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Posted By: Mark F. Foley

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The U.S. Securities Exchange Commission (SEC) Enforcement Division altered the jet stream of blogosphere commentary last December by, for the first time, recommending legal action against a CEO on account of a Facebook post. Immediately after the announcement, a blizzard of articles, tweets, and blogs buried the mediascape with opinions about the critical role of CEO social media use in the new economy, the wisdom or foolishness of allowing CEO's to Tweet or post, and whether the SEC should be time warped back to the Stone Age it seems to prefer.

Sweeping away the accumulated hyperbole reveals two important takeaways from the SEC's announcement, applicable to both public and private companies: i) the more things change, the more they remain the same, and ii) this latest "grave threat" to the modern world is not a crisis, but an opportunity. Social media can be a valid, legal, and effective way to communicate with investors, if it's done right.

About Regulation FD
The SEC's action responded to a July 2012 Facebook post by CEO Reed Hastings stating that members watched over 1 billion hours on Netflix in June. Netflix estimated that Hastings had reached 200,000 people through his Facebook, Twitter, and LinkedIn accounts. The SEC felt this was material information for investors and that by announcing it through social media, rather than more traditional outlets, Netflix had violated Regulation Fair Disclosure (Reg. FD).

The SEC adopted Reg. FD in 2000 to fix a perceived lack of fairness in the public securities markets. Before Reg. FD, public companies could share material information with analysts who participated in conference calls or meetings not open to smaller investors. Well-connected investors got trading advantages over the general public. Reg. FD prohibits public companies from providing material information to limited groups of investors without simultaneously making the information available to the entire marketplace.

Under Reg. FD, public disclosures must be made by "filing or furnishing a Form 8-K, or by another method or combination of methods that is reasonably designed to effect broad, non-exclusionary distribution of the information to the public." The "other method" most often employed is a press release to an array of media outlets likely to disseminate the information broadly and quickly. Individuals and companies violating Reg. FD risk injunctions and monetary penalties.

Use of Social Media Growing, Creating Risks
Social media channels first became critical communication tools for companies after adoption of Reg. FD. A 2010 study of the 100 largest companies in the Fortune 500 found that 79% were using at least one of the four most popular social media platforms. See Burson-Marsteller Fortune Global 100 Social Media Study, Feb. 23, 2010.

A 2012 Forbes article cited an IBM study saying 57% of surveyed CEO's likely would be using social media by 2017. Mark Fidelman, FORBES, May 22, 2012.

The SEC itself uses social media to disclose important information such as speeches, trading suspensions, litigation releases, and administrative proceedings.

While some CEOs see social media as "part of their job description," others try to minimize risk by having employees write or review tweets before posting, and some CEOs have already tried social media and moved on. See Leslie Kwoh and Melissa Korn, 140 Characters of Risk: Some CEO's Fear Twitter, WALL STREET JOURNAL, September 26, 2012.

Not everyone does, or should, use all forms of social media. The point of Twitter, for example, is to provide information contemporaneously with the occurrence of a thought or an event. This promptness is both the differentiating touchstone of the medium and its source of danger. Quick, unconsidered, unscripted communications by senior executives of public companies pose risks in the form of leaked intellectual property, disclosed business plans, angered customers, litigious investors, and frothy regulators. The SEC Netflix announcement demonstrates the potential for liability arising from disclosures of information requiring consideration through social media focused solely on promptness. A Facebook post subjected to prior review might have been a better choice.

Even where the SEC does not act, executives may be at risk. In May 2012, retailer Francesca's Holdings Corporation fired its CFO, Gene Morphis after he tweeted: "Board meeting. Good numbers = Happy Board." Mr. Morphis, who was also active on other social media outlets, had a history of postings about earnings calls, road shows, and other work related matters. Morphis lost his job even though the SEC took no action. Rachel Emma Silverman, Facebook and Twitter Postings Cost CFO His Job, WALL STREET JOURNAL, May 14, 2012.

Social Media Without Big Risk

The SEC has never issued guidance about the use of social media, but it has issued guidance that websites could be deemed sufficiently "public" to satisfy Reg. FD when: (1) it is a recognized channel of distribution, (2) posting on the web site disseminates the information in a manner making it available to the securities marketplace in general, and (3) there has been a reasonable waiting period for investors and the market to react to the posted information. Indeed, "for some companies in certain circumstances, posting ... information on the company's web site, in and of itself, may be a sufficient method of public disclosure," SEC Release No. 34-58288 (Aug. 7, 2008) at 18, 25.

This is an example of how "the more things change, the more they stay the same" when it comes to the intersection of law and technology. The purpose of Reg. FD is to make sure that all investors have access to the same information roughly simultaneously. The specific communications method is not important so long as the principle of public disclosure to the general market, not subsets of investors, is served. Because 8-K filings and press releases were the most common ways to quickly and broadly disseminate information in the past, investors knew where to look for them and could monitor those information outlets. Now, when companies establish their websites as well-known places to find press releases, SEC filings, and supplemental information, they, too, have become acceptable means for Reg. FD disclosures.

The same analysis applies to social media, as well as any new communications technology that may exist in the future. The critical question is: has the company sufficiently alerted the market to its disclosure practices based on the regularity, prominence, accuracy, accessibility, and media coverage of its disclosure methods? If so, social media should be just as acceptable as any other communication tool.

One company seems to have found the right balance. Alan Meckler, CEO of WebMediaBrands Inc. drew the SEC's attention after a pattern of regularly disclosing company information through social media back in December 2010. The SEC's Division of Corporation Finance questioned whether Mr. Meckler's Tweets "conveyed information in compliance with Regulation FD."SEC letter dated December 9, 2010. Despite, the investigation, the SEC brought no enforcement action.

To use social media with minimum SEC risk, the company must educate investors so that they know such communications will always occur at a particular place and at least simultaneously with other outlets. This is done by a regular pattern of social media disclosure and links to other sources, such as SEC filings, showing the way. A company should not force investors to win a shell game, finding the nut of important information in Twitter this time, on Facebook the next time, and Instagram after that. Consistency, predictability, and transparency are key. Used this way, social media present an opportunity to communicate with investors in new ways, not a source of legal problems.

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