

## Keeping Tabs On Employee Social Media Discourse

Law360, New York (May 02, 2013, 12:24 PM ET) -- Public companies that choose not to review their social media policies may do so at their peril.

Recently, the U.S. [Securities and Exchange Commission](#) concluded an investigation of [Netflix](#) and its CEO, Reed Hastings. The SEC's investigation concerned Hastings' use of his personal [Facebook](#) page to announce that Netflix had streamed 1 billion hours of content in June 2012.

Central to the SEC's investigation was the following issue: whether Hastings' post ran afoul of the SEC's "full disclosure" requirement applicable to material, nonpublic information disseminated by a public company. Although the SEC elected not to pursue an enforcement action against Netflix, it issued guidance concerning a company's public disclosures through social media.

The SEC guidance and report arising from the Netflix investigation is required reading for corporate counsel and human resources personnel charged with developing social media policies and monitoring compliance in this area.

In the past two years, Netflix has focused on expanding its Internet streaming business. On Jan. 4, 2012, Netflix issued a press release announcing that it had streamed two billion hours of content in the last quarter of 2011; it posted the same metric on its website as well as in a letter issued to shareholders that accompanied a quarterly financial report. Hastings represented to shareholders that the streaming metric represented "widespread adoption and usage of the service."

Netflix next reported on the streaming metric on the company's official blog. It briefly referenced the fact that people were "enjoying nearly a billion hours per month of movies and TV shows from Netflix." It made no further official reports regarding the metric.

On July 3, 2012, Hastings posted a message on his personal Facebook that stated, in part, "Netflix monthly viewing exceeded 1 billion hours for the first time in June." The announcement represented a nearly 50-percent increase in streaming hours from Netflix's January announcement that it streamed 2 billion hours in the previous three-month quarter. The post was on Hastings' personal Facebook account.

According to counsel for Netflix and Hastings, he designated the post as "public" using Facebook's subscription service. Therefore, the post was "available to anyone on the Internet, including Facebook's more than one billion users as well as Hastings' 200,000-plus Facebook 'friends' and subscribers."

In December 2012, Hastings had said, "we [Netflix] don't currently use Facebook and other social media to get material information to investors, we usually get that information out in our extensive investor letter[s], press releases and SEC filings." Following Hastings' post, Netflix issued a press release on July 3, 2012, regarding the release date for its second quarter earnings; the press release did not mention the streaming metric referenced in Hastings' Facebook post.

Similarly, Netflix's June streaming metric was reported to the market in phases — by approximately noon on July 3, it was reported by a few news outlets; the same day, Netflix circulated the post to a few reporters but did not issue a press release; by the time the markets closed, the news was picked up by the mainstream financial press.

Netflix's stock price began to rise on July 3 and July 4 following Hastings' Facebook post.

### **SEC Regulation of Disclosures of Material, Nonpublic Information**

Regulation Fair Disclosure (Regulation FD) requires that an issuer disclose material, nonpublic information to the securities market and its shareholders in a manner reasonably designed to achieve effective broad and nonexclusionary distribution to the public. Regulation FD was adopted out of the SEC's concern that issuers were selectively disclosing important nonpublic information to select investors rather than making a full disclosure to the general public.

In 2008, the SEC issued guidance confirming that Regulation FD applied to disclosures made on a company's website. The SEC reasoned that websites could serve as an effective means for sharing information if investors have advance notice that the website is a potential means where they can find important company information.

The SEC's April 2, 2013 Netflix report (called a "Rule 21(a) Report of Investigation") extended the same advance notice logic to corporate disclosures made using social media.

### **Netflix Dodges SEC Enforcement Action**

Ultimately, the SEC decided not to pursue an enforcement action, and it did not allege wrongful conduct against Netflix or Hastings. According to the SEC, the primary reason for leniency was because it learned during its investigation and through related public commentary that there was "uncertainty concerning how Regulation FD and the Commission's 2008 Guidance apply to disclosures made through social media."

Instead, the SEC issued a Section 21(a) Report of Investigation clarifying its view on the use of social media in the context of corporate disclosures and compliance with Regulation FD. The report addresses two critical issues: Public companies communicating to investors through social media channels must carefully analyze whether Regulation FD applies to those communications, and the SEC's 2008 guidance applies with equal force to corporate disclosures made through social media channels.

