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# Social Media Use by Public Companies – The SEC Weighs In

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The increasing presence of social media has created new avenues for companies to market to and connect with consumers, customers and investors. Many heads of industry maintain very public profiles, appearing regularly on television and interacting routinely with the investing public through online and print media. They frequently write blogs with broad followings, and regularly publish information on their corporate or personal Facebook pages and through Twitter accounts. Social media allows faster and more efficient dissemination of information than more traditional communication methods and the Securities Exchange Commission (SEC) has begun to recognize the value that this communication provides to investors. But federal securities regulation and policy have had trouble keeping pace with these ever-expanding modalities of corporate communication.

The recent threat of enforcement by the SEC against Netflix, Inc. and its Chief Executive Officer Reed Hastings, arising out of a brief Facebook posting illustrates the challenges of compliance with complex securities regulations in our modern, plugged-in society. Before the advent of the Internet, corporate press releases were carefully composed and then reviewed by legal, investor relations and marketing personnel, followed by further revisions and further reviews prior to eventual publication. In contrast, investors today have become accustomed to receiving information from public company representatives on a real-time basis, 24/7. In that light, in July 2012 Hastings posted the following message to his personal Facebook page with over 200,000 followers:

> *Congrats to Ted Sarandos, and his amazing content licensing team. Netflix monthly viewing exceeded 1 billion hours for the first time ever in June. When House of Cards and Arrested Development debut, we'll blow these records away. Keep going, Ted, we need even more!*

There are three separate but interrelated Reg. FD issues raised in the context of a company's disclosure of material non-public information on its corporate Web site or another electronic forum, such as a social media outlet:

1. whether initial disclosure of information on the Web site or social media constitutes "selective disclosure" in violation of Reg. FD
2. whether the company may satisfy its Reg. FD obligation to simultaneously or promptly disseminate publicly any material non-public information that has been selectively disclosed by publishing the information on the Web site or social media, and
3. whether the company may selectively disclose the information to analysts or shareholders after initial disclosure through the Web site or social media.

All of these questions turn on whether the Web site or social media satisfies Reg. FD's requirement to be "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." If it does, then disclosure on the Web site or social media will not constitute selective disclosure, and will satisfy the requirement for the broad dissemination of previously selectively disclosed information. And the company may then selectively disclose the information following disclosure on the Web site or social media after a reasonable waiting period has transpired in order to allow the investment community to react to the information.

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The posting was redistributed shortly thereafter to countless others through various Internet publications and content aggregators. Nevertheless, in December 2012, the SEC notified Netflix and Hastings that it was considering bringing an enforcement action concerning a possible violation of Regulation FD (Fair Disclosure). Reg. FD, adopted in 2000, seeking to ensure a level playing field among investors, mandates that distribution of material nonpublic information must not be selective but must instead be broad and non-exclusionary. The SEC's response to Hastings's Facebook post raised the concern among public company executives and securities law practitioners that any disclosure through social media outlets, without further guidance from the SEC, may give rise to liability under Reg. FD.

On April 2, 2013, the SEC issued a Report of Investigation (2013 Guidance) announcing that it had determined not to pursue an enforcement action in this instance. In announcing this decision, the SEC took the opportunity to provide some clarity as to the applicability of Reg. FD to disclosures made through social media channels such as Facebook and Twitter. In this article, we will briefly describe the operation of Reg. FD, examine the history of the SEC's views as to the application of Reg. FD to Internet communications, and provide guidance for public companies seeking to incorporate social media into their communication strategy.[1]

> ***Pepper Point:*** *Companies should determine whether to establish one or more social media outlets through which to disclose material non-public information. These social media outlets, which need not be the exclusive venue for disclosure, should be identified on the company's Web site with specificity, in order to afford investors the opportunity to take the steps necessary to obtain information as and when released. Disclosure of information through social media outlets should be subject to the same rigorous constraints and procedures as disclosures through other public means such as press releases or earnings conference calls. Companies should designate specific individuals or a specific department to be responsible for such disclosures. We expect most companies will also continue to report important corporate news through the traditional press release and Form 8-K channel.*

Reg. FD was adopted in 2000 in order to address the persistent problem of corporate officers informing their favorite securities analysts and institutional investors as to material financial developments before the information was available to the investing public generally. This age-old practice led to an imbalance of information between the well-heeled customers of a particular investment firm which happened to curry favor with a corporate insider, on the one hand, and average investors, on the other hand, threatening the integrity of the securities markets and damaging investor confidence. The practice did not abate notwithstanding repeated warnings in speeches and presentations by SEC commissioners throughout the years, and as a result, the SEC decided to act in a more formal way, giving rise to the adoption of Reg. FD.

