HINCKLEY ALLEN

ALERT

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SECURITIES

SEC ISSUES GUIDANCE ON SOCIAL MEDIA DISCLOSURE

In July 2012, Netflix's President, Reed Hastings, announced on his personal Facebook page that Netflix had streamed 1 billion hours of content in June. Netflix is a public company, and the Securities and Exchange Commission ("SEC") subsequently commenced an investigation of whether this announcement violated SEC Regulation FD, which adresses selective disclosure of material information by public companies.

In a Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 (Release No. 69279, April 2, 2013), the SEC announced its determination not to pursue an enforcement action against Hastings or Netflix. In its release, the SEC did not explain that decision, but it did provide guidance regarding the use by public companies of social media to communicate with shareholders and potential investors.

Regulation FD. This rule generally requires that public companies issue material information on a broad and non-exclusive basis. A Form 8-K announcement is clearly compliant with Regulation FD. Guidance issued by the SEC in 2008 regarding disclosure via a corporate website provides that such disclosure may be appropriate if the website is first established as a "recognized channel of distribution." The SEC believes that the 2008 guidance, supplemented by the 2013 guidance, should assist companies in complying with Regulation FD.

Recognized Channel of Distribution. A concept from the 2008 guidance, "recognized channel of distribution," remains the predicate for compliance under the new release as well. An outlet such as Facebook, Twitter, or other social media, in order to be used properly to communicate material information, needs first to be established for this purpose. This means that issuers:

1. Must alert the market (e.g., through press releases and periodic reports filed with the SEC) that they intend to use the specific channel to communicate material information;
2. Must use the channel for that purpose;
3. Should recognize that some disclosures do not fit well into social media formats, and use a Form 8-K for those situations;
4. Should separate communication channels for material investor information from those used for consumer/customer purposes; and
5. Should adopt and enforce a policy on the use of social media by management, employees, and even directors.

Of particular concern would be communications during proxy solicitations, pending announced acquisitions, or securities offerings. Also, a listed company must inform its exchange of the issuance of material information in advance.

Bottom Line. The use of social media by public companies as a communications channel to the investing public is becoming more common. The SEC recognizes that reality, and its guidance attempts to provide a roadmap for compliance. However, every public company should first consider whether social media communications are necessary or desirable to their investor relations goals. If the conclusion is that social media should be used, a well-considered policy tailored to the needs and habits of the individual company is recommended before social media is used for investor purposes.

The Hastings experience serves as a reminder to all public company insiders that any communication regarding their company, in whatever form or venue, can be viewed as a Regulation FD event.

For additional information, please feel free to contact the author, William Bouton, any of the following securities lawyers at Hinckley Allen — James Burke, Margaret Farrell, Adam Gwaltney, David Hirsch, Sarah Lombard , Ashley Taylor — or visit hinckleyallen.com.

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