

April 12, 2013

## **WARSHAW BURSTEIN CLIENT ALERT**

### *“Using Social Media to Disclose Information”*

The Securities and Exchange Commission (“SEC”) issued a Report<sup>1</sup> earlier this month clarifying that companies can use social media like Facebook and Twitter to release material information to the public in compliance with Regulation Fair Disclosure (“Regulation FD”), so long as investors are alerted to which social media the company will use to release such information.

Regulation FD requires disclosure that is “reasonably designed to provide broad, non-exclusionary distribution of [the] information to the public.” Regulation FD prohibits public companies, or persons acting on their behalf, from selectively disclosing material, nonpublic information to certain securities professionals or shareholders where it is reasonably foreseeable that they will trade on that information before it is publicly available. In 2008, the SEC issued guidance (the “2008 Guidance”)<sup>2</sup> that explained that for purposes of complying with Regulation FD, a company makes public disclosure when it distributes information “through a recognized channel of distribution.” While the 2008 Guidance addressed websites and contemplated various “push” technology forms of communication such as email alerts and RSS feeds, and interactive communications such as blogs, it did not explicitly address disclosures made through social media like Facebook and Twitter. The Report updates the 2008 Guidance and confirms that Regulation FD applies to social media and that disclosures through social media are capable of complying with Regulation FD.

### **Background**

The Report stems from an SEC inquiry into a post made by Reed Hastings, the Chief Executive Officer of Netflix, on his personal Facebook page announcing a milestone in the company’s monthly viewing (“streaming”) numbers. That information was not disclosed previously in a press release or in a Form 8-K filing. Moreover, neither Hastings nor Netflix had previously used Hastings’ Facebook page to announce company metrics, nor had they taken any steps to make the investing public aware that Hastings’ personal Facebook page might be used to communicate information about Netflix.

---

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

<sup>2</sup>Commission Guidance on the Use of Company Websites, Exchange Act Rel. No. 34-58288 (Aug. 7, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf> (the “2008 Guidance”).

The SEC did not initiate an enforcement action or allege wrongdoing by Hastings or Netflix. Rather, recognizing the market uncertainty about the application of Regulation FD to disclosure using social media, the SEC issued the Report.

### **Using Social Media Going Forward**

In its Report, the SEC reiterated that Regulation FD requires a “facts and circumstances” analysis and amplified two points: first, communication through social media requires the same careful Regulation FD analysis as communication through more traditional channels of communication, such as a press release or a Form 8-K filing; and second, the principle that the public must be alerted to the channels of communication a company will use to disseminate material information applies to disclosure through social media.

Companies must examine vigorously the factors necessary to determine if their communication channels - including social media channels - are “recognized channels of distribution.” Companies must make certain they have provided adequate notice, including notice on their websites and in public filings as to which social media they will be using to disseminate information. The steps taken to alert the market about which forms of communication a company intends to use and the types of information that may be disclosed through these channels are “critical to the fair and efficient disclosure of information.” The Report also noted that while every case must be evaluated on its own facts, disclosure of material, nonpublic information on the personal social media sites--like Facebook or Twitter--of a corporate officer, without advance notice to investors is “unlikely” to comply with the disclosure requirements of Regulation FD.

Companies considering making disclosures through use of social media should review their existing social media policies.

*By:* Meryl E. Wiener, a Warsaw Burstein partner who practices in the areas of Corporate, Private Investments Funds, Securities and Litigation. Ms. Wiener can be reached at (212) 984-7731, or by e-mail at [mwiener@wbcsk.com](mailto:mwiener@wbcsk.com) for more information about the Report or for assistance in reviewing your social media policy to insure its usefulness and compliance with Regulation FD.

© Warsaw Burstein, LLP, 2013. All rights reserved.

*This memorandum was prepared as a service to clients and other friends of Warsaw Burstein to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Warsaw Burstein" and the "firm" refer to Warsaw Burstein, LLP*