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DISCLOSURE

Company Disclosure in the Age of Social Media: The Old Rules Still Apply

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With the breathtakingly rapid global penetration of digital communications, the ripple effects of this fundamentally new way to convey information continue to widen. Perhaps the most disruptive change has come with the explosive growth of social media, such as Facebook, Google+, Twitter and LinkedIn. The industry behemoth Facebook alone, for example, has over one billion registered users, and according to a recent Nielsen report, accounts for roughly 17 percent of the total time spent online by PC users in the U.S. Businesses, as well, have quickly discovered the opportunities presented by the ubiquity of social media.

Coupled with a decline in the number and reach of traditional print forms of communication, social media has the capacity to become the principal means by which businesses communicate with each other, their markets, and with the investing community. These developments have not escaped the notice of the Securities and Exchange Commission, which in early April released guidance to public companies to enable their use of social media in compliance with their responsibilities under federal securities laws.

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In acknowledging the broad adoption of social media by business interests, the SEC nonetheless confirmed that communications made through social media are no less subject to Regulation Fair Disclosure, commonly referred to as Reg FD, than traditional communications channels. Additionally, the SEC reiterated that its existing guidance concerning online communications, which it issued in 2008 with a focus on the use by public companies of websites for disclosure purposes can be extended also to apply to disclosures made through social media.

Prior to its release in early April, the SEC had not directly addressed the question of whether and to what extent Reg FD applies to social media disclosures. News accounts published in December 2012, however, that the SEC intended to recommend enforcement action against Netflix for violations of Reg FD, seemed to forecast the Commission's incipient focus on the new communications channel. Netflix's alleged violations purportedly stemmed from a public Facebook post made by its CEO, Reed Hastings on his personal account on July 3, 2012, praising his content licensing team for achieving a customer content viewing milestone. Unfortunately for Netflix, however, according to the SEC staff, Mr. Hastings' post violated Reg FD because: (i) the post contained nonpublic material information about Netflix in the customer usage data; and (ii) the means by which such information was disclosed did not constitute sufficient, wide-spread public dissemination in accordance with the rule. In its new release, however, the SEC also indicated that it will not pursue any action against Netflix for the Facebook post, offering no explanation other than a reference to the existence of market uncertainty on the topic prior to the new guidance.

The implication of the new release, however, is unmistakable: the SEC does not view social media as redefining public disclosure; and therefore, corporate disclosures made via social media are not exempt from the established regulatory structure governing issuers' corporate communications, including Reg FD. Therefore, it

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is now advisable that companies take immediate action to update their Reg FD policies to incorporate a carefully constructed and comprehensive social media protocol, designed to ensure that their use of social media complies with Reg FD, including, most importantly, by key company employees as well as by the company itself. To achieve this objective, the protocol should be based on both the requirements of Reg FD, in general, and available SEC guidance indicating its view of the specific circumstances that must exist for a company's use of social media to be determined to be Reg FD compliant. To that end, a general overview of the requirements of Reg FD and a summary of applicable SEC releases is helpful.

OVERVIEW OF REG FD

Reg FD, which became effective on October 23, 2000, was enacted in order to combat the practice of selective disclosure, wherein an issuer discloses material nonpublic information to only a subset of the market. Reg FD's central requirement, set forth in the regulation's opening provision, Rule 100(a), provides that: subject to certain exceptions, whenever an issuer, or any person acting on an issuer's behalf, discloses any material nonpublic information regarding that issuer or its securities to certain persons (including, e.g., securities market professionals or certain holders of the issuer's securities), the issuer shall make public disclosure of that information: (a) simultaneously, in the event of an intentional disclosure; or (b) promptly, in the event of a nonintentional disclosure. Reg FD's remaining provisions further delineate the scope of the rule and the steps required to comply with it. Some of its key provisions are the following:

Scope

The restrictions set forth in Reg FD apply to disclosures of ''material nonpublic information.'' Reg FD, however, does not itself define either the term ''material'' or ''nonpublic,'' relying instead, in the case of materiality, on long-developed case law and SEC interpretations that look at whether ''there's a substantial likelihood that a fact would be viewed by the reasonable investor as having significantly altered the total mix of information available.'' As to whether information is ''nonpublic,'' the SEC, in its Reg FD adopting release, advised that ''information is nonpublic if it has not been disseminated in a manner making it available to investors generally.''

