

SEC Provides Guidance on the Use of Social Media to Disseminate Investor Information

On April 2, 2013, the Securities and Exchange Commission issued a report clarifying existing guidance to confirm that public companies may use social media outlets, such as Facebook and Twitter, to announce key information in compliance with Regulation FD of the Securities Exchange Act of 1934, so long as investors have been alerted in advance about which social media outlets will be used to disseminate such information.

Background on Regulation FD and 2008 SEC Guidance on Use of Company Websites

Adopted in 2000, Regulation FD prohibits public companies from making selective disclosure of material, non-public information to select individuals before such information is made available to the general public. Generally, it requires that companies disclose material information by filing a Form 8-K or in another manner that is reasonably designed to “achieve effective broad and non-exclusionary distribution” to the public.

In August 2008, the SEC issued interpretive guidance regarding the use of company web sites to disclose information to investors, stating that in evaluating whether a posting on a company web site is public disclosure for purposes of Regulation FD, companies must consider whether: (i) the web site is a “recognized channel” of distribution; (ii) posting information on a web site disseminates the information so as to make it available to the markets; and (iii) a reasonable waiting period has occurred so that the market can digest such information.¹ According to the 2008 guidance, whether a web site can be considered a recognized channel of distribution turns 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.”

The 2008 guidance was focused on web site postings, and did not specifically address social media outlets. Since 2008, corporations have increasingly incorporated social media in their communications strategies. A 2012 study by Burson-Marsteller found that 87 percent of the *Fortune Global 100* companies use one of the major social platforms to communicate with shareholders and the general marketplace.² Addressing a perceived gap in the SEC’s guidance as set forth below, the SEC has now clarified that its 2008 guidance also applies to disclosures made through social media outlets, such as Facebook and Twitter.

SEC Report Okays Disclosure via Social Media

The new guidance from the SEC comes from an April 2, 2013 report on its decision not to initiate an enforcement action against Netflix’s chief executive officer, Reed Hastings.³ In July 2012, the SEC opened an investigation into whether a post Mr. Hastings made on his personal Facebook page violated Regulation FD. In his post, Mr. Hastings announced to his approximately 200,000 followers that Netflix had hit a milestone by streaming 100 billion hours of video content during the month of June. The information was not disclosed in a press release, on Netflix’s website, or in a Form 8-K or other SEC filing. Netflix had not previously used Mr. Hastings’s Facebook page to report similar company information.

¹ Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (Aug. 7, 2008), available [here](#).

² See The Burson-Marsteller Global Social Media Check-Up 2012, July 17, 2012, available [here](#).

³ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Motorola, Inc., Release No. 34-46898 (Nov. 25, 2002), available [here](#).

In its report, the SEC clarified that the 2008 guidance extends to social media communications, including the non-exhaustive list of factors to be considered in evaluating whether a corporate web site constitutes a recognized channel of distribution. The report specifically highlighted the concept that the investing public should be alerted to the channels of distribution a company will use to disseminate material information. The SEC stressed that Regulation FD compliance was always intended as a “facts-and-circumstances” analysis and that its 2008 guidance was meant to be flexible and adaptive to new forms of communication, citing its consideration of “push” technology and other forms of communications.

As a practice point, the guidance specifically mentions that one way in which a company could position its social media sites as recognized channels of distribution would be to include a statement in its press releases and periodic reports that specifically refers to the company’s social media channels as a source of important information.

Also, although the SEC declined to pursue an enforcement action against Netflix’s chief executive officer and stated that they “do not wish to inhibit the content, form, or forum” of disclosures through social media channels, the report states that personal social media sites of company employees, such as Mr. Hastings, would not ordinarily be assumed to be channels through which companies disclose material corporate information.

Practical Tips for Applying the SEC Guidance on Social Media

- Use official corporate social media accounts for investor communications (*e.g.*, not a personal page as in the Netflix example).
- Corporate social media accounts should not be limited or restricted, such as a password requirement or limiting access to members of a social media network.
- Include a statement in all press releases that refers to the company’s social media outlets as sources of important information. Example: “We routinely post information that may be important to investors in the [Investor Relations] section of our web site at [www.\[publiccompany\].com](http://www.[publiccompany].com), on our Facebook page at [http://www.facebook.com/\[publiccompany\]](http://www.facebook.com/[publiccompany]) and on Twitter @[\[publiccompany\]](https://twitter.com/[publiccompany]). We encourage investors to consult our web site regularly and to follow us on Facebook and Twitter for important information about us.”
- Consider continuing to use wire services and/or Form 8-Ks for public disclosure of information that is clearly material, so as to avoid potential violations of Regulation FD and of stock exchange rules, such as the NYSE procedures for public release of information (which states a preference for press releases and pre-clearance of such releases before opening or during market hours).
- Be mindful that the antifraud provisions of the securities laws continue to apply to company statements made on social media channels in the same way as any other statement made by, or attributable to, a company.

For further information concerning the SEC’s guidance on the use of social media including Facebook, Twitter, LinkedIn, YouTube or corporate blogs, please contact your usual Ropes & Gray attorney.

The full text of the SEC’s report is available [here](#).