SEC Guidance on Disclosure Through Social Media

Like Websites, Social Media Can Be a Regulation FD-Compliant Means of Broad Dissemination But Only If the Company Has Taken Steps to Establish It as a Recognized Channel of Distribution; Companies Using Social Media Should Remain Mindful of Antifraud and Other Regulatory Concerns

SUMMARY

On April 2, 2013, the Securities and Exchange Commission issued guidance confirming that the disclosure by public companies of material non-public information through social media channels, such as Facebook and Twitter, is governed by the principles outlined in the SEC’s 2008 guidance on website disclosure — specifically, that social media can be a Regulation FD-compliant means of broad dissemination but only if the company has taken adequate steps to alert the market that it intends to disclose such information through that channel. It is therefore important to note that if the company has not adequately alerted the market that it will disclose material information through a social media channel, then disclosure of material non-public information through that social media channel will be selective disclosure in violation of Regulation FD.

The SEC guidance explains that whether a particular form of social media is a “recognized channel of distribution” depends on the facts and circumstances, but indicates, as an example, that a company might alert the market by noting on its corporate website the specific forms of social media it intends to use and the type of information that will be disclosed.

Whether or not a company intends to use social media as a channel for distribution of material non-public information, we suggest that companies that communicate with investors and the public through social media take steps to ensure that they have in place appropriate controls and procedures. Corporate legal
departments should work closely with the investor relations and public relations departments to develop and implement social media policies in light of potential liability under federal antifraud provisions and other applicable laws and regulations.

BACKGROUND ON REGULATION FD

Under Regulation FD, material non-public information that is provided by an issuer to specified parties, including investors who might trade on the basis of the information, must be published in a manner “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.” In 2008, the SEC issued guidance as to when disclosure by an issuer on its corporate website can be a Regulation FD-compliant means of broad dissemination. The 2008 guidance included a non-exclusive list of factors for companies to consider in evaluating whether their company website is a recognized channel of distribution for these purposes, including:

- whether and how the company lets investors and the markets know that they should look at the company’s website for information;
- whether the company has made investors and the markets aware that it will post important information on its website and whether it has a pattern or practice of posting such information on its website;
- whether the company’s website is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the website in the location known and routinely used for such disclosures, and whether the information is presented in a format readily accessible to the general public;
- the extent to which information posted on the website is regularly picked up by the market and readily available media;
- the steps the company has taken to make its website and the information accessible;
- whether the company keeps its website current and accurate;
- whether the company uses other methods in addition to its website posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information; and
- the nature of the information.

The SEC’s new guidance confirms that the same analysis applies to disclosure through social media, and indicates that the SEC expects issuers to “examine rigorously” the factors indicating whether a particular social media channel is a “recognized channel of distribution” for communicating with their investors.

BACKGROUND ON SEC REPORT OF INVESTIGATION

The new guidance was issued in the form of a report of investigation stating that the SEC would not pursue an enforcement action against Netflix, Inc. and its CEO concerning the CEO’s use of his personal Facebook page to announce a streaming milestone reached by Netflix without an accompanying press release or Form 8-K filing by Netflix. In 2012, Netflix disclosed that the company and the CEO had each received a Wells Notice from the SEC staff relating to alleged violations of Regulation FD in connection with their social media communications.
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with the CEO’s Facebook post. The SEC, in its report of investigation, noted that neither Netflix nor its CEO had previously used his personal Facebook page to announce company metrics and that Netflix had not previously informed shareholders that the CEO’s Facebook page would be used to disclose this type of information. Nevertheless, the SEC did not pursue an enforcement action against Netflix or its CEO, but, in light of the perceived uncertainty regarding the application of Regulation FD to social media, instead took the opportunity to provide this clarifying guidance.

SECURITIES LAW CONSIDERATIONS

Companies using social media to communicate with investors should be mindful of the continued possibility for antifraud liability under the federal securities laws. The new guidance does not address this specifically, but it highlights the similarity between disclosures through social media channels and disclosures through channels addressed in the 2008 guidance, such as websites, blogs, RSS feeds and email alerts. The 2008 guidance discusses antifraud liability for making certain types of information or content available through company websites, including hyperlinked third-party information and summaries of more detailed information. A comparable antifraud liability analysis should apply to disclosures through social media channels.

In particular, in the 2008 guidance, the SEC focused on the question of whether providing a hyperlink to third-party information (as often occurs in tweets or Facebook posts) means that the company has “adopted” the information for liability purposes. In its 2000 release on the use of electronic media, the SEC set out its position that a company may be liable for hyperlinked third-party information if it has involved itself in the preparation of the information (“entanglement”) or it has explicitly or implicitly endorsed or approved the information (“adoption”). In the 2008 guidance, the SEC discussed the “adoption” theory in the context of company websites and reaffirmed that the key inquiry is whether the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information.

Based on the 2008 guidance, we expect the factors that would be relevant to this inquiry in the context of social media channels would include:

- the context of the hyperlink (i.e., the company’s explanation about the source when it, for example, re-tweets a third party news article or shares a Facebook post or a YouTube video);
- the risk of confusing the investor as to the source of the information (which could be addressed, in part, through the use of disclaimers); and
- the nature and presentation of the hyperlinked information, including selective choices by the company (e.g., implicit adoption or endorsement is more likely if a company makes selective choices of hyperlinked information, particularly where such information is not representative of what is available, such as when a company only re-tweets favorable analyst reports).