Reg FD applies to disclosures made by: (i) companies that have a class of securities registered with the SEC, or that are required to file periodic reports with the SEC, under the Securities Exchange Act; or (ii) any person acting on the company's behalf, particularly its senior officials (i.e., a director, executive officer, investor relations or public relations officer, etc.) or any other company official who regularly communicates with securities market professionals or with security holders.

The regulation, however, applies only to disclosures made to a person outside the issuer itself who is a: (i) securities market professional (e.g., broker-dealers and their associated persons, investment advisers, certain institutional investment managers and their associated persons, and investment companies, hedge funds, and affiliated persons); or (ii) a person who is a holder of the issuer's securities, under circumstances in which it is reasonably foreseeable that such person would trade on the basis of the disclosure.

An exemption provided by Rule 100(b)(2) excludes from Reg FD's requirements disclosures made: (i) to a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant); (ii) to a person who expressly agrees to maintain the disclosed information in confidence; or (iii) in connection with a securities offering registered under the Securities Act.

Compliance

Rule 101(e) of Reg FD provides that an issuer can make a disclosure ''public'' by: (i) filing or furnishing a Form 8-K, or (ii) disseminating information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, nonexclusionary distribution of the information to the public. A newswire press release is a classically accepted means to make public disclosure. So while an issuer has significant leeway to choose how it wants to disclose information so as to be ''reasonably designed to provide broad dissemination'' an incorrect analysis might risk violating Reg FD. It is this aspect which is most affected by the SEC's new guidance.

Under Rule 100(a)(1) of Reg FD, whenever an issuer *intentionally* makes selective disclosures covered by the regulation, it must, subject to certain exceptions, simultaneously disclose that information publicly. Rule 101(a) provides that ''a selective disclosure of material nonpublic information is 'intentional' when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.'' In the case of a *non-intentional* selective disclosure, however, an issuer is obligated, under Rule 100(a)(2) of Reg FD, to publicly disclose such information ''promptly.'' Rule 101(d) defines ''promptly'' to mean as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) after a senior official of the issuer learns that there has been an unintentional disclosure by the issuer or person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic.

GUIDANCE

In its new guidance, the SEC has confirmed that Reg FD's application to issuer disclosures through social media platforms will not differ from distributions made through other channels. The new guidance also reaffirmed the applicability of the Commission's 2008 guidance, which at the time focused principally on disclosures made through company websites. In its 2008 release, the SEC identified two factors, each relevant in a Reg FD compliance evaluation: (i) whether the company's website is a ''recognized channel of distribution;'' and (ii) whether posting on the company's website achieves ''broad dissemination of the information'' to the securities marketplace. While not definitive, an issuer that can answer both of these questions in the affirmative is well-positioned to use its social media accounts, as well as its website, for disclosure purposes without violating Reg FD.

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The 2008 release provides that whether a company's website is a recognized channel of distribution depends on the steps that a company has taken to alert the market to its website, such as by noting in its periodic SEC filings and press releases that it uses a specific website address to post important information. Under the new guidance, similarly, the SEC focuses on the steps that an issuer has taken to notify the market effectively to its use of social media for the dissemination of material nonpublic information.

The SEC does not, however, view an issuer's having alerted the market to its use of its website for disclosures as sufficient. Rather, the Commission additionally requires that the market must actually use the issuer's website as a source for information; otherwise it would not qualify as a ''recognized channel of distribution'' for the issuer. Therefore, by extension, an issuer choosing to make disclosure through social media must also take affirmative steps to bring the audience to the media.

