

Regulation FD in the Social Media Age

The SEC staff's issuance last year of a "Wells Notice" to Netflix and its CEO alleging a violation of Regulation FD based on a personal Facebook posting by the CEO caused significant concern. SEC interpretative guidance in 2008 had focused on the application of Regulation FD to company web site disclosures, but not social media, which were then only starting to gain in popularity.¹ The Netflix Wells Notice called into question the kinds of judgments practitioners had nonetheless become accustomed to making in the intervening years.

On April 2, 2013, the SEC announced its decision not to proceed further in the Netflix matter and issued a report of investigation that builds on its 2008 guidance.² The new guidance permits a company and its employees to use social media to report material information without violating Regulation FD, so long as two conditions are met. First, a social media channel used for this purpose must be a "recognized channel of distribution" within the meaning of the 2008 guidance. Second, the company must alert the market to the channels used and the information it may disclose using them.

We describe practical implications of the new guidance below. While a welcome first step, the guidance does not address the interplay of social media with other U.S. disclosure rules and leaves open questions about whether existing practices in other areas could attract SEC comments or enforcement interest.

Background

Regulation FD prohibits U.S. public companies from disclosing material nonpublic information to market professionals and to security holders if it is reasonably foreseeable that holders will trade on the basis of the information, absent disclosure to the general public at the times and in the manner provided in the Regulation. Although not subject to this restriction, foreign

¹ *Commission Guidance on the Use of Company Web Sites*, SEC Release Nos. 34-58288, IC-28351 (Aug. 1, 2008).

² *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings*, SEC Release No. 69279 (Apr. 2, 2013).

private issuers³ often look to Regulation FD for guidance to avoid liability for selective disclosures under the anti-fraud provisions of the federal securities laws.

Not long after a widely-reported correspondence between then-SEC Chairman Cox and the CEO of Sun Microsystems, who was advocating that web site disclosure could be Regulation FD-compliant,⁴ the SEC issued the 2008 guidance. The guidance provided non-exclusive factors for companies to consider in evaluating whether web site posts would be compliant with Regulation FD, including the ways information would be posted and the accessibility of the information to investors.

In the years since the 2008 guidance, the SEC and its staff have been silent on the implications of social media, with the exception of a staff comment letter questioning tweets by a company's CEO about future acquisitions, stock option purchases and new services. The company argued that the tweets were not material nonpublic information and were in any event linked to the company's web site, thus qualifying as publicly disseminated. The staff did not pursue its comment further, leaving practitioners with no indication of the limits applicable to similar disclosures.⁵

The Netflix situation, however, raised alarms. A Wells Notice indicates the staff's intent to recommend cease-and-desist proceedings or a civil injunctive action. Aside from significantly raising the stakes, the staff's action in Netflix seemed questionable, since the CEO's post reached more than 200,000 followers and provided information in line with prior company guidance and arguably not material.⁶ At least one prominent commentator suggested in an amicus Wells Submission in the Netflix matter that the Notice itself had had a chilling effect and reflected an outdated view of corporate communications.⁷ Although the Netflix matter had a favorable resolution, companies are now on notice of how they may be accountable under Regulation FD when using social media to disclose material company information.

Practical Implications of the SEC Report

Alert the market with specific details of the social media channels used

The SEC report reminds companies to consider the factors set out in the 2008 guidance when determining whether a social media outlet is a "recognized channel of distribution."⁸ The most

³ "Foreign private issuer" means any foreign issuer other than a foreign government, except one with more than 50% of its outstanding voting securities held by U.S. residents and either (1) a majority of executive officers or directors who are U.S. citizens or residents; (2) more than 50% of assets located in the United States; or (3) business that is administered principally in the United States. Rule 3b-4 under the Securities Exchange Act of 1934 ("Exchange Act").

⁴ At the time of the correspondence, the company had also announced that its financial results would be posted to its web site and RSS feeds before distribution through third-party news services.

⁵ WebMediaBrands Inc., SEC Correspondence (CORRESP) (Jan. 7, 2011).

⁶ Netflix, Inc., Current Report on Form 8-K (Dec. 6, 2012).

⁷ *Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?*, Joseph Grundfest, Rock Center for Corporate Governance at Stanford University Working Paper No. 131, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209525 (Jan. 30, 2013).

