

USA: Tweeting corporate communications

During 2012, use of corporate blogging, Facebook and Twitter among Fortune 500 companies increased as companies sought to increase their brand awareness and customer engagement, enhance networking and recruiting, and access key demographics by engaging in social media. According to a study conducted by the University of Massachusetts at Dartmouth, in 2012:

- 73% of all Fortune 500 companies have an official corporate Twitter account with regular tweet activity, which is up from 62% in 2011;
- 66% of all Fortune 500 companies have a corporate Facebook page compared to 58% in 2011; and
- 28% have a corporate blog with regular posts compared to 23% in 2011.¹

While the use of social media has created new opportunities for many companies to reach targeted demographic groups, it also can expose unsuspecting companies and their officers to risks as demonstrated in recently disclosed enforcement action initiated against Netflix and its CEO, Reed Hastings. This article summarizes some of the U.S. securities law considerations and recent guidance that apply to social media use by publicly traded companies.

The SEC alleges that Mr Hastings' Facebook post violates Regulation FD

In December 2012, Netflix and its CEO, Reed Hastings, each received Wells notices from the Enforcement Division of the United States Securities and Exchange Commission (the "SEC") informing them of the intent of the SEC to pursue enforcement action as a result of a July 2012 Facebook post made by Mr. Hastings. The Facebook post congratulated Netflix's content licensing team for exceeding a milestone in monthly viewing hours and contained a positive prediction regarding future monthly viewing hours. Netflix did not file a Current Report on Form 8-K with the SEC, issue a press release or publicly disseminate any other disclosure at the time.

The SEC alleged that Mr. Hastings' Facebook post violated Regulation FD, which prohibits the selective disclosure of material non-public information to market professionals or investors. In a Form 8-K later furnished by Netflix, Mr. Hastings defended his post by claiming both that disclosures made on his Facebook page were "public" given that he has over 200,000 friends who subscribe to his posts, and that the post itself was not "material" information about Netflix.²

The SEC has become more concerned over the use of social media communications

The Netflix action is a reminder that despite the casual and spontaneous nature of communication via social media such as Facebook and Twitter, such communication is still subject to securities laws and regulation such as Regulation FD. To satisfy Regulation FD requirements, companies typically disclose material non-public information in a broadly disseminated press release or Form 8-K, or on a publicized call or webcast which is accessible to the public. In 2008, the SEC issued additional Regulation FD guidance (the "2008 Guidance") explaining how companies may use website disclosure as a Regulation FD compliance disclosure tool. In order to qualify, companies must demonstrate, among other things, the following:

- their corporate website is a recognized channel of distribution;
- posting information on the corporate website disseminates the information in a manner that makes it available to the securities marketplace in general; and
- there has been a reasonable period of time for investors and the market to react to the posted information.³

On April 2, 2013, the SEC concluded its investigation of Netflix and Mr. Hastings and determined not to pursue any enforcement action. Instead, the SEC issued a

¹ The Social Media Surge by the 2012 Fortune 500," Center for Marketing Research, University of Massachusetts at Dartmouth, <http://www.umassd.edu/cmr/socialmedia/2012fortune500/> (last accessed on January 25, 2013).

² Ex. 99.1 to Netflix Current Report on Form 8-K, filed December 5, 2012

³ SEC Interpretive Release No. 34-58288 (August 7, 2008).

Report of Investigation (the “Report”) to provide guidance to issuers regarding how Regulation FD and the 2008 Guidance apply to disclosures made through social media.

The Report states that the principles outlined in the 2008 Guidance apply with equal force to corporate disclosures made through social media channels including Twitter and Facebook – reiterating the fundamental importance of alerting investors in advance to the channels of distribution that a company intends to use to disseminate material information. Companies are also encouraged to identify on their corporate websites the specific social media channels that they intend to utilize for the dissemination of material, non-public information and to give investors and the market the opportunity to take steps necessary to subscribe to, join, register for or review that channel⁴. However, the Report cautions that whether or not a particular Twitter feed or Facebook page qualifies as a recognized channel of distribution of information in compliance with the 2008 Guidance remains subject to a “facts and circumstances” analysis. Finally, the Report clarifies that without advance notice to investors, the disclosure of material, non-public information on the personal social media site of an individual corporate officer employed by a public company is unlikely to satisfy the requirements of Regulation FD even if the individual has a large number of subscribers, friends or other social media contacts.⁵

The guidance set forth in the Report appears consistent with the SEC’s response to earlier reviews of the disclosure of information by executives via social media channels.

