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“Follow Us on Twitter” - SEC Makes Clear that Companies may Utilize Social Media Channels for Corporate Communications Under Certain Circumstances

Before taking advantage of the ever-increasing options for corporate communications through social media channels, companies must conduct a careful Regulation FD [1] analysis to determine whether the chosen social media channel is a “recognized channel of distribution” for communications to the investing public, or else run the risk of a Regulation FD violation.

In a recent *Report of Investigation*, the SEC advised companies that the use of social media is a valid means of corporate communication, but that companies must first consider whether each such disclosure implicates Regulation FD and then rigorously examine whether the particular chosen channel is a “recognized channel of distribution” for communication to the investing public. If Regulation FD is implicated, but the company determines that the chosen channel of social media is not broad enough, it must also use a more traditional means of communication, such as filing a Current Report on Form 8-K, in order to comply with Regulation FD. The SEC emphasizes that it is critical to the fair and efficient disclosure of information for companies to take sufficient steps to alert the investing public as to (1) the types of social media channels it will use, and (2) the types of information that will be disclosed through those channels.

The report clarifies that Regulation FD applies to communications via social media (Facebook, Twitter, LinkedIn, etc.) in the same manner as it applies to communications made through a company’s website and that although its 2008 Guidance [2] is largely focused on the use of websites, such guidance is equally applicable to the distribution of important non-public information through social media. The guidance provides factors that companies can use to evaluate whether a particular type of social media is a “recognized channel of distribution.”

Such factors include:

- Disclosing its social media domain names and addresses in its periodic reports and alerting investors that it plans to routinely post important information at such locations;
- Establishing a pattern of posting information through social media;
- Presenting the information in a format that is readily accessible to the general public;
- Advising the media about such postings whereby the media can pick up the information and further distribute it; and
- Keeping its social media channels current and accurate.

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“Follow Us on Twitter” - SEC Makes Clear that Companies may Utilize Social Media Channels for Corporate Communications Under Certain Circumstances CONTINUED

This recent guidance on the use of social media follows an inquiry the SEC launched into a post that the CEO of Netflix, Inc. made on his personal Facebook page regarding the achievement of a certain milestone metric.^[3] Netflix did not file an 8-K, issue a press release or otherwise more broadly disclose the milestone metric to the investing public. Furthermore, the company did not alert investors that important information would be distributed through the CEO's Facebook page. Although the SEC announced that it would not be seeking an enforcement action against Netflix or its CEO, acknowledging that there was market uncertainty about the application of Regulation FD to social media, it used the Netflix inquiry as a means to resolve this uncertainty.

SUGGESTED PRACTICES FOR SOCIAL MEDIA DISCLOSURES

- Develop a written company policy on public disclosures that includes social media considerations and clearly identifies the company's approved social media channels.
- Clearly communicate to the investing public what channels of social media the company will use and what types of information it will be distributing through those channels.
- Company policies should ensure that only specified individuals are authorized to post or tweet on behalf of the company.
- Appoint an individual at the company or from an outside firm who understands the technology of social media and the limitations of federal securities laws to field questions from authorized individuals that communicate on behalf of the company.
- Social media posts regarding the financial condition or results of the company should include a link, if available, to a relevant public filing or release highlighting the same.
- Refrain from linking to analyst reports without appropriate disclaimers. It is better to link to a company webpage containing all such disclaimers in addition to the link to the report.
- Extend the company's quarter-end information blackout periods to include prohibitions on social media posts.
- Establish special rules for “fundamental” corporate events. For example, you might enforce a blanket prohibition on social media posts during a proxy contest, a material acquisition, a securities offering, or a tender offer.
- Although tweeting or posting live from annual shareholder meetings may help disseminate information to shareholders who are not present at the meetings, caution should be taken to ensure that such tweeting or posting only takes place subsequent to or simultaneously with the meeting being made available to the public (*e.g.*, through streaming via the company website).
- Although not strictly required, any post or tweet should be limited to subject matters that are already publicly disclosed, or the company should coordinate a concurrent disclosure through a conventional channel. When coordinating a concurrent disclosure, take into consideration the speed of the respective channels. For example, a social media post that loads instantly should not precede the quarterly earnings release even if the release is publicly available just moments later.
- Remember that posts, tweets, and other social media communications may be instant and permanent.

[1] Regulation FD seeks to prevent a company's selective disclosure of important non-public information to securities market professionals or shareholders where it is reasonably foreseeable that such persons would trade on the basis of the information. Thus, Regulation FD requires the distribution of important non-public information in a manner reasonably designed to achieve effective broad and non-exclusionary distribution to the public.

[2] Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (Aug. 7, 2008) can be found by visiting <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

[3] Our January 2013 Advisory regarding the Netflix, Inc. inquiry can be found on the Wiggin and Dana website by visiting <http://www.wiggin.com/netflix-encounters-sec-inquiry-for-social-media-communications>.