⁸ These factors include (1) whether and how companies let investors and the markets know that the company has a web site that should be looked to for information, (2) whether the company has provided awareness that it will post important information there and whether it has a pattern or practice of doing so, (3) whether the company's web site is designed to

important of these is letting the market know where to look for information. The report emphasizes that advance publication of the company's intended use of specified social media to disseminate company news is critical to meeting the notice requirement.

The SEC report refers to press releases and periodic reports as ways to provide notice and suggests that companies may also provide the notice on their web sites. We recommend providing the specific details, such as the account name, the URL or the specific webpage, for the social media channels that may be used. Reliance on general references to a channel or to company sites on a channel would not be prudent. Notice should be given well in advance of the company's posting of potentially material information through these channels or any channel that may later be added. The identification should be repeated regularly as part of periodic reports and press releases, and disclosed prominently on the company's investor relations page with links to the channels to promote investor awareness and access. Channels should be readily accessible without charges or comparable barriers, and companies should provide instructions or FAQs on their investor relations page on how to subscribe to them.

The SEC report also requires disclosure about the kinds of information that will be posted on the designated channels. This disclosure could include, for example, expectations that a company will tweet its earnings or post its material corporate and financial press releases via links using a particular Twitter handle or on a specified Facebook or LinkedIn page, or that its key executives may comment on company or market developments using the designated channels. We expect that companies with an active social media presence will use relatively general formulations to permit flexibility in their practices over time.

Proceed with caution if personal social media channels may be used

Not surprisingly, the SEC report clarifies that *personal* social media channels are unlikely to qualify as Regulation FD-compliant means of disseminating information absent prior notice. The SEC report highlights the fact that a personal social media channel is not ordinarily assumed to be used for disclosing company information, regardless of the reach of the channel in terms of subscribers or otherwise. This suggests the SEC may apply a higher standard to the sufficiency of the company's notice when material information may have been disclosed through these channels. For example, a general company notice that employees, or specified executives, may use their personal social media accounts to post company information would likely not be sufficient. As in the case of its own channels, the company should include a specific identification of the URL, Twitter handle or the like for any personal social media that may be used. Given that a person may have multiple social media accounts (including as part of a single channel), it may also be

lead investors and the market efficiently to information about the company, whether the information is prominently disclosed in a location known and routinely used for such disclosures and whether it is presented in a format readily accessible to the general public, (4) the extent to which information posted on the web site is regularly picked up by the market and readily available media and reported therein or the extent to which the company has advised the media about the information, (5) the steps the company has taken to make its web site and the information accessible, (6) whether the company keeps its web site current and accurate, (7) whether the company uses other additional methods to disseminate information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information and (8) the nature of the information. *Commission Guidance on the Use of Company Web Sites*, SEC Rel. Nos. 34-58288, IC-28351 (Aug. 1, 2008) at 20-22.

appropriate for the company to disclaim the use of any other personal account of a specified individual for purposes of disseminating company information.

Exercise care in selecting social media channels and be sure to use them

Companies should keep in mind that the SEC's 2008 guidance also addressed the accessibility of information *after* posting, such as whether it will be picked up by the media. Based on its report in the Netflix matter, the SEC appears to acknowledge Facebook and Twitter as valid media for public disclosure under Regulation FD. Companies that use other channels should pay particular attention to whether those channels would be widely followed.⁹ Even in the case of Facebook and Twitter, companies must consider on an ongoing basis whether changes in their format or accessibility would cause them to be non-compliant in the future. In the case of authorized personal social media channels, the company should also ensure that the individual applies site settings that permit maximum accessibility. We recommend that companies use a limited number of social media channels, in keeping with the 2008 guidance that whether a particular means of communication is Regulation FD-compliant depends in part on the other methods a company uses to disseminate information and whether those are its "predominant" methods.

The SEC's 2008 guidance also relied on whether the company has a pattern or practice of using its web site for company disclosures. It will likewise be important that companies in fact use social media channels they establish for these purposes, so as to create the kind of investor and media following the SEC expects.

Consider whether other concurrent means of dissemination may be appropriate

It may be prudent in some cases to couple publication of information via social media channels with more conventional means, such as a press release or Form 8-K, to ensure broad public dissemination. Whether this is desirable will depend mainly on the significance of the information, the length of time the company (or individual) has been using the channel in question and the breadth of exposure the company in fact achieves through that channel. An approach involving concurrent use of conventional disclosure methods may also be appropriate when a company initiates use of social media channels, since it may take time for investors to gain access to those channels or, for some institutional investors, to amend internal policies to permit access to sites that may otherwise be blocked.

