

April 2, 2013

Companies May Now Use Social Media for Announcements if Investors are Alerted

by Jerry J. Burgdoerfer, William L. Tolbert, Jr. and Elaine Wolff

Companies may now use social media outlets like Facebook and Twitter to announce key information in compliance with Regulation Fair Disclosure (Regulation FD) so long as investors have been alerted about which social media will be used to disseminate the information. The SEC today released a report of investigation that clarifies that social media can serve as an effective means for disseminating information to investors if investors have been made aware that's where to look for it.

The SEC cautioned however that personal social media sites of individuals employed by a company would not ordinarily be assumed to be channels through which the company would disclose material information. As a result, disclosure of material, non-public information on a personal social media site of an individual corporate officer, without advance notice to investors that the site may be used for this purpose is unlikely to qualify as an acceptable method of disclosure under Regulation FD. Regulation FD requires companies to distribute material information in a manner reasonably designed to get that information out to the general public broadly and non-exclusively.

The SEC's report of investigation stems from an inquiry the Division of Enforcement launched into a post by Netflix CEO Reed Hastings on his personal Facebook page stating that Netflix's monthly online viewing had exceeded one billion hours for the first time. Netflix did not report this

through a press release or a Form 8-K and the post was not placed on Netflix's own web site or Facebook page. In addition, neither Netflix nor the CEO had previously used Facebook to announce company metrics or to alert investors that the CEO's personal Facebook page might be used to communicate information about Netflix. Netflix's stock price had begun rising before the posting and increased from \$70.45 at the time of the Facebook post to \$81.72 at the close of the following trading day.

The SEC did not initiate an enforcement action or allege wrongdoing by the CEO or Netflix. It issued the investigation report in recognition that there has been market uncertainty about the application of Regulation FD to social media as set forth in the Commission's August 2008 Guidance on the Use of Company Web Sites¹ ("2008 Guidance"). The 2008 Guidance was primarily directed at the use of issuer web sites as a method for disseminating information in compliance with Regulation FD. Before today, the SEC had not addressed the application of Regulation FD to disclosures through social media channels.

¹ Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (August 7, 2008)

For further information, please contact:

Jerry J. Burgdoerfer

Partner

Tel: 312 923-2820

Email: jburgdoerfer@jenner.com

William L. Tolbert, Jr.

Partner

Tel: 202 639-6038

Email: wtolbert@jenner.com

Elaine Wolff

Partner

Tel: 202 637-6389

Email: ewolff@jenner.com