Specifically, public companies must provide advance notice to the public of the specific channels the company will use to disseminate material information.

As the acting director of the SEC's Division of Enforcement, George Canellos explained: "[m]ost social media are perfectly suitable methods for communicating with investors, but not if the access is restricted or if investors don't know that's where they need to turn to get the latest news."

### **Employers Beware**

The SEC's Rule 21(a) Report of Investigation assumed that an employee's social media activity regarding his employer on the employee's personal social media account (rather than through a corporate "page" or business account) may qualify as a corporate disclosure subject to fair

disclosure regulations. Thus, employers may unwittingly violate the SEC's full-disclosure requirements unless they take steps to guard against employees' impulsive and inadvertent disclosures of material, nonpublic information through social media channels.

The SEC's current position on social media as a conduit for corporate disclosures places employers in a precarious position. The SEC assumed without much elaboration that a post relating to a business and financial metric on the personal Facebook page of Netflix's CEO constituted a corporate disclosure. This is despite the SEC's general agreement that "[p]ersonal 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."

In Netflix's case, the SEC noted, "[n]either Hastings nor Netflix had previously used Hastings' Facebook page to announce company metrics ... Instead, Netflix has consistently directed the public to its own Facebook page, [Twitter](#) feed, and blog and to its own web site for information about Netflix."

It seems that Netflix's attempts to carve out social media as a means for making corporate disclosures did not help but hurt its case. Because the general investing public would not expect that Netflix would distribute important information through Hastings' Facebook account, his personal post constituted a problematic "selective" corporate disclosure of "material" information to his 200,000-plus Facebook friends absent a corresponding press release or other communication to the general public specifically referencing the June streaming metric.

In the SEC's view, a company can be liable if certain employees post important company information on their personal social media accounts particularly where the company has not designated social media as a "recognized channel of distribution" for communicating with its investors and where an employer may not monitor or track its employees' social media activity.

In light of the Rule 21(a) Report of Investigation, employers need to examine their social media policies. Employers are especially at risk in connection with the private social media activity of top management especially their officers, directors or any individual who can be deemed to be the company's mouthpiece.

To avoid becoming the SEC's next target in connection with fair disclosures, employers subject to SEC regulations should consider the following practical steps:

### ***Known Corporate Disclosures***

Companies who have formally adopted social media channels as a means to communicate with investors and shareholders should keep in mind:

#### *1. Evaluate Social Media Content*

Companies must evaluate any statements made through their social media channels in the context of Regulation FD. Specifically, companies must examine whether the disclosure concerns "material, nonpublic information." If the answer is yes, then companies must determine whether the social media disclosure is "reasonably designed to provide broad, non-exclusionary distribution" to investors.

#### *2. Provide Advance Notice*

Companies using official social media accounts should define ways to alert the public of their use. For example, they can provide advance notice that social media is a “recognized channel of distribution” through press releases, SEC filings or investor websites. These communications should identify the social media channels that the company will use to disclose important, nonpublic information and the types of information that may be disclosed through these channels.

### ***“Inadvertent” Corporate Disclosures by Employees***

Companies should take steps to control potential risk of liability arising from the private social media activity of key officials and top management:

#### *1. Train Company’s Top Management and Spokespersons*

Companies should counsel officers, directors or other individuals who have access to the company’s business and financial metrics that posting information about the company on social media channels could implicate Regulation FD.

#### *2. Evaluate Social Media Policies*

Companies should consider oversight over social media used by those authorized to speak for the company (even if the individual is not a designated company spokesperson but may be deemed to speak for the company). However, such oversight can implicate the employees’ privacy, First Amendment and potentially, their Section 7 rights pursuant to the National Labor Relations Act, among other rights, so companies need to tread with caution in this area.

#### *3. Consult the Experts*

A misstep can cost a company shareholder good will, diminish its market value and generate negative publicity if the company is subjected to costly enforcement actions. Given the rapidly changing and complex regulatory framework concerning social media, employers should consult counsel when developing, modifying or implementing their social media policies.

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