The SEC has provided guidance to publicly reporting companies on how to use popular social networking sites, such as Facebook and Twitter, consistent with federal securities laws.

On April 2, 2013, the Securities and Exchange Commission (SEC) issued a release detailing its investigation into whether Netflix, Inc. and its CEO, Reed Hastings, violated Regulation FD and Section 13(a) of the Securities Exchange Act of 1934, when Hastings used his personal Facebook page to announce that Netflix had streamed 1 billion hours of content in June 2012. Hastings’ personal Facebook page had not previously been used to make company announcements, and shareholders had not been informed that it would be used to disclose company information. In addition, after the disclosure, Netflix did not post the information on its website, issue a press release or file a Form 8-K.

The SEC declined to pursue an enforcement action against Hastings and Netflix, but used this matter as an opportunity to clear up uncertainty regarding the use of social networking sites to disclose material, nonpublic information. The SEC did so by addressing two questions raised during the course of its investigation:

- the application of Regulation FD to Hastings’ Facebook posting; and
- the applicability of the SEC’s August 2008 Guidance on the Use of Company Web Sites (2008 Guidance) to emerging technologies such as social networking sites.

**Regulation FD Applies to Disclosures of Material, Nonpublic Information on Social Networking Sites**

The SEC explained in its release that issuers may use popular social networking sites, such as Facebook and Twitter, to disclose material, nonpublic information, but such disclosures must comply with Regulation FD. Regulation FD provides that when an issuer, or a person acting on its behalf, discloses material, nonpublic
information to certain enumerated persons, such as shareholders and securities market professionals, where it is reasonably foreseeable that they will purchase or sell the issuer’s securities on the basis of the information, it must distribute that information in a manner reasonably designed to provide broad and non-exclusionary distribution to the public. When the disclosure of material, nonpublic information is intentional, it must be distributed to the public simultaneously, and when such disclosure is inadvertent, it must be distributed to the public promptly afterwards. The SEC does not require the use of a particular method for public disclosure, but it must be done through a recognized channel of distribution, such as an issuer web site, press release or Form 8-K filing.

The SEC explained that “the rule makes clear that public disclosure of material, nonpublic information must be made in a manner that conforms with Regulation FD whenever such information is disclosed to any group that includes one or more enumerated persons.” The SEC further emphasized that “if an issuer makes a disclosure to an enumerated person, including to a broader group of recipients through a social media channel, the issuer must consider whether that disclosure implicates Regulation FD.” This analysis would include determining:

- whether the disclosure includes material, nonpublic information; and
- if it does, and the issuer chooses not to file a Form 8-K, whether the information was disseminated in a manner reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

**Download: Safe Tweeting: SEC Provides Guidance on Social Media and Regulation FD Compliance**


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