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How to Confidently Use Your Website and Social Media to Comply With Regulation FD

Last month, the SEC issued new guidance clarifying how companies can use social media channels, such as Twitter and Facebook, in compliance with Regulation FD. The guidance came in the form of an “investigation report” which grew out of the highly publicized use by Netflix’s CEO of his personal Facebook account to announce important information regarding Netflix. While the April report does not solve all the mysteries surrounding use of electronic media under Regulation FD, it does go a long way toward helping companies chart a path to using these technologies without worrying about violating Regulation FD. Based on this new guidance, we have developed a blueprint that companies can use to comfortably use websites and electronic media without worrying about FD issues. This is not the only way to comply with FD, but we think it is a good – and more importantly, easy- way.

A Little Background

We hope most of our readers already know the basic requirements of Regulation FD: An issuer that discloses material nonpublic information to certain individuals (generally holders of the issuer’s securities that might reasonably be expected to trade based on the information and securities market professionals) must also make the information concurrently publicly available using an FD-approved method of dissemination. The law makes filing an 8-K the preferred method. Issuing a press release is also always acceptable, so long as you use an appropriate wire service. Using other methods, however, may be less certain.

Nothing has been less certain for quite some time than when and how a website and other electronic media can be used to satisfy Regulation RD. The SEC issued guidance in 2008, and last month’s report emphasized that companies should continue to apply the 2008 guidance. Unfortunately, the 2008 Interpretive Release was not a model of clarity. As a result, the move toward the use of the company website as the primary channel of distribution for material information has been a trickle rather than a stampede.

A second but related issue is the question of when announcing information on a website or using social media actually violates Regulation FD. Recall that Regulation FD only applies to communications that are directed to certain covered persons. Last months’ report makes it clear that using social media

to announce material information certainly may violate Regulation FD, unless the social media constitutes a “recognized channel of distribution.” The report did not change the SEC position, however, that disclosure of information on an issuer’s website in a location and format readily accessible to the general public does not, in and of itself, violate Regulation FD, although if the website is not a “recognized channel of distribution,” the issuer will not be free to selectively communicate the information to analysts and others covered by Regulation FD until the information has been publicly disseminated.

So what is a “recognized channel of distribution”? The 2008 guidance provided many non-exclusive factors. Last month’s report confirmed that they are still – at least to some extent – relevant, and that they apply to social media as well. Thus, here are the non-exclusive factors that a company has to weigh (the factors below have been modified in order to accommodate the concept of social media as well as website disclosure):

- Whether and how companies let investors and the markets know that the company has a website or uses a particular social medium and that they should look at the website or the social medium for information.
- Whether the company has made investors and the markets aware that it will post important information on its website or disclose it through the use of social media and whether it has a pattern or practice of actually disclosing information in such a fashion.
- Whether the company’s website or social media usage is designed to lead investors and the market efficiently to information about the company, and whether the information is prominently disclosed in a location known and routinely used for such disclosures, and is presented in a format readily accessible to the general public.
- The extent to which information posted on a website or disclosed through social media is regularly picked up by the market and readily available media, and reported in such media, or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved. (The SEC noted that companies with less of a market following, which may include many companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company’s website or disclosed through social media and that they should look in those places for current information about the company).
- The steps the company has taken to make its website and any information disclosed through social media accessible, including the use of push technology, such as RSS feeds, or releases through other distribution channels either to widely distribute such information or advise the market of its availability. (The SEC noted that it did not believe, however, that push technology was necessary, although it may be one factor to consider in evaluating the accessibility of the information).
- Whether the company keeps its website and/or social media posts current and accurate.
- Whether the company uses other methods in addition to website posting or social media disclosure to disseminate the information and whether and to what extent those other methods are the pre-dominant methods the company uses to disseminate information.
- Finally, the nature of the information being disclosed.

The factors are so complex and there are so many of them, it is unsurprising that after the 2008 guidance not many issuers rushed to use their websites (or social media) to release material information. One of the most difficult parts of the inquiry was trying to figure out how to weight the various factors, as well as how to determine when a website or other medium was adequately followed.

Last month's report did seem to simplify the analysis by stressing that the "central focus" is on whether the company first provided adequate notice to the market and others. That is, the company must take affirmative steps to make investors, the markets, and the media aware of the channels of distribution it expects to use, so that these parties know where to look for disclosures of material information about the company or what they need to do to be in a position to receive this information. Throughout the report, the SEC repeatedly stresses this point and dramatically downplays the other facts. In fact, the press release announcing the report provided a one sentence interpretation of the 2008 release that completely ignored the other factors, merely stating: "The SEC issued guidance in 2008 clarifying that websites can serve as an effective means for disseminating information to investors if they have been made aware that is where to look for it." Similarly, George Canellos, then Acting Director of the SEC's Division of Enforcement, said: "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."

