

SEC Decides That Companies May Use Social Media

April 8, 2013

The Netflix Investigation

On July 3, 2012, the CEO of Netflix, Reed Hastings, used his personal Facebook page to announce that Netflix had streamed 1 billion hours of content in the month of June. As the Securities and Exchange Commission explained in releasing its Report of Investigation (April 2, 2013) on this matter, “Neither Hastings nor Netflix had previously used Hastings’s personal Facebook page to announce company metrics, and Netflix had not previously informed shareholders that Hastings’s Facebook page would be used to disclose information about Netflix. The page was not accompanied by a press release, a post on Netflix’s own web site or Facebook page, or a Form 8 K.” Netflix stock rose \$11 in the next day and a half of trading.

Following an investigation, the SEC decided not to take any action against Hastings or Netflix (though it never really explained why). At issue was whether SEC Regulation FD applied to this communication (answer: yes), and what standards would determine whether Hastings or Netflix violated Regulation FD.

Regulation FD

Regulation FD prohibits a public company or anyone acting on its behalf from selectively disclosing material nonpublic information to certain securities professionals, or shareholders where it is reasonably foreseeable that they will trade on that information, before the information is made available to the general public.

In 2008, the SEC published a release, *Commission Guidance on the Use of Company Web Sites*, that explained that in complying with Regulation FD, a company makes public disclosure when it distributes information “through a recognized channel of distribution.” So the question posed was whether social media outlets such as Facebook and Twitter are indeed “recognized channels of distribution” for purposes of public disclosure by public companies.

Use of Social Media Can Comply with Regulation FD

The SEC labored mightily through an eight-page report to conclude that yes, social media can be recognized channels of distribution, noting, “We emphasize for issuers that steps taken to alert the market about which forms of communication a company intends to use for the dissemination of material, nonpublic information, including the social media channels that may be used and the types of information that may be disclosed through these channels, are critical to the fair and efficient disclosure of information.”

Similarly, issuers should consider including in periodic reports, press releases and on corporate web sites, disclosures “identifying the specific social media channels a company intends to use for the dissemination of material nonpublic information, [in order to] give investors and 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.”

But Be Careful

Two big caveats apply: First, if a company does not have good reason to believe that its social media outlets are widely followed, use of them may not constitute adequate public distribution for the obvious reason that the audience is not big enough or broad enough.

Second, the SEC frowned on company disclosures via the social media accounts of individual corporate officers “without advance notice to investors that the site may be used for that purpose,” reasoning that such use is unlikely to qualify as a method “reasonably designed to

provide broad, non-exclusionary distribution of the information to the public” as required by Regulation FD. Personal social media sites of company executives would not ordinarily be assumed to be company channels for disclosure, the SEC added, though the SEC did not bar such use.

Conclusion

In short, an issuer can use social media to make Regulation FD-compliant disclosures. But companies should make sure that the number of subscribers to their social media is sufficiently large and broad-based to be truly a recognized public channel. And companies should announce, at each opportunity, the use and availability of its social media outlets for public disclosures. If those cautions are not followed, public issuers would be better advised to stick with press releases and periodic and current reports under the federal securities laws.

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