

In Order to Tweet Information, Companies Must Alert Investors

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On April 2, 2013, the Securities and Exchange Commission (SEC) clarified that companies may use social media outlets (i.e., Facebook or Twitter) to announce material information without violating Regulation FD so long as investors are alerted in advance about which designated social media channels the company will use and access to those channels is not restricted. In reaching this conclusion, the SEC referenced its 2008 guidance in which it confirmed that websites could be used to disseminate information if the company had notified investors that key information would be posted there.

The SEC announcement arose from an enforcement inquiry into a Facebook post by the Netflix CEO announcing that monthly online viewings exceeded 1 billion hours. The information was not included in a subsequent press release later the same day or otherwise communicated to investors in a regulatory filing. Netflix had not previously used Facebook or other social media to make announcements or indicated that it would communicate important information via Facebook.

After the Facebook post, the stock price rose, raising the issue of selective disclosure. Although the SEC did not initiate an enforcement action, the agency commented that disclosure of material nonpublic information on the personal social media site of an officer without advanced notice to investors that the site may be used for this purpose was unlikely to satisfy Regulation FD. Issuers should use this opportunity to remind their officers and employees that they should follow company policies regarding the disclosure of information at all times, including when posting on social media outlets.

What This Means to You

The Netflix story serves as a further reminder that regardless of how it is shared, material nonpublic information must be fully and fairly disclosed. Although the SEC report permits companies to use social media to disseminate important corporate information, companies should carefully review the SEC's 2008 guidance regarding disclosure of information on company websites before doing so. Our view is that such methods of communication will inevitably increase, and relevant corporate training, policies and procedures should contemplate the use of social media. Until these pieces are in place, companies should use social media sparingly and with caution.

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