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SEC Releases Guidance On Application Of Regulation FD To Social Media Channels

**Garrett A. DeVries,
Alice Hsu,
Christine B. LaFollette and
Bruce S. Mendelsohn**

**AKIN GUMP STRAUSS HAUER &
FELD LLP**

On April 2, 2013, the Securities and Exchange Commission (SEC) issued a Report of Investigation (the "Report")¹ in connection with its investigation of whether a post by the chief executive officer of Netflix, Inc. on his personal Facebook page violated Regulation FD. The SEC declined to pursue an enforce-

Garrett A. DeVries, a Partner in Akin Gump's Dallas office, represents clients in capital markets, securities, mergers and acquisitions and equity derivatives transactions. Alice Hsu, a Partner in Akin Gump's New York City office, focuses her practice on corporate and securities matters. Christine B. LaFollette is Akin Gump's Partner-in-Charge of the Houston office and a Member of the firm's management committee and the Houston office's diversity committee. She has over 30 years experience representing issuers and underwriters in public offerings and private placements of equity and debt securities, restructurings and financings. Bruce S. Mendelsohn, Partner in the New York office, focuses on securities matters, corporate governance, mergers and acquisitions, and counseling boards of directors and board committees.



**Garrett A.
DeVries**



**Alice
Hsu**



**Christine B.
LaFollette**



**Bruce S.
Mendelsohn**

ment action against Netflix and its CEO, but issued the Report to provide guidance on the application of Regulation FD to the use of social media. The SEC's guidance concluded that social media channels may be used by companies to communicate material nonpublic information in satisfaction of Regulation FD requirements as long as companies have previously taken appropriate steps to alert investors and the market to the social media channels they will use to distribute such information.

This article summarizes the facts surrounding the Netflix investigation, Regulation FD and related guidance and considerations for companies when using social media.

Background

The Report stems from an SEC investigation concerning a post in July 2012 made by Netflix's CEO on his personal Facebook page, which stated that Netflix monthly viewing exceeded one billion hours for the first time ever. The Report states the following facts. After the information in the Facebook post was disclosed, the price of Netflix's stock increased from \$70.45 at the time of the post to \$81.72 at the close of business on

the following trading day. Netflix did not file with or furnish to the SEC a Form 8-K, issue a press release or otherwise announce this milestone. Neither Netflix nor its CEO had previously used the CEO's personal Facebook page to announce company metrics and neither of them had taken any steps to alert investors that this page might be used to announce company metrics. Based on these factors, the SEC investigated whether the Facebook post by the CEO violated Regulation FD.

Regulation FD And Related Guidance

Under Regulation FD and Section 13(a) of the Securities Exchange Act of 1934, as amended, public companies, or persons acting on their behalf, generally may not selectively disclose material nonpublic information to certain specified parties, including securities professionals or company stockholders where it is reasonably foreseeable that they will trade on the basis of the information before it is made available to the general public. An intentional disclosure of material nonpublic information requires simultaneous distribution of the same information to the public, while an inadvertent disclosure requires prompt distri-

Akin Gump
Strauss Hauer & Feld LLP

*Please email the authors at gdevries@akingump.com,
ahsu@akingump.com, clafollette@akingump.com or
bmendelsohn@akingump.com with questions about this article.*

bution of the information to the public upon the discovery of such inadvertent disclosure. For Regulation FD purposes, information is considered public if it has been disseminated through a recognized channel of distribution that is reasonably designed to achieve broad and non-exclusionary disclosure to the public, such as a Form 8-K or a press release.

In 2008, in response to the widespread use of websites to disseminate information electronically, the SEC provided guidance that included factors a company should consider when evaluating whether a company's website constitutes a recognized channel of distribution for purposes of Regulation FD. These factors include:

- whether and how a company makes investors and the markets aware that they should look at the company's website for important information
- whether the company has a pattern or practice of posting important information on its website
- whether the website leads investors and the markets efficiently to information about the company and whether the information is prominently disclosed and presented in a format readily accessible to the general public
- the extent to which information posted on the website is regularly picked up by the market and media
- steps the company has taken to make its website and the information accessible or to advise the market of its availability
- whether the company keeps its website current and accurate
- whether the company uses other methods to disseminate important information and whether and to what extent those other methods are the predominant method used by the company to disseminate information
- the nature of the information.²

In the Report, the SEC emphasized that its 2008 guidance applies equally to company disclosures made through current and evolving social media channels of corporate communication and, as such, this guidance should be the framework for determining whether a particular social media channel is a recognized channel of distribution for Regulation

FD purposes. Specifically, the SEC made clear that companies must take sufficient steps to alert investors and the market to the channels of distribution that they will use to disseminate material information, as well as the type of information that companies intend to disclose through these channels. Further, the SEC reminded companies that disclosures to any group that includes any of the enumerated persons set forth in Regulation FD should be carefully analyzed for compliance with Regulation FD.

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Considerations For Companies Regarding Social Media

Company websites, RSS feeds, blogs and social media sites, including Facebook, Twitter, YouTube, LinkedIn and Instagram, are increasingly being used by companies to connect with customers, media and investors. While these emerging technologies facilitate widespread access to information and give companies the ability to immediately connect with audiences, they also increase the burden on investors to decipher where the most relevant material information is located. In light of the Report, here are a few considerations for companies regarding the use of social media:

- If companies intend to notify investors of material information through social media channels, they should clearly alert investors to the specific channels of communication that they intend to use and the types of information that may be disclosed. Companies' SEC filings, press releases and websites

should disclose this information and explain to investors and the market how to access the applicable channels and give them the opportunity to subscribe, join, register or otherwise become familiar with the particular channel prior to using it to disclose material information.

- Companies should clearly identify company personnel authorized to speak or post or tweet on behalf of the company. Companies should review, update or revise as necessary any internal policies, procedures or guidelines to ensure the company has a defined process for dealing with social media.

- Companies should carefully vet corporate communications to be made through social media channels for Regulation FD compliance. First, companies should assess whether the information is material and nonpublic. If so, Regulation FD requires that the disclosure be made through a recognized channel of distribution. To ensure broad dissemination through a recognized channel of distribution, companies should consider making such disclosure in a contemporaneous press release or Form 8-K, in addition to any social media channels. Communications should also be reviewed for compliance with restrictions under the Securities Act of 1933, as amended, when there is a pending or proposed securities offering.

- Once companies begin using a social media channel, they should be consistent and establish a regular pattern of disclosing information through that channel so it is more likely to become a recognized channel of distribution.

- For companies not currently using social media, they should evaluate whether their current methods of disclosure are sufficient and effective, and consider whether social media can supplement or enhance their current business strategy or investor relations program.

¹ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc. and Reed Hastings, Release No. 69279 (April 2, 2013). <http://www.sec.gov/litigation/investreport/34-69279.pdf>.

² Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (August 7, 2008). <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.