In other cases, notably those matters identified as "material information" in applicable listing standards,¹⁰ such as significant company reorganizations, changes in executive leadership and the announcement of quarterly or annual results, we expect most companies will continue to rely on concurrent press releases, even though stock exchange "timely release" rules have for some time allowed most disclosures to be made by any Regulation FD-compliant method (or combination of

⁹ For example, Bloomberg announced soon after the publication of the report that it will integrate company Twitter feeds into its content and provide a platform through which investors can create filters and alerts to monitor the feeds of the companies they are most interested in. See *Bloomberg Brings Twitter to the Street*, Inside Investor Relations, available at <http://www.insideinvestorrelations.com/articles/social-media/19418/bloomberg-brings-twitter-street/> (Apr. 5, 2013).

¹⁰ See New York Stock Exchange Listed Company Manual §§202.05 and 202.06; NASDAQ Stock Market Rule 5250(b), IM-5250-1. Note in this regard that the NYSE continues to encourage the use of press releases when disseminating material information within the meaning of its rules.

methods). In devising procedures to allow use of social media, companies should also recall the need to comply with listing standards requiring pre-release notification to listing authorities of their intended release of specified types of material information.

Review communications and social media policies and training materials

The SEC's new guidance presents a good opportunity to review internal policies on communications and social media. In particular, if personal social media channels may be used, the sanctioned channels should be identified in the company's communications policy. Under a staff Compliance and Disclosure Interpretation, if a company's policy identifies authorized spokespersons, it is not responsible for selective disclosures by others.¹¹ The SEC report on Netflix did not address how the new guidance would affect this C&DI, but creating a record of authorized social media channels seems both logical and prudent.

A determination that no designated spokesperson may use personal social media to disclose company information should likewise be memorialized in the communications policy. In this regard, the importance of spokesperson training also bears emphasis. If the policy disclaims personal social media channels as official sources of company information, designated spokespersons under the policy must avoid posting potentially material nonpublic information on personal social media, since it would be significantly more difficult to argue that no violation of Regulation FD had occurred.

Companies should also review their existing employee guidance about responsible use of social media. A natural reaction to the SEC's new guidance might be to implement a policy that flatly prohibits employees from disclosing company information through personal social media. This type of provision is, however, of questionable enforceability (along with a number of other typical provisions in social media policies) based on staff guidance of the National Labor Relations Board interpreting Section 8(a)(1) of the National Labor Relations Act.¹² That Section prohibits the maintenance of work rules, apparently including social media policy restrictions, that would tend to chill employees when engaging in protected organizing activity under Section 7 of the Act.¹³ Companies should be sure to clarify that social media restrictions are not intended to impinge on Section 7 rights, including by providing examples in the policies of acceptable and unacceptable uses of social media.

¹¹ SEC, *Compliance and Disclosure Interpretations*, Regulation FD, Question 101.10 (Aug. 14, 2009).

¹² See Office of General Counsel, National Labor Relations Board, Memorandum OM 11-74 (Aug. 18, 2011), Memorandum OM 12-31 (Jan. 24, 2012) and Memorandum OM 12-59 (May 30, 2012), *available at* <http://www.nlrb.gov/reports-guidance/operations-management-memos> (finding certain restrictions and prohibitions in social media policies to be overbroad and unlawful under the National Labor Relations Act).

¹³ See, e.g., Office of General Counsel, National Labor Relations Board, Memorandum OM 12-59 (May 30, 2012) ("... a rule is clearly unlawful if it explicitly restricts Section 7 protected activities . . . [or] upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights" (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004))).

Ensure compliance with other communications rules and safe harbors

As noted above, the SEC report does not address the implications of using social media under other provisions of the U.S. federal securities laws. Some of those provisions require that dissemination of specific types of information be accompanied by prescribed legends;¹⁴ others provide safe harbors whereby the disseminated information will not violate other rules if appropriately legended.¹⁵ To comply, legends must generally be “prominent.” Similarly, written disclosure of non-GAAP financial measures requires inclusion of the most directly comparable GAAP financial measure and a reconciliation of the two measures.¹⁶

It may be impractical or impossible to meet these requirements using some social media channels that limit the length of postings. Some commentators have suggested using abbreviated legends or links to long-form legends or other required information in these cases. For example, companies that tweet updates during an earnings call routinely start off with at least one pre-call tweet linking to the company’s forward-looking statement disclaimer and may continue to include the link on tweets made during the call. A few companies that have tweeted non-GAAP financial measures during their earnings calls have also linked to required reconciliations posted on the company web site, and in at least two business combination transactions, the acquiror’s postings or tweets were linked to a web site containing required information under Securities Act Rule 165. It is unclear, however, whether these links would satisfy the relevant rules, and pending further SEC guidance, we would advise companies to proceed with caution.