The 2008 guidance also notes that a summary or overview standing alone, which a reasonable person would not perceive as a summary or overview and which does not provide additional information to alert a
reader as to where more detailed information is located, could result in investors not understanding that the statements should be read in the context of the information being summarized. The brief nature of communication through social media channels presents a similar problem (e.g., Twitter limits each individual tweet to 140 characters), as it is often not obvious to readers that a tweet or post should be placed in the context of a longer message, especially when each tweet or post could be re-tweeted or shared separately. Companies should ensure that communications through social media, where appropriate, make clear the broader context in which the communication should be read, including by providing a cautionary note or a link to more detailed information from which the brief or summary information is derived.

**CONTROLS AND PROCEDURES AND OTHER REGULATORY REQUIREMENTS**

More broadly, issuers should ensure that the legal and compliance departments are working together with the investor relations and public relations teams to develop and implement appropriate firmwide controls and procedures with respect to the use of social media. Senior employees that are authorized to speak on behalf of the company should be made aware of the company policies applicable to their communications. Employees more broadly should understand that, in the context of social media as in all other contexts, they are not authorized to, and should not purport to, speak for the company.

Companies should also ensure that social media communications are subject to the restrictions and requirements imposed on company communications generally, including those relating to the use of non-GAAP measures under Regulation G, the use of forward-looking information, and any references to pending securities offerings. Company policies on social media should also be developed in the context of the particular regulatory and self-regulatory rules applicable to the company, including the following.

**Stock Exchange Requirements.** Both the New York Stock Exchange and the Nasdaq Stock Market reference Regulation FD as the basis for assessing whether material information has been publicly disseminated. Therefore, if a listed company disseminates material information through social media, but has not taken adequate steps to condition the market to anticipate that method of communication, then it may have violated stock exchange listing standards as well as Regulation FD. In addition, the current stock exchange rules continue to favor (though not require) disclosure through a press release or Form 8-K, rather than other Regulation FD-compliant methods, exemplified by Nasdaq’s additional prior notice requirement for companies using a Regulation FD-compliant method for disclosure other than a press release or Form 8-K.⁶

**Financial Institutions.** In January 2013, the U.S. banking regulators proposed supervisory guidance that would require financial institutions to address compliance and reputational risks raised by activities conducted through social media.⁷ Specifically, a financial institution’s risk management program should allow it to identify, measure, monitor, and control the risks related to social media, should reflect the extent of the institution’s use of social media and should include, among others:
a governance structure with clear roles and responsibilities whereby the board of directors or senior management direct how using social media contributes to strategic goals of the institution and establishes controls and ongoing assessment of risk in social media activities, as well as parameters for providing appropriate reporting to the board of directors or senior management that enable periodic evaluation of the effectiveness of the social media program;

- policies and procedures regarding the use and monitoring of social media and compliance with all internal policies and all applicable consumer protection laws, regulations and guidance, including methodologies to address risks from online postings, edits, replies and retention;

- an employee training program that incorporates the institution’s policies and procedures for official, work-related use of social media, including defining impermissible activities; and

- an oversight process for monitoring information posted to proprietary social media sites administered by the financial institution or a contracted third party and a due diligence process for selecting and managing third-party service provider relationships in connection with social media.

Registered Investment Advisers. In January 2012, the SEC’s Office of Compliance Inspections and Examinations issued a National Examination Risk Alert highlighting that registered investment advisors (“RIAs”) must comply with antifraud provisions, compliance provisions and recordkeeping provisions of the federal securities laws when they use or permit the use of social media by their representatives, solicitors and/or third parties. The SEC staff suggests in the risk alert that RIAs should:

- periodically evaluate the effectiveness of their compliance programs as they relate to social media (factors that might be considered include usage guidelines, content standards, monitoring, training and information security);

- pay particular attention to third-party content, if permitted (for example, the use of a “like” button could be interpreted as a statement of a client’s endorsement of an RIA or an investment advisory representative, raising issues under the Investment Advisers Act); and

- review their recordkeeping and document retention policies to ensure that any required records generated by social media communications are retained in compliance with the federal securities laws, including in a manner that is easily accessible for a period not less than five years.

FINRA Member Broker-Dealers. FINRA member broker-dealers are subject to additional recordkeeping, suitability, supervision and content requirements for communications with the public through social media. For example:

- a broker-dealer is prohibited from establishing links to any third-party site that it knows or has reason to know contains false or misleading content;

- a registered principal of a broker-dealer must approve all static content (e.g., profile, background, wall information or interactive content that is posted in a static forum) on a social networking site established by the broker-dealer or its registered representatives before it is posted, as static postings constitute advertisements under FINRA rules; and
while no prior approval is required for unscripted interactive communications, a broker-dealer must supervise non-static, real-time communications on a social networking site (e.g., real-time interactions on Twitter, Facebook or blogs) in accordance with FINRA rules governing interactive electronic forums (e.g., broker-dealers may adopt risk-based supervisory procedures utilizing post-use review, including sampling and lexicon-based search methodologies, of unscripted participation in an interactive electronic forum).

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ENDNOTES


2 Public disclosure must be made simultaneously with intentional selective disclosure, or promptly following unintentional selective disclosure.


4 See Current Report on Form 8-K of Netflix, Inc., filed on December 5, 2012.


6 Nasdaq IM-5250-1 provides that “[w]hen a Company chooses to utilize a Regulation FD compliant method for disclosure other than a press release or Form 8-K, the Company will be required to provide prior notice to the MarketWatch Department of: 1) the press release announcing the logistics of the future disclosure event; and 2) a descriptive summary of the material information to be announced during the disclosure event if the press release does not contain such a summary.” In addition, Section 202.06 of the NYSE Listed Company Manual provides that “[w]hile not requiring them to do so, the Exchange encourages listed companies to comply with the immediate release policy by issuing press releases.”


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