Reg. FD requires that any disclosure by a domestic[2] public company, or by a person acting on the company's behalf, of material nonpublic information to specified categories of persons must be given in a manner that provides general public disclosure rather than selective disclosure. The covered categories, defined based on the likelihood that the persons in these categories will be interested in the information in connection with the trading of the company's investment securities, include broker-dealers, securities analysts, investment advisers, hedge funds, and the company's security holders under circumstances in which it is reasonably foreseeable that the security holders would purchase or sell securities on the basis of the information. Certain categories of persons are exempt from the prohibition against selective disclosure, including persons who owe a duty of trust or confidence to the company (such as an attorney, investment banker, or accountant), credit rating agencies, offerees in certain enumerated types of registered public offerings, and persons who agree to maintain the disclosed information in confidence (thus allowing firms to hold confidential discussions with otherwise covered third parties). If a company does disclose material nonpublic information selectively instead of through a public disclosure, it must disclose the information publicly, either simultaneously (for intentional disclosures), or promptly (for non-intentional disclosures).

In order for a disclosure to satisfy the requirement that it be a "public disclosure" for purposes of Reg. FD, the company may either disclose the information in a Form 8-K filed or furnished with the SEC, or may instead disseminate the information through another method (or combination of methods) of disclosure that is "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." It is this latter portion of the definition that has created the uncertainties that led to the threatened enforcement action against Netflix and its CEO and that is fleshed out in the 2013 Guidance.

A brief overview of the SEC's historical positions *vis-à-vis* the interplay of Regulation FD and Internet communications will reveal the tension between the SEC's encouragement of the

disclosure of information on the Internet, on the one hand, and attempts to ensure broad dissemination of information disclosed on the Internet, on the other hand. In 2002, the SEC embraced the ubiquity of the Internet by requiring, for the first time, that issuers disclose in their annual reports on Form 10-K whether they maintained Web sites where investors could access the issuers' SEC filings. Since then, the SEC has either required or explicitly approved Web site disclosure of more and more information, including, among other things, Section 16 "short-swing trading" filings (2003), non-GAAP financial information (2003), prospectuses in public offerings (2005), board committee charters (2006), proxy materials (2007), foreign private issuer disclosure documents (2007), participation in electronic shareholder forums (2008), interactive financial statement data (2009), and most recently, information about a company's use of "conflict minerals" in its manufactured products (2012).

And yet, the SEC has been reticent to allow a company's Internet disclosures alone to satisfy Reg. FD's requirement of "broad dissemination" of material nonpublic information. In its adopting release in 2000, the SEC discussed the possibility of using a company's Web site to satisfy the requirement that material non-public information be disseminated through any "method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public." At that time, the SEC declined to allow a company's Web site alone to satisfy these disclosure requirements, as the SEC felt that not all investors had access to the Internet and most companies' Web sites were not widely followed by the investment community. The SEC did, however, identify a permissible procedure for the disclosure of material non-public information involving Web site posting as one component in an overall public disclosure process that relied largely on traditional business wires for pushing out information, that has since become the standard for discussing quarterly earnings releases.

Under the SEC's sanctioned procedure in the August 2000 Reg. FD release, a company would first disclose, either on the company's Web site or through a press release, the date on which it would plan to hold an earnings conference call or Internet webcast that would be open to the public, and would provide the means for public access to the call or webcast. Then the company would issue its earnings release through regular business wire channels and conduct the earnings conference at the previously designated time. In this manner, any additional material non-public information that might be revealed on the conference call would not be considered to have been selectively disclosed in violation of Reg. FD by virtue of having been discussed on a conference call rather than having been disclosed in a press release or in an SEC filing. Note that this procedure allowed the use of a company's Web site merely to advertise the fact of a future call on which material non-public information could be disclosed, but not as a means to publicly disseminate the material non-public information itself. That same advertisement would typically be repeated in the earnings release itself, which was published through standard business wire services.

> ***Pepper Point:*** *Companies should ensure that they have in place robust Reg. FD policies. A well-drafted policy will identify those corporate officers who are authorized to communicate with analysts, securities market professionals and major stockholders and implement controls to ensure that all such communications are designed to comply with Reg. FD's prohibition against selective disclosure. The policy should establish standard procedures for routine public interactions such as quarterly earnings conference calls and investor conferences, and provide for coordination with legal professionals for any other type of communication in order to ensure compliance.*

In 2000, companies were not yet at liberty to disclose material non-public information exclusively through their Web sites, and popular Internet social media forums like Facebook and Twitter were mere figments of the imagination of a handful of future billionaires. As use of the Internet became more and more commonplace among the investment community, the SEC's attitude towards disclosure on a company's Web site became somewhat more relaxed. In 2007, several months after an online blog exchange between the then-chairman of the SEC and the CEO of Sun Microsystems about the possibility of a corporate Web site being considered sufficiently broad and non-exclusionary to satisfy Reg. FD's requirements, Sun broke new ground by releasing its quarterly earnings release on its corporate Web site and through its corporate RSS feeds 10 minutes before releasing it to the traditional news wire services.