As a result, while the report does not resolve every technical question that can arise under Regulation FD, we can now recommend a number of "best practices," which, if followed, should provide issuers with greater confidence in utilizing their websites or social media disclosure in order to comply with Regulation FD.

Here's What You Should Do

- **Issue a press release or file a Form 8-K announcing your chosen channels of distribution.**
This part is key. Last month's report stresses that in virtually every case, you probably cannot legally use social media unless you notify the market of your intent.
- **Don't have more than 5 channels of distribution.**
A company can have multiple channels of distribution, such as its website, its Facebook page and its Twitter feed, in addition to Forms 8-K and press releases. However, more than a handful is taking you into dangerous territory. Although many issuers have announced numerous channels of distribution, the Staff has informally expressed unhappiness with this "shotgun" method. Investors are complaining also, since this places an enormous burden on them to monitor multiple sources of information. Our opinion is that if you use too many channels, it is more likely that the Staff will look harder at the other factors, such as whether or not there was an adequate number of followers. Using more than five doesn't mean you've necessarily violated Regulation FD, it just means that you have stepped out of what we consider to be the comfort zone, and now you have to more closely analyze every single channel looking at all of the numerous and vague factors outline above.

- **Consider a phase-in period of up to one year.**

If you are announcing a new medium that does not already have a high number of followers, it may help you to use a phase-in period before using that medium as the sole outlet for material information. The length of period that is appropriate may vary, but a year would certainly be safe. Throughout the period, you may wish to issue multiple advisory press releases or make advisory Form 8-K filings, continuously alerting investors to the timing of upcoming website postings or social media disclosures. In addition, consider providing investors with the specific date after which no advisory press release or Form 8 K will be issued and after which important information will be posted only on the website or issued via social media or other specified channels of distribution.

- **Update your disclosure policy.**

Many issuers' current disclosure policies were drafted at a time when press releases and SEC filings were the only reliable methods of complying with Regulation FD. As a result, issuers wishing to avail themselves of the possibility of utilizing website disclosure or social media should review their disclosure policies in order to ensure that they encompass these alternative channels of distribution. In addition, issuers must ensure that they have proper controls and procedures in place to ensure proper review and vetting of all such channels of distribution. If, like Netflix, the company chooses to use an individual officer's Facebook or Twitter account as a recognized channel of distribution of the company, proper controls must be in place to ensure that the officer provides the appropriate disclosure committee personnel with advanced copies of all company-related Facebook posts, tweets, et cetera for proper vetting.

- **Disclosure should be consistent, predictable and transparent.**

The most important factor in utilizing a website or social media as a recognized channel of distribution for purposes of satisfying Regulation FD is to ensure that investors know exactly what the issuer's methods of disclosing important information will be and where it can be found. The issuer should develop a pattern of regularly and consistently using the specified website location and other channels of communication, such as social media, for all important disclosures.

- **Monitor actual usage.**

Although last month's report downplayed the significance of actual traffic, we still recommend that issuers track the number of hits that their website receives, as well as the number of users that access or subscribe to social media disclosure. This should be reviewed occasionally to make sure that there is no reason to think that investors and analysts are failing to receive the information. If for example, a particular channel seems to be disfavored and has only extremely sporadic traffic, we would recommend abandoning it or doing something further to alert the investment community to its use. This practice will help to support the issuer's position that the chosen distribution channel is in fact a recognized channel.

- **Website disclosure tips.**

If using a website as a recognized channel of distribution, issuers should provide investors with the exact web address of the portion of the website where disclosures will be placed. This should ideally be an investor's webpage, which is ordered in such a fashion that important information is easily ac-

cessed and read. The investor's webpage should be directly and freely accessible to all. If utilizing a website as a sole disclosure method, issuers must ensure that they can produce a record of what was disclosed on the website at any given time. Issuers should also consider allowing investors to sign up for push notification of website postings.

- **Do not confuse compliance with Regulation FD with clearance for insiders to trade.**

Although the concept of material inside information utilized in Regulation FD is by design the same concept of material inside information utilized in connection with Rule 10b 5 and insider trading prohibitions, Regulation FD, by its terms, allows communication of such material inside information to analysts and other covered persons concurrently with disseminating the information in a Regulation FD compliant method; however, judicial interpretations of Rule 10b 5 and insider trading prohibitions require that information have been publicly disseminated and absorbed by the market before insiders can trade. As a result, the standard one to two full trading day period imposed by most issuers' insider trading policies should continue to apply to all material inside information, regardless of whether or not it has been disclosed pursuant to a recognized channel of distribution and in full compliance with Regulation FD.

A Final Note

After many years of reluctance to use electronic media to release material information, increasing numbers of issuers are now moving more confidently to using the internet and other electronic media to communicate with the investment community. We think this is a positive development, and issuers should not let fear of violating Regulation FD hold them back from joining this new age of corporate communications.

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