribution it expects to use, so these parties know where to look for disclosures of material information about the company or what they need to do to be in a position to receive this information.

Consistent with the SEC's guidance, companies that intend to use social media outlets to release material information should consider adopting the following guidelines:

- Notifying investors on an on-going basis of the social media channels that will be used through traditional channels of communication such as SEC filings, websites and press releases;
- Establishing a policy for the dissemination of material, non-public information on social media and closely monitoring adherence to the policy;
- Limiting dissemination to established corporate social networking posts as opposed to the disclosure of corporate information through personal social media sites and postings and sites of corporate executives; and
- Disseminating the information on social networking websites in conjunction with the simultaneous dissemination of the information in press releases and SEC filings.

In addition, companies that are listed on a stock exchange should review the disclosure policies of such exchange to be sure that the use of social media to disclose material information complies with the listing rules of such exchange.

We are available to provide counsel concerning these issues, as well as internet and social media law issues. For additional information, please contact an attorney named below or contact the attorney with whom you have a primary relationship.

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