

SEC Says Social Media Releases Can Satisfy Regulation FD

Legal Update

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On April 2, 2013, the SEC confirmed that public companies may use social media, such as Facebook and Twitter, and other emerging means of communication in much the same way that they use their own websites to announce key information in compliance with Regulation FD. The key is whether investors have been notified about the social media accounts ahead of time.

According to the SEC, "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." Read the SEC's press release.

This release followed an investigation of Netflix and its CEO Reed Hastings for his Facebook post stating that Netflix streamed more than 1 billion hours in a single month. Read the full Report of Investigation.

Regulation FD

Regulation FD requires U.S. public companies to distribute material nonpublic information in a manner reasonably designed to disseminate that information to the general public broadly and non-exclusively. It is intended to ensure that all investors have the ability to gain access to material information at the same time.

What Constitutes Public Disclosure

Public disclosure under Regulation FD requires either including the information in a Form 8-K filing or disseminating the information by press release or other broad, non-exclusionary means to the public.

Website Disclosure. The SEC issued guidance in 2008 clarifying that websites also can serve as an effective means for disseminating information to investors if they've been made aware that is where to look for it. According to the SEC, determining if website posting is "public" turns on "whether and when:

1. a company website is a recognized channel of distribution,
2. posting of information on a company website disseminates the information in a manner making it available to the securities marketplace in general, and
3. there has been a reasonable waiting period for investors and the market to react to the posted information."

This website guidance, together with the SEC's Q&A on Regulation FD, continues to provide valuable insight into how to satisfy Regulation FD's public disclosure requirements. According to the SEC, "Companies should review the Commission's existing guidance - it is flexible enough to address questions that arise for companies that choose to communicate through social media, and the guidance does so in a straightforward manner."

Conclusion

Public companies that wish to use Facebook or Twitter for public disclosures satisfying Regulation FD should inform investors of their intent to do so on their website and in a press release. These companies should also monitor whether their "followers" or "likes" suggest that this medium is sufficiently broad and non-exclusive. Companies should have clear disclosure policies in place for company personnel providing company information through social media outlets. Companies also should continue to issue press releases and file or furnish Forms 8-K with the SEC consistent with current practice for disclosures made on social media outlets until their use of social media is sufficiently established.