

Client Alert

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SEC Clarifies Use of Social Media Under Regulation FD

Adopted in 2000, Regulation FD generally prohibits public companies and personnel acting on their behalf from selectively disclosing material, nonpublic information to certain groups, such as brokers, investment advisers, analysts and shareholders who are likely to trade on information, without concurrently making widespread public disclosure. Regulation FD has been in place for many years and public companies are generally familiar with its requirements to avoid selective disclosure by either obtaining assurances of confidentiality or publicizing material, nonpublic information in a manner reasonably designed to achieve effective broad and non-exclusionary distribution to the public. With the advent of social media and the proliferation of the Internet since 2000, a number of public companies have been using channels other than the traditional press release or Form 8-K filing to distribute important information. Companies have also widely embraced social media for the purpose of marketing their products and services.

These developments raise the question of how best to structure disclosures made via social media to comply with Regulation FD. Amid this uncertainty, at least one prominent public company has recently been scrutinized by the Securities and Exchange Commission on the allegation that the company's CEO violated Regulation FD by posting certain information about the company on the CEO's personal social media page, without contemporaneous public disclosure by the company.

Like many areas concerning emerging technologies, developments in disclosure technologies have outpaced the state of the law. The SEC originally took a limited view under Regulation FD in 2000, for example, of disclosures made on a company's website. In 2008, the Commission issued an interpretive release (2008 Guidance) addressing the circumstances under which information posted on a website would be considered public for purposes of Regulation FD.¹

Though the 2008 Guidance did not directly address social media, it is still instructive. In evaluating a website, the SEC indicated that companies should consider whether:

1. the website is a recognized channel of distribution;
2. the posting of information on the website disseminates the information in a manner that makes it generally available to the securities marketplace; and
3. there has been a reasonable waiting period for investors and the market to react to the posted information.

The 2008 Guidance lays out a number of guidelines for assessing whether these criteria have been satisfied, which turn largely on the steps a company takes to publicize its use of a website, as well as whether the press, investors and the market actually take notice of the site. Applying these criteria by analogy to social media, it is theoretically possible to structure social media feeds to satisfy Regulation FD as well.

¹ Release No. 34-58288, Commission Guidance on the Use of Company Websites (August 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

Turning back to the recent investigation of a prominent public company and its CEO over disclosures made on the CEO's personal social media page, on April 2, 2013, the SEC issued a report of investigation of the subject events under Section 21(a) of the Exchange Act (Section 21(a) Report).² The Commission usually avails itself of this provision of the Exchange Act when it seeks to make a policy announcement about an uncertain compliance matter in lieu of commencing an enforcement action. Here, the Commission did not bring any enforcement charges against the public company or its CEO.

For the first time, the Section 21(a) Report provides the Commission's view that, under the right circumstances, issuer-sponsored social media can be a permissible channel of dissemination of information under Regulation FD. The Commission emphasized that the principles outlined in the 2008 Guidance — and specifically the concept that the investing public should be alerted to the channels of distribution a company will use to disseminate material information — apply with equal force to corporate disclosures made through social media channels.

The Commission noted that the 2008 Guidance for websites encourages issuers to consider including in periodic reports and press releases the corporate website address and notice that the company routinely posts important information on that website. Likewise, in the Section 21(a) Report the Commission also encouraged public companies to disclose on their corporate websites the specific social media channels the company intends to use for the dissemination of material, nonpublic information, so that investors and the markets have the opportunity to take the steps necessary to be in a position to receive disclosures, such as subscribing, joining, registering or reviewing that particular channel. The Commission also indicated that other techniques for making social media outlets recognized channels of distribution under Regulation FD may be possible as well.

The Section 21(a) Report also makes clear that an individual corporate officer's personal social media page will generally NOT be a permissible channel under Regulation FD. The Commission noted this to be true even if the corporate officer has a large number of subscribers, friends or other social media contacts, such that the information is likely to reach a broader audience over time. The Commission cautioned that personal social media sites of individuals employed by a public company would not ordinarily be assumed to be channels through which the company would disclose material corporate information. Without adequate notice that such a site may be used for this purpose, the Commission feared, investors would not have an opportunity to access this information or, in some cases, would not know of that opportunity at the same time as other investors.

With a clearer path forward, we expect that more public companies will now make greater use of social media channels to disseminate material, nonpublic information without the risk of SEC enforcement action. As with other emerging areas of the law, companies should monitor how their peers and other prominent public companies begin to make extended use of social media so that their own practices remain state-of-the-art. Companies should review their disclosure policies to ensure that individual executives are not using personal social media pages to disclose material, nonpublic information about their companies. And companies should be vigilant in publicizing which social media channels they will be adopting, as well as monitoring use of these channels to ensure that investors, news media and other interested parties are indeed following the company's social media feeds.

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