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SECURITIES

The Securities and Exchange Commission is aware that companies have begun to make significant use of social media in part because it provides a casual and relatively inexpensive way for companies to advertise and quickly connect with the public, the authors write. In light of the SEC's growing interest, the authors offer suggested practices to help public companies reduce the securities regulatory risks associated with disseminating company information through social media.

Think Before You Tweet—Securities Law Considerations and Best Practices When Communicating to the Public Through Social Media

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In July 2012, Netflix Inc.'s chief executive officer posted on Facebook that "Netflix monthly viewing exceeded 1 billion hours for the first time ever in June." The post was accessible to the more than 200,000 followers of his Facebook page. "So what?" you may be asking.

In December 2012, Netflix reported in a Form 8-K filed with the Securities and Exchange Commission that Netflix and its chief executive officer each had received a Wells Notice from the staff of the SEC, indicating that the staff plans to recommend to the SEC that it bring a civil action against Netflix and its CEO for violations of the SEC's Regulation FD (Fair Disclosure) in connection with the Facebook post.

According to Netflix, the SEC staff thought that the CEO's Facebook post contained material nonpublic information about Netflix, which Netflix should instead have first disclosed in a Form 8-K or press release.

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Following an investigation by the SEC's Division of Enforcement, on April 2, 2013, the SEC issued a report noting, among other things, that it had determined not to pursue an enforcement action in this matter.

The SEC action with respect to Netflix evidences the SEC's view that disclosing material nonpublic information through social media (e.g., Facebook, Twitter, YouTube, LinkedIn, etc.) may violate federal securities laws. It also evidences heightened regulatory scrutiny of public blogs, tweets and other social media disseminations. Indeed, in January 2012, the SEC issued a social media alert, Investment Adviser Use of Social Media, noting, among other things, that the SEC staff has recently reviewed social media postings by various registered investment advisers to "evaluate whether their use complied with the federal securities laws," which suggests that the SEC may be conducting a similar review and evaluation of social media use by public companies.

This heightened scrutiny can be attributed at least in part to the SEC's awareness that companies have begun to make significant use of social media and other non-traditional channels such as blogs because, among other reasons, they provide a casual and relatively inexpensive way for companies to advertise and quickly connect with the public. In other words, it is cheap to tweet. Indeed, the SEC stated in its April 2, 2013, report that it "is aware that public companies are increasingly using social media to communicate with shareholders and the market generally."

Other Examples of Public Company Incidents with Social Media Use

Below are two other cases where social media use by public company officers got the attention of the SEC or resulted in the termination of the user.

- By letter dated Dec. 9, 2010, the SEC requested that the chief executive officer of WebMediaBrands Inc. explain whether updates on his blog regarding WebMediaBrands “conveyed information in compliance with Regulation FD” and other SEC rules and regulations. The company’s website provided a link to the officer’s blog, which included the following tweets of the officer: (1) “I bought 400,000 shares of WebMediaBrands today in the open market. Needless to say I am a believer in the future of the company”; and (2) “Good chance we will be making a few acquisitions by middle of March.” In response to the SEC’s request, WebMediaBrands’ counsel asserted that the officer’s posts comply with Regulation FD and other SEC rules and regulations primarily because the posts did not contain any material nonpublic information. As of the date of this article, the SEC has not taken any further action that has been publicly disclosed.
- On May 14, 2012, Francesca’s Holdings Corporation announced that it terminated for “cause” the employment of its chief financial officer because he “improperly communicated company information through social media.” For example, the officer tweeted March 2012 “Board meeting. Good numbers = Happy Board” six days prior to the company’s announcement of its quarterly financial results.

The following sets forth an overview of certain securities laws and other concerns in the context of social media use for corporate communications, along with an outline of best practices that companies should consider implementing to reduce associated risks.

Regulation FD

In 2000, the SEC adopted Regulation FD to address the practice by public companies and other issuers of selectively disclosing material nonpublic information before they released such information to the public generally. Regulation FD governs the process by which issuers release selective disclosure of material nonpublic information to certain individuals or entities—generally, analysts, institutional investors, shareholders, and others. The rule was designed to ensure that all investors have equal access to a company’s material disclosure at the same time.

Public disclosure of material nonpublic information can be made under Regulation FD by filing a Form 8-K with the SEC, by issuing a broadly disseminated press release, or by other means that are reasonably designed to result in broad and nonexclusionary distribution of the information to the public.

In light of the evolution of technology and the growing use of the internet, the SEC has determined that, for some companies in certain circumstances, posting of material nonpublic information on the company’s website in and of itself may be a sufficient means of public disclosure that satisfies the disclosure requirements of Regulation FD.

