

The SEC Provides Guidance on the Use of Social Media for Public Company Disclosure

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On April 2, 2013, the Securities and Exchange Commission issued a "report of investigation" that provides important guidance for companies that wish to use social media outlets, such as Facebook and Twitter, to publicly disclose corporate developments. The SEC issued the Report under Section 21(a) of the Exchange Act, which permits the agency to report on the results of an investigation, typically in lieu of the imposition of penalties. In this case, the Report relates to a widely publicized investigation of Netflix, Inc., and the disclosure of a corporate development by its CEO on his personal Facebook page.

While the use of social media to disclose material corporate information was never expressly prohibited, the SEC had not directly addressed the practice until now. Most companies considered the use of social media for corporate disclosure to be imprudent. The Report is significant not only because it implicitly legitimizes the use of social media for public disclosure, but also because it provides important guidance for doing so. The SEC emphasizes that the appropriateness of a public disclosure through social media depends on the facts and circumstances. Relevant factors might include whether investors can expect the company to disclose information on a particular social media page, and the degree to which the page in question is followed by subscribers. In addition, the SEC highlights the need for companies to provide advance notice to investors of their intention to use social media in this manner. In particular, companies should provide advance notice of the specific social media sites that they intend to use to disseminate information, and the categories of disclosure that investors can expect to find on such sites.

The basis of the SEC's investigation of Netflix was Regulation FD, which mandates that companies alert the public to material information broadly and non-selectively. The investigation was triggered by a post by Netflix CEO Reed Hastings on his personal Facebook page, disclosing that the company's monthly online viewing had exceeded one billion hours for the first time. The investigation focused on whether the posting by Mr. Hastings met the requirements of Regulation FD, and on the theory that investors may not have expected material corporate developments to be reported on the CEO's personal webpage.

The information posted on Facebook was not reported on a Form 8-K or in a press release issued by Netflix. On that same day of the posting, Netflix's stock price increased (although the increase had begun prior to the posting). According to the SEC, neither Mr. Hastings nor Netflix had previously used Mr. Hastings' Facebook page to announce material information about Netflix, and investors were not alerted to the possibility that the company might do so. The company, according to the agency, instead directed investors to its own Facebook page, blog and corporate website. The SEC also highlighted that Mr. Hastings had not consulted with his chief financial officer or investor relations department before posting the information, and that the milestone in monthly online viewing posted by Mr. Hastings "reached the securities market only incrementally."

We expect that the response to the new guidance will initially be cautious, and that most companies will continue to issue press releases and/or file Forms 8-K to announce information in compliance with Regulation FD, even when they disseminate the same information through recognized social media outlets in a manner consistent with the guidance. Over the long term, however, the SEC's announcement has the potential to change the way in which companies share important information and reap the benefits of social media.

A copy of the SEC's Report is available [here](#).

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