Other SEC communication rules impose timely filing requirements that may apply to social media posts. For example, in connection with proxy solicitations under Regulation 14A, companies and third parties must file solicitation material on the date first used.¹⁷ Heightened monitoring of information flow in those cases will be necessary to ensure compliance.

Similarly, the SEC’s new guidance does not affect or limit the applicability of the so-called “gun-jumping” provisions of the Securities Act in connection with securities offerings, and companies must evaluate whether expected social media communications would be protected under available safe harbors. In some cases, a black-out on social media communications (or certain types of communications) may be appropriate or required.

Implement appropriate disclosure controls and procedures

Disclosure of information in a regulation FD-compliant way does not obviate the need to ensure that Exchange Act reports be materially accurate and complete. Companies should have disclosure controls and procedures in place to evaluate whether disclosures through social media channels must also be reflected in their periodic or current reports. For example, Item 2.02 of Form

¹⁴ See, e.g., Rule 165 under the Securities Act of 1933 (“Securities Act”) (written communications made “in connection with or relating to” a business combination transaction where securities are offered as consideration) and Rule 14a-12 under the Exchange Act (solicitation before furnishing a proxy statement).

¹⁵ See, e.g., Rule 135 under the Securities Act (press release notice of proposed public offering) and Section 21E of the Exchange Act (forward-looking statements).

¹⁶ See *Conditions for Use of Non-GAAP Financial Measures*, SEC Rel. Nos. 33-8176; FR-65 (Mar. 28, 2003).

¹⁷ Rules 14a-6 and 14a-12 under the Exchange Act.

8-K requires a company to report any public announcement or release disclosing material nonpublic information about a completed fiscal period. Company or executive tweets about previously unannounced preliminary quarterly financial results would, for example, fall within this Item, if the information were material.

Finally, companies should be mindful that social media postings remain subject to the anti-fraud provisions of the federal securities laws. Companies should consider, in particular, how social media communications may alter the “total mix” of information that is publicly available about them and educate authorized users of personal social media about the importance of balance (and the avoidance of cherry-picking) in company communications. The company may also have a duty to correct misstatements made by employees posting on social media¹⁸ or may be forced to consider whether to respond to third-party posts, or third-party responses to company posts, to correct what the company believes to be misstatements.¹⁹

While most companies with an active social media presence have procedures to vet the company’s own posts, the level of oversight of executive social media posts tends to be more limited. The more casual tone of personal posts, which can promote a more “human” connection with investors, could also entail risks to executives and companies alike.²⁰ While there is no one-size-fits-all approach to oversight, we would expect most companies to heighten their procedures surrounding social media use in light of the SEC’s new guidance, particularly where personal social media may be used.

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Please contact any of our partners and counsel listed under “Capital Markets” and “Corporate Governance” in the “Practices” section of our web site (www.cgsh.com), or any of your other regular contacts at the firm for further information about the matters discussed above.

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¹⁸ See *In re Sharon Steel*, SEC Release No. 34-18271 (Nov. 19, 1981) (holding that a company must assume a duty to make corrective disclosure where there is either evidence that rumors originated from within the company or trading by insiders in the company’s shares).

¹⁹ In *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 163 (2d Cir. 1980), in the context of disclosure in an analyst report, the Second Circuit stated that potential corporate liability for third-party statements depends upon whether management “sufficiently entangle[s] itself with the analysts’ forecasts to render those predictions ‘attributable to it.’” The court further explained that entanglement can occur when company officials make an implied representation that the information they have reviewed is accurate or at least comports with the company’s views. Companies should be careful not to give any indication that they purport to agree with third-party statements on their social media channels to avoid liability for those statements.

²⁰ See, e.g., *The Timing of Tesla C.E.O.’s Tweets*, The New York Times, available at <http://dealbook.nytimes.com/2013/04/01/the-timing-of-tesla-c-e-o-s-tweets/> (Apr. 1, 2013); *140 Characters of Risk: Some CEOs Fear Twitter*, The Wall Street Journal, available at <http://online.wsj.com/article/SB10000872396390444083304578018423363962886.html> (Sept. 26, 2012).

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