

A horizontal banner image divided into several vertical panels. From left to right, the panels show: a pair of scales of justice, a gavel, a stack of books, a computer keyboard, and a close-up of a gavel. Overlaid on this image is the text "JONES DAY" in a smaller font and "COMMENTARY" in a large, bold, white font.

JONES DAY
COMMENTARY

SEC ENDORSES USE OF SOCIAL MEDIA UNDER REGULATION FD

On April 2, 2013, the Securities and Exchange Commission issued a Report of Investigation¹ making it clear that public companies can now use social media channels such as Facebook and Twitter without running afoul of Regulation FD.

This development is not a “blank check” for public companies to use social media in a haphazard fashion. Rather, it requires companies to develop a thoughtful, consistent approach to use of social media as a means of disclosing material nonpublic information and to clearly communicate that approach to shareholders and the marketplace. At the same time, it provides important reassurance that companies can use social media and other emerging forms of communication.

The SEC report arose from an investigation into a posting by the CEO of Netflix on his personal Facebook page. Although the SEC clearly did not

approve of this posting, it recognized that enough uncertainty exists regarding public company use of social media that the public interest would be better served by the issuance of clarifying guidance.

BACKGROUND

Adopted by the SEC in 2000, Regulation Fair Disclosure (“Reg FD”) was designed to address the concern that companies were selectively disclosing information to favored individuals or institutions before issuing public announcements, thereby enabling those persons to gain an unfair trading advantage over the rest of the investing public.² While Reg FD does not require use of a particular method of communication, it requires that a company disclosing material information do so in a manner that is reasonably designed to enable all investors to gain access to the information at the same time.

In 2000, of course, the communication landscape was far different than it is today. The use of the internet as a tool for public communication was comparatively new, and the concept of “social media” was as yet unknown. The subsequent proliferation of new technologies raised many questions about what is, and is not, permissible under Reg FD. In 2008, the SEC issued “Commission Guidance on the Use of Company Web Sites,”³ which addressed many questions concerning the use of web sites as communications tools and contemplated other “push technologies” such as email alerts, RSS feeds, and corporate blogs. At the time, the SEC observed that it expected continued advances in communications technology, and thus its guidance was designed to provide a factor-based framework for analysis rather than a set of static rules. The newly released SEC report emphasizes that these same factors apply to the use of social media.

THE NETFLIX MATTER

Netflix is an online entertainment service that provides movies and television programming to subscribers by streaming content through the internet and distributing DVDs through the mail. Recently, it has focused increasingly on its streaming business. In January 2012, it announced in a press release that it had streamed two billion hours of content in the fourth quarter of 2011. During year-end and fourth quarter earnings calls, Reed Hastings, the CEO of Netflix, commented that this was important as a “measure of engagement and scale in terms of the adoption of our service....” Mr. Hastings also stated that he did not anticipate that Netflix would regularly report the number of hours streamed, but that the company would update that metric “on a milestone basis.” Shortly thereafter, in a July 3, 2012 post on Mr. Hastings’ personal Facebook page, he disclosed the news that for the first time ever, Netflix monthly viewing had exceeded one billion hours during the month of June, which was roughly a 50 percent increase over the streaming hours reported the previous January.

Netflix had not previously used Mr. Hastings’ personal Facebook account to announce company information or milestones in the past, and in fact Mr. Hastings had previously stated that the company did not use social media to

announce material nonpublic information, preferring instead to use investor letters, press releases, and SEC filings.

The news contained in Mr. Hastings’ personal post reached the market only gradually, as various individuals and news services became aware of it, and Netflix’s stock price, which had been trading at \$70.45 at the time of the posting, increased to \$81.72 at the close of the following day. The SEC’s Division of Enforcement opened an investigation.