This was followed in 2008 by the SEC's release of its "Guidance on the Use of Company Web Sites,"[3] (2008 Guidance) in which the SEC addressed a number of legal issues raised in connection with the use of corporate Web sites, including Reg. FD issues. The 2008 Guidance listed a number of non-exclusive factors that would be instructive as to whether a company's Web site constitutes a recognized channel of distribution and would satisfy Reg.

FD requirements for broad and non-exclusionary dissemination of information, including:

- whether the company has made investors and the markets aware that it will post important information on its Web site and whether it has a pattern or practice of posting such information on its Web site
- whether the information that is important for investors is prominently disclosed on the Web site in the location known and routinely used for such disclosures, and in a format readily accessible to the general public
- the extent to which information posted on the Web site is regularly picked up by the market and readily available media, and reported in, such media or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved
- the steps the company has taken to make its Web site and the information accessible, including the use of "push" technology, such as RSS feeds, or releases through other distribution channels either to widely distribute such information or advise the market of its availability
- whether the company keeps its Web site current and accurate
- whether the company uses other methods in addition to its Web site posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information, and
- the nature of the information.

In the 2013 Guidance, the SEC announced that its 2008 Guidance applies with "equal force" to disclosures made via social media outlets. Consequently, companies using social media to disseminate information need to determine whether the channel being used is a recognized channel of distribution for purposes of determining whether it is in compliance with Reg. FD. According to the SEC, a "recognized channel of distribution" is one in which a company takes appropriate steps to alert the market as being a means to disseminate material non-public information to investors, including the type of social media used and the type of information disclosed. By analogy to the 2008 Guidance, a company may accomplish this by identifying on its corporate Web site, or in periodic reports and press releases, the specific social media channels where the company intends to release important information to investors. The SEC pointed out that this would "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." Notification of the social media channels to be used for dissemination of information should be specific, such as by identifying the specific Twitter account or Facebook page through which the material information will be published, allowing unfettered access to the information that will be disclosed (*i.e.* without requiring the sender to accept a "friend request" from any interested follower).

> ***Pepper Point:*** *Disclosure on designated social media outlets should be coordinated as part of a company's overall investor communication strategy. Topics of disclosure and appropriate emphasis and messaging should be carefully considered. Special situations such as communication during a securities offering or proxy solicitation require involvement of legal professionals. Officers, directors and employees should be cautioned against disclosing any confidential company information on industry or interest group pages or company or personal Web pages (e.g., Pinterest, Instagram, YouTube, Google+, LinkedIn, etc.) other than through approved channels and procedures.*

Ultimately, the analysis of whether the means by which a company seeks to satisfy its legal obligations of broad public disclosure to comply with Reg. FD is a "facts-and-circumstances analysis." In the Netflix case, although the SEC criticized the CEO for disclosure on his personal Facebook page with no prior corporate notification that material non-public corporate information would be disclosed through this venue, the agency determined not to bring an enforcement action because of the novelty of the issue and the absence of any explicit prior SEC guidance as to the application of Reg. FD to disclosures made through social media. Now that the SEC has provided guidance in this area, public companies that wish to communicate with investors through social media outlets may proceed to do so after taking the necessary steps to establish their designated social media channels as "recognized channels of distribution." Assuming that sufficient groundwork has been laid and adequate internal processes have been implemented and are followed, public companies should be able to successfully incorporate social media into their investor communication strategies.

## Endnotes

1 The 2013 Guidance and this article only address the securities law issues relating to how Reg. FD applies to disclosures on corporate Web sites and social media outlets. There are many other securities law implications of such disclosures not addressed herein, including, among others, permissibility of communications during registered or private securities offerings, compliance with antifraud regulations for disclosures and hyperlinked material, compliance with proxy solicitation regulations, and due consideration of disclosure controls and procedures for social media and Web site postings.

2 Foreign companies are exempt from compliance with Regulation FD.

3 Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 34-58288, Investment Company Act No. 28351, 73 Fed. Reg. 45,862 (Aug. 1, 2008).

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