

Lessons from Netflix on the Use of Social Media for Informal Disclosure

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On April 2, 2013 the Securities and Exchange Commission (SEC) issued a report (the Netflix Report) announcing that it would not pursue enforcement action against Netflix, Inc. and its Chief Executive Officer, Reed Hastings, for violating rules against selective disclosure by posting otherwise nonpublic company information on Mr. Hastings' personal Facebook page. The post in question touted the achievement by Netflix of the arguably material milestone of one billion monthly viewing hours of streaming content in June 2012.

The Facebook posting by Mr. Hastings broke all of the traditional rules concerning informal corporate communications. Prior to his post, Mr. Hastings did not receive input from the Netflix chief financial officer, legal department or investor relations department. Netflix did not file or furnish to the SEC a Current Report on Form 8-K or issue a press release concerning the milestone either before or after the post. Netflix had not identified Mr. Hastings' Facebook page as a source of information concerning the company. Nonetheless, the market reacted swiftly to the Facebook post. A technology blog picked up the post within an hour after its release, and the story also appeared in the mainstream financial press by the end of the day. The fact that Mr. Hastings' personal Facebook page had over 200,000 subscribers at the time of the post, including equity research analysts, shareholders, reporters and bloggers, probably speeded this dissemination, and perhaps also contributed to the significant rise in the Netflix stock price over the following trading day.

The Netflix Report indicates that the SEC decided not to pursue an enforcement action under its rules against selective disclosure because of market uncertainty about the application of its existing guidance to social media. The actual wide dissemination of the information in the Facebook post probably also influenced the SEC's decision not to pursue an enforcement action.

The SEC used the Netflix Report as an opportunity to clarify that its existing guidance on website disclosure also applies to social media outlets. Here are some of the lessons to be drawn from the Netflix Report.

1. *Consider the factors applicable to your company's social media usage under the existing SEC guidance.*

Regulation FD generally prohibits public companies or persons acting on their behalf from selectively disclosing to securities professionals or shareholders, material, nonpublic information before it is made available to the general public. In its 2008 release, "*Commission Guidance on the Use of Company Web*

Sites” (Release No. 34-58288), the SEC addressed whether information on a company’s website can be considered public for purposes of Regulation FD in the absence of other disclosures, such as a press release or an SEC filing. The SEC concluded that this would depend on a number of factors, which would vary from issuer to issuer and could evolve over time. The Netflix Report reaffirmed this analysis and explicitly extended it to social media.

Under the 2008 release, as so interpreted, the test of whether information posted only on a social media outlet is public will depend on whether:

- The outlet is a recognized channel for the distribution of information concerning the particular company;
- Posting information on the outlet makes it available to the securities marketplace in a broad and non-exclusionary manner; and
- There has been sufficient time for the market to absorb the information.

Whether an outlet has become a recognized channel for information concerning the company will depend on, among other things:

- Steps taken by the company to identify the outlet as a source for information concerning the company;
- The use of the outlet by investors and others in the market; and
- Whether other methods of disclosure by the company are predominant.

Of principal concern in the Netflix case was that the company had not identified the CEO’s Facebook page as a source of corporate information. The more typical concern is whether the company’s message will be broadly disseminated. As a result of this concern, most companies do not actually use their websites for disclosing new or significant information, although information that appears only on the website may supplement other disclosures and be referred to in SEC filings and press releases.

In using social media, companies should be mindful of the type of information being disclosed, the audience for that particular form of social media and the constraints of the form itself. Twitter, for example, might become a recognized channel of information for a particular company, but by itself would not be appropriate for most disclosures.

2. *Develop and regularly update policies for the use of social media tailored for the company's particular situation, and make sure those policies are understood by company personnel.*

The challenge for corporate social media use is to coordinate disclosures by various departments within the company and to make sure that personal posts by individual officers, directors and employees do not take on the attributes of corporate disclosures or inadvertently leak otherwise undisclosed material information. Although companies differ significantly in their usage of social media, all companies need to develop clear policies and procedures for its use and to make clear the legal implications if these policies and procedures are not followed.

3. *Make sure that significant disclosures are reviewed by the company and made through recognized channels of communication.*

No matter what form of media is used, the company should still control the process. If accidental disclosures that would not comply with Regulation FD take place, companies should react quickly by making disclosure through a press release or Form 8-K. Companies can also ensure that they are delivering a consistent message by reviewing disclosures across all media.

4. *Monitor the use of the company's social media outlets by investors and others in the market.*

Understanding its investors' use of social media can be helpful to a company from a number of standpoints. Monitoring the use of the company's website, Facebook page and other social media outlets can help the company determine how and whether they can be used as channels for communicating information to investors and the press.

About the Author

Bonnie J Roe is a partner in the Corporate Group of Cohen & Gresser LLP, where she represents publicly and privately held companies and investment funds. Ms. Roe has thirty years of experience advising public companies on disclosure, securities law compliance and corporate governance. She has served as counsel for issuers, underwriters and placement agents in connection with public and private offerings, including PIPE transactions and cross-border offerings. Ms. Roe was named as one of New York's *Super Lawyers* for Securities & Corporate Finance in 2011 and 2012 and is mentioned in *Who's Who in America* and *Who's Who in American Law*.

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