CLIENT ALERTS & INSIGHTS

New Guidance from SEC About the Use of Social Media by Public Companies

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The SEC is warming up to social media.

On Tuesday, April 2, 2013, the SEC issued a press release that clarifies its position that a company may use social media outlets to announce key information, and that such disclosure will comply with Regulation Fair Disclosure (Regulation FD), as long as the company has previously alerted the investing public regarding what social media outlets it will use.

The press release was accompanied by a report on the results of the Division of Enforcement's investigation into social media use by Netflix CEO Reed Hastings. In July 2012, Mr. Hastings posted on his personal Facebook page that Netflix users were enjoying "nearly a billion hours per month" of streaming video, and proceeded to congratulate Netflix's chief content officer for reaching that number. As a result, the SEC began an investigation (made public by Netflix on December 5, 2012) of the company and Mr. Hastings for violations of Regulation FD, Section 13(a) of the Securities Exchange Act and various other rules for selective disclosure of material non-public information (for more information on prior investigations into social media use and Regulation FD please click here).

In Tuesday's report, the SEC took the opportunity to provide some direction to companies in regard to their social media use. The SEC analogized its 2008 guidance on dissemination of information through company websites to the current issue of dissemination of information by means of social media. While the SEC emphasized that every case must be evaluated on its own facts, it reiterated that the main focus will be on whether all investors have the opportunity to gain access to material non-public information at the same time.

With that directive in mind, the SEC stated that a company should provide appropriate notice to the investing public of the specific channels that the company will use to disseminate material, nonpublic information. Referring to the 2008 guidance, the SEC stated that it encourages companies to include in their various publications, including press releases, disclosures, and other periodic reports, any means by which they will be publishing such material nonpublic information. Therefore, if a company wishes to use Twitter, Facebook or any other social media outlet to disseminate material nonpublic information, providing notice of the intended outlet to investors through already recognized channels before the fact would place all investors on equal footing to receive those important disclosures.

George Canellos, Acting Director of the SEC's Division of Enforcement, summed up the Commission's attitude toward social media by stating, "most social media are perfectly suitable methods for communicating with investors, but not if the access is restricted or if investors don't know that's where they need to turn to get the latest news." What is important is that investors and

the public are aware what social media outlet is being used as a method of publication, and that access to that outlet is available to all.

The same rules apply for the social media account of an executive or other representative of a company. Simply the fact that that individual has a large number of followers or subscribers is not enough to consider publications from that account "reasonably designed to provide broad, non-exclusionary distribution of information to the public." Again, what is important is that the company make the public aware that material information may be introduced by means of that executive's Twitter, Facebook or other outlet prior to any material dissemination and that that outlet is available to all.

While the SEC suggests that whenever possible, companies should still adhere to the practice of submitting material nonpublic information to the SEC prior to public disclosure though other medium, the SEC has provided its guidance regarding an approved method of using social media to get the company's information out to the investing public.

Additional Information

For assistance in developing or reviewing your policies, processes and procedures or if you have questions regarding this area of disclosure and enforcement, please contact any of our securities attorneys below:

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