In December of 2010, a small internet company, WebMedia Brands, and its CEO, Alan Meckler, appeared to successfully defend tweets via a personal Twitter account against allegations that the tweets violated Regulation FD by applying the 2008 Guidance to the Twitter account. In a comment letter issued to the company, the SEC’s Division of Corporation Finance noted that Mr. Meckler regularly used his Twitter account to discuss pending acquisitions and next quarter results prior to the company’s disclosure of this information in SEC filings. For example, in August 2010, the CEO tweeted: “WebMediaBrands posts its 2nd quarter financials a week from today after market. Conference call is on Thursday.

Rev. growth big.” The SEC comment letter questioned whether the use of the tweets was in compliance with Regulation FD and other SEC rules and regulations.⁶ WebMediaBrands’ response claimed first that the tweets did not violate Regulation FD because none of the tweets concerned material non-public information. As an alternative, WebMedia Brands also claimed that even if the tweets were deemed to be material, Mr. Meckler’s Twitter page was a recognized channel of distribution for information about the company and that the postings disseminated the information in manner that made them available to the marketplace in general because Mr. Meckler’s Twitter feed appears on a blog linked to WebMediaBrand’s corporate website.⁷ After the company submitted its response, the SEC issued a letter stating that it had no further comments.



Mr Meckler regularly used his Twitter account to discuss pending acquisitions



Besides compliance with Regulation FD, communications via social media must also comply with other securities laws and regulations. For example, general anti-fraud rules can apply to any company statements whether written or oral, including tweets or posts. Adhering to these rules in the context of communication via social media platforms can be challenging, because tweets and posts may need to be abbreviated due to character limits of the platforms, as well as the customs and practices that have developed around social media communication. However, issuing short declarative statements using social media, unaccompanied by the kind of qualifying verbiage or additional details that are often included in corporate communications issued by public companies through press releases or SEC filings, creates risks that followers could misinterpret a company’s statements. The company, or individual executive, issuing the tweet or post could be exposed to claims by the SEC or plaintiffs’ lawyers that the substance of the company information contained in the message was not adequately

⁴ SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings (April 2, 2013).

⁵ Id.

⁶ <http://www.sec.gov/Archives/edgar/data/1083712/000101968711000062/filename1.htm>

⁷ Id.

communicated. In addition, tweets or posts must still include, or be accompanied by, required disclaimers or reconciliations if they include forward-looking information or adjusted or non-GAAP financial information.



Coordinate the release of information over all platforms



While the SEC's recently issued guidance set forth in the Report reflects a recognition by the SEC of the expanding use of social media by publicly traded companies, companies should continue to exercise caution when using social media and consider adhering to the following practices:

- Require all executives and employees who are authorized to use social media on behalf of the company to have Regulation FD training;
- If the company uses social media outlets to communicate information that could be viewed as material to investors, it should do so in conjunction with traditional forms of disclosure (for example, SEC filings and press releases) and coordinate the release of information simultaneously across all platforms;
- If the company uses different avenues for disseminating company information beyond traditional press releases and SEC filings, the company should alert investors in advance and tell them how and where the company will release such information;
- If the company intends to disseminate company information on social media platforms, the company should consider linking blogs, Facebook pages or Twitter accounts that it intends to utilize to the company's website;
- All posts and tweets by the company or any of its executives that comment on or summarize press releases or earnings calls should include links to the full text of the press releases or webcasts; and

- Adopt, and regularly update, policies to address social media communication by the company, its employees and executives.

The state of the law and best practices in the area of corporate communications via social media is evolving rapidly along with expanding use of social media platforms by companies and their executives. The SEC cases and general legal principles discussed above serve to highlight some of the potential pitfalls that exist in this area. Company counsel, corporate executives, corporate communications teams and other company employees should be mindful of both the risks and opportunities presented by the use social media as an outlet for sharing company information.



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