

Disclosing Corporate Information Via Social Media: After Investigating the CEO of Netflix, the SEC Releases Helpful Guidance

As social media becomes more pervasive in today's society, it has become an important part of many companies' communications, marketing and public relations strategies. More and more companies and their executives are incorporating Facebook, Twitter, Google+ and the like into their communications strategies in an effort to reach larger and more targeted audiences. In doing so, they often step into grey areas of securities laws, most of which were enacted prior to today's social media explosion, such as Regulation Fair Disclosure (RegFD), promulgated by the Securities and Exchange Commission (SEC) in 2000.¹ RegFD requires that whenever a company, or a person acting on its behalf, discloses material, nonpublic information to analysts, investment professionals or company stockholders, the company must make that information simultaneously available through broadly disseminated public disclosure. Traditionally, corporations have complied with RegFD by issuing a press release or filing or furnishing the information on a Form 8-K with the SEC. In 2008, in an effort to keep up with the growing prevalence of the Internet, the SEC issued helpful interpretative guidance (2008 Guidance)² on the RegFD-compliant use of companies' corporate websites and certain other electronic means of communications, so long as the disclosures were being made "through a recognized channel of distribution." On April 2, 2013, the SEC published a Report on Investigation (Report)³ that, once again, provides guidance designed to reconcile the growing tension between securities laws and the new forms of electronic, and specifically social media, communications.

The impetus behind this most recent guidance was a much-publicized story of the SEC investigating Netflix, Inc. and its CEO, Reed Hastings, as a result of a Facebook post by Hastings. On July 3, 2012, Hastings posted the following message on his personal Facebook page: "Netflix monthly viewing exceeded 1 billion hours for the first time ever in June [2012]." After this post was broadcast to Hastings' more than 200,000 Facebook followers and picked up by analysts and the press, Netflix stock jumped from US\$67.85 a share on July 2, 2012 – the day before the post – to US\$81.72 on July 5, 2012. Netflix had not previously disclosed this milestone by a press release or a Form 8-K, nor had it alerted investors that communications may be made via Hastings' Facebook page. As a result, the SEC sent

1 <http://www.sec.gov/rules/final/33-7881.htm>.

2 <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

3 <http://www.sec.gov/litigation/investreport/34-69279.pdf>.

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both Netflix and Hastings a letter (known as a “Wells Notice”) informing them of the staff’s intent to recommend enforcement proceedings for violation of RegFD. In its April 2013 Report, the SEC determined that it would not bring an enforcement action against Netflix or Hastings, despite concluding that Hastings’ Facebook post was not likely to satisfy RegFD requirements, and acknowledged that the proliferation of social media resulted in uncertainty and confusion with respect to the application of RegFD. The Report then provided some helpful guidance on the ways companies could use social media without running afoul of the SEC rules.

The SEC focused on whether RegFD is applicable to social media channels, generally, and whether the 2008 Guidance can be relied upon with respect to social media communications. The Report answers both questions in the affirmative.

The Report emphasizes that if a company makes a disclosure through a social media channel to a broader group of recipients, which may include persons enumerated for the purposes of prohibited selective disclosure under RegFD, the disclosure should be analyzed for compliance with RegFD. This would include determining whether the disclosure includes material, nonpublic information, and whether the information was being disseminated in a manner “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.” In the 2008 Guidance, the SEC stated that corporations can address the concern of whether a website or another electronic communication, such as a blog or an RSS feed, constitutes a RegFD-compliant means of dissemination by adopting disclosure policies that inform investors, the market and the media of these channels of distribution for important corporate information. Such disclosure policies may include statements in a company’s periodic reports, in press releases or website postings directing investors to such distribution channels. The Report confirms that the 2008 Guidance is not limited to the forms of electronic communication specifically mentioned there, but is meant to be “flexible and adaptive” to provide companies “with a factor-based framework for analysis, rather than static rules applicable only to websites.”

Accordingly, the SEC has now confirmed that companies may use social media channels to make key disclosures of material and previously nonpublic information, so long as investors and the markets have been alerted as to which specific social media outlets would be used to disseminate such key information to give them the opportunity to take appropriate steps to be in a position to receive these disclosures by subscribing, joining or otherwise accessing that particular channel.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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