

CLIENT UPDATE

BLOGS, FACEBOOKING AND TWEETING: MAY BE PUBLIC ENOUGH FOR REGULATION FD

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In December 2012, we reported on the SEC's intention to recommend that the SEC bring suit against Netflix, Inc. and its CEO, Reed Hastings, for violations of Regulation Fair Disclosure ("Regulation FD") relating to postings made by Mr. Hastings on his Facebook page. In a report of investigation made public on April 2, 2013, the SEC reported that it has determined not to pursue an enforcement action against either Netflix or Mr. Hastings for having violated prohibitions on the selective disclosure of material non-public information. Further, and of potentially greater interest, the SEC used the report to provide guidance to issuers regarding how Regulation FD and the SEC's 2008 Guidance on the Use of Company Websites apply to social media channels such as Facebook and Twitter.

In the report, the SEC confirms its view that Regulation FD and the 2008 Guidance apply to social media and other technologies used by public companies the same way they apply to company websites. In elaborating on this point, the SEC emphasizes the following two principles:

- communications from issuers to investors through social media channels require careful Regulation FD analysis; and
- it is critical in complying with Regulation FD that issuers alert the investing public to the channels of distribution a company will use to disseminate material information.

The report also makes clear that even if an issuer alerts investors that it intends to use social media to disseminate material non-public information and the media channel is a “recognized channel of distribution”, as that term is used in the 2008 Guidance, it must still consider other factors set forth in the 2008 Guidance in concluding that those communications would not constitute selective disclosures of material non-public information in violation of Regulation FD.

As satisfaction of many of the conditions set forth in the 2008 Guidance is subjective, and the SEC’s general anti-fraud Rule 10b-5 applies to all corporate communications, including those transmitted through social media channels, we continue to recommend that issuers proceed cautiously in using social media channels alone to disseminate material non-public information.

Finally, we note that the report restates with great clarity the SEC’s view that the applicability of Regulation FD cannot be negated solely by selectively disclosing information to a mixed group comprised of persons that fall within and outside of the categories of persons to which Regulation FD applies. Thus, issuers should continue to ensure that the dissemination of material non-public information to persons that can be reasonably expected to trade securities on the basis of the information or provide others with advice about securities trading is made in compliance with Regulation FD’s requirement for simultaneous “public disclosure” or otherwise pursuant to a specific exception to the rule.

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Please do not hesitate to contact us with any questions.

April 4, 2013