The 2008 release does not provide a bright-line rule to determine whether a company's website is capable of achieving broad dissemination of information. Instead it indicates that the focus should be on: ''(A) the manner in which information is posted on a company's web site; and (B) the timely and ready accessibility of such information to investors and the markets.'' Additionally that earlier guidance outlines several factors that the SEC indicates it would consider, including whether the information on an issuer's website is: (i) routinely updated; (ii) posted in a location known and routinely used; (iii) accessible using ''push'' technology such as e-mail alerts and RSS Feeds (i.e., where the information is sent by the company to the market automatically, without the market having to pull such information in order to receive it); and (iv) regularly picked-up by the market, or if not, then an issuer advises the media of the information. It is reasonable to assume that similar considerations apply to the use of social media.

Although it ultimately decided not to pursue any enforcement action against Netflix, the SEC's treatment of the Netflix Facebook posting is also instructive. The Commission, in the new guidance, identified the following as examples of things not to do when using social media for disclosure purposes, noting that: (i) neither Mr. Hastings nor Netflix had previously used Mr. Hastings' personal Facebook page to announce company metrics; (ii) Netflix had not previously informed shareholders that Mr. Hastings' Facebook page would be used to disclose information about Netflix, and in fact, Netflix had consistently directed the public to its own Facebook page, Twitter Feed, blog and website for corporate information; (iii) Mr. Hastings' post was not accompanied by a Netflix press release, a post on Netflix's own website or Facebook page, or the filing of a Form 8-K; (iv) prior to his post, Mr. Hastings did not receive input from Netflix's CFO, legal department, or investor relations department; and (v) while Netflix did send the post to several reporters, it did not disseminate the information to the broader mailing list that it normally uses for its corporate press releases.

SUGGESTIONS FOR REG FD SOCIAL MEDIA PROTOCOL

Based on the regulatory environment indicated by the SEC's new guidance, issuers should quickly develop and incorporate a comprehensive social media protocol into their Reg FD policies, and should consider including the following affirmative and negative steps in such a protocol, some of which will undoubtedly be viewed as intrusive:

- Specifically identify the group of individuals tasked with maintenance of the company's own social media accounts, limiting the access to make posts on such accounts to only those persons. Such persons should be well-versed in Reg FD's requirements, both in general and regarding social media, and should work with legal counsel to get formal sign-off prior to any posting on the company's accounts.

- Upload a memorandum on the company's website, describing the company's disclosure practices (including, e.g., the fact that it uses social media to disclose corporate and investor information), and thereby alerting the market of its use of social media.

- Clearly display links to each of the company's social media accounts on the company's website in a routine location, allowing the accounts to be easily accessed by the public.

- Include disclosure in all of the company's SEC filings and press releases of the fact that the company uses social media to disseminate corporate and investor information, and further provide the information required to access such accounts.

- Institute and follow a routine pattern for using social media to disseminate company information along with other channels of distribution.

- Consider supplementing disclosures of material nonpublic information made via social media with simultaneous disclosures through other distribution channels (including e.g., a Form 8-K filing, or a press release, etc.)

- Executives should be advised not to post any information about the issuer or its securities on personal social media accounts. Companies should strongly consider requiring those executives to enable their personal social media accounts to be monitored by the company's legal department to prevent posts that might violate Reg FD.

CONCLUSION

The SEC's latest guidance makes it clear that the relaxed and casual environment that is so characteristic of social media platforms, and certainly one of the reasons for its astonishing growth, does not translate well to the strict disclosure obligations imposed on public companies. Nonetheless, the SEC has made clear that social media can be a valuable and useful tool for disseminating company information, if properly managed. On the other hand, careless and non-reviewed corporate disclosure by an issuer through social media outlets may lead to a serious enforcement action by the SEC.

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