Prior to issuing its April 2013 report, the SEC had not provided any guidance on the use of social media as a means of disclosing information to the public under Regulation FD, except that companies should review the SEC’s 2008 website guidance in SEC Release No.

34-58288 (Aug. 1, 2008). The website guidance describes how companies can use their websites to provide information in a manner deemed to be public for purposes of Regulation FD.

In its April 2013 report, the SEC noted that, in light of the increasing use by public companies of social media to connect with the market, it deemed it in the public interest to issue its report “to provide guidance to issuers regarding how Regulation FD and the 2008 Guidance apply to disclosures made through social media channels.”

The SEC stated that the principles set forth in the 2008 website guidance apply to a public company’s disclosures via social media. Accordingly, the SEC’s April 2013 report makes clear that a company may use social media to announce material information in compliance with Regulation FD if the company provides appropriate notice to the investing public “about which forms of communication the company intends to use for the dissemination of material, non-public information, including the social media channels that may be used and the types of information that may be disclosed through these channels.”

The SEC provided in its report some suggested methods that a company could use to be in the position to utilize social media to disseminate information in compliance with Regulation FD and the 2008 website guidance, including providing in the company’s periodic reports and press releases the company’s website address and disclosures that the company routinely posts important information on that website, as well as disclosures on the company’s website identifying the actual social media channels the company intends to use to disclose material nonpublic information.

Importantly, the SEC indicated that disclosing material, nonpublic information on the personal social media page of officers or employees of a public company, without first notifying investors that the site may be used for such purpose, likely would not be considered an acceptable method of disclosure under Regulation FD. The SEC also reminded companies that the analysis of whether Regulation FD was violated is “a facts-and-circumstances analysis based on the specific context presented.”

Anti-Fraud and Insider Trading Regulations

Despite the informal nature of social media, public company representatives must be aware that the anti-fraud and insider trading provisions of the 1934 Securities Exchange Act, as amended, particularly those contained in Section 10(b), and in SEC Rule 10b-5 promulgated thereunder, fully apply to information disclosed through social media. Section 10(b) and Rule 10b-5 prohibit any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, based on the circumstances under which they were made, not misleading, in connection with the purchase or sale of securities.

In addition to avoiding the selective disclosure of material nonpublic information, public companies must be certain that their social media postings provide the context necessary in order to make such postings not misleading (including providing any cautionary statements). However, this often may be quite difficult to accomplish in view of the limited space available to provide information on certain social media platforms (e.g., tweets have a 140-character limit).

Regulation G

If a public company posts information concerning non-GAAP financial measures, the SEC requires under Regulation G that such a company include a comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the comparable GAAP financial measure. For purposes of Regulation G, a non-GAAP financial measure is a numerical measure of a public company's historical or future financial performance, financial position, or cash flows that excludes or includes amounts that are included in or excluded from, as the case may be, the most directly comparable financial measure calculated and presented in accordance with GAAP in the financial statements of the company.

Since Regulation G was adopted before social media became ubiquitous, Regulation G does not cover how such reconciliation should be shown in the context of the disclosure via social media of a non-GAAP financial measure.

Best Practices to Avoid Being 'Followed' by the SEC

In view of the recent crackdown by the SEC on certain social media use by companies and their officers and other representatives as part of the companies' marketing strategy, the following practices may help public companies reduce the securities regulatory risks associated with disseminating company information through social media:

- Adopt social media guidelines that clearly delineate how social media may (and may not) be used by their representatives from a securities law and corporate governance standpoint. These guidelines should

regulate disclosures on social media in the same way as companies regulate disclosures in other media (*i.e.*, companies should not disclose material information through social media before disclosing it through a Form 8-K or more customary news releases, unless they use an appropriate method to disclose such information in compliance with Regulation FD and the SEC's 2008 website guidance).

- Review and update these guidelines, as appropriate, to reflect changes in the use of social media.
- Review existing policies, such as Regulation FD and insider trading policies, to be certain that they cover the use of social media.
- Prohibit company representatives from tweeting if additional context or cautionary statements are needed to make the statement not misleading.
- Link a social media posting that uses a non-GAAP financial measure to the GAAP reconciliation.
- Consider stock exchange (e.g., NASDAQ, NYSE, etc.) rules that may apply to the disclosure of material information through social media. For example, NASDAQ Rule 5250 and IM-5250-1 require NASDAQ listed companies to notify NASDAQ at least 10 minutes prior to the release of material information that involves any of the events specified in IM-5250-1, such as financial-related disclosures. NYSE Listed Company Manual Section 202.06 provides that NYSE listed companies are expected to release quickly to the public through any Regulation FD compliant method any information that might be expected to materially affect the market for its securities.)



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