THE SEC REPORT OF INVESTIGATION

In its report, the SEC recognized the emerging importance of social media as a tool for companies to communicate with the public. It stressed that it has no interest in inhibiting companies from responsibly using new media or in placing unnecessary compliance burdens on issuers. At the same time, the SEC made it clear that it expects companies to be thoughtful and systematic if they intend to announce material nonpublic information through social media. The SEC stressed two fundamental points:

- Company communications through social media require careful analysis under Reg FD, similar to the analysis applicable to the use of more traditional channels.
- It is critically important that a company alert the public in advance regarding the social media channels of distribution it intends to use to disseminate material nonpublic information.

The report thus confirms that Reg FD’s goal of ensuring broad, nonexclusionary distribution of material nonpublic information may be accomplished by the use of social media, as long as certain steps are followed.

DISCLOSURE OF COMPANY INFORMATION THROUGH SOCIAL MEDIA

A company using social media as a means of disclosure should periodically review and update its communications policy. A company should consider taking steps such as the following:

- Use social media outlets that are explicitly identified with the company. While the SEC stated that personal social media sites of company officers might be acceptable if the company has explicitly alerted investors in advance, personal sites should not be viewed as a preferred vehicle for company communications.
- Determine which forms of social media are readily accessible by current or potential investors.
- Confirm that any social media channels that are selected are up to date and that members of the public can easily navigate them to find posted company information.
- Inform the marketplace that the company intends to use the selected media channel or channels, and do so via traditional disclosure channels, such as press releases, SEC reports, and the company's web site.
- If, prior to alerting the public that a particular social media channel will be used, an unintentional disclosure of material nonpublic information has been made on a social media site, promptly file a Form 8-K or distribute a press release disclosing the information.
- Educate executives and employees on the company's social media policy.

CONCLUSION

The new SEC report makes clear that companies can use social media channels to disseminate material nonpublic information to investors. A company choosing to do so must undertake a careful Reg FD analysis and inform the investing public in advance of the channels it intends to use. The guidance contained in the SEC report will assist in designing communication programs using social media or other emerging communication technologies that will not run afoul of Reg FD.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Thomas C. Daniels
Cleveland
+1.216.586.7017
tcDaniels@jonesday.com

Joan E. McKown
Washington
+1.202.879.3647
jemckown@jonesday.com

Roman E. Darmer
Irvine
+1.949.553.7581
rdarmer@jonesday.com

Robert A. Profusek
New York
+1.212.326.3800
raprofusek@jonesday.com

William S. Freeman
Silicon Valley
+1.650.687.4164
San Francisco
+1.415.626.3939
wfreeman@jonesday.com

Peter J. Romatowski
Washington
+1.202.879.7625
pjromatowski@jonesday.com

Robert W. Gaffey
Chicago
+1.312.326.7838
rwgaffey@jonesday.com

John C. Tang
San Francisco
+1.415.875.5892
Silicon Valley
+1.650.687.4129
jctang@jonesday.com

Alexander A. Gendzier
New York
+1.212.326.7821
agendzier@jonesday.com

Lizanne Thomas
Atlanta
+1.404.581.8411
lthomas@jonesday.com

Harold K. Gordon
New York
+1.212.326.3740
hkgordon@jonesday.com

Patricia J. Villareal
Dallas
+1.214.969.2973
pjvillareal@jonesday.com

Henry Klehm III
New York
+1.212.326.3706
hklehm@jonesday.com

ENDNOTES

- 1 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: *Netflix, Inc., and Reed Hastings*, Exchange Act Release No. 69279 (Apr. 2, 2013).
- 2 “Selective Disclosure and Insider Trading,” Securities Act Release No. 7881, Exchange Act Release No. 43154, Investment Company Act Release No. 24599, 65 Fed. Reg. 51716 (Aug. 21, 2000).
- 3 “Commission Guidance on the Use of Company Web Sites,” Exchange Act Release No. 58288, Investment Company Act Release No. 28351, 73 Fed. Reg. 45862 (Aug. 7, 2008).