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Corporate Governance Group Client Alert: The SEC Finally Embraces Social Media as an Acceptable Channel of Communication for Regulation FD Purposes

Seeking to encourage issuers to use new forms of communication that enhance the flow of information to the investing public, the Securities and Exchange Commission (the "SEC") issued a press release and related report¹ to clarify that social media, such as Facebook and Twitter, can be considered acceptable channels of communication for purposes of complying with Regulation Fair Disclosure ("Regulation FD").

Regulation FD prohibits public companies from selectively disclosing material, non-public information to certain securities professionals or stockholders where it is reasonably likely that they will trade on such information before that information becomes publicly available. When an issuer intentionally discloses material, non-public information, the issuer is required to simultaneously distribute such information to the public "through a recognized channel of distribution".

In 2008, in response to the proliferation of websites as a means to electronically disseminate information to stockholders, the SEC issued guidance designed to be flexible and adaptive that directly addressed "the use of issuer web sites as a method of disseminating information in compliance with Regulation FD". The 2008 guidance identified a non-exhaustive list of factors to be considered when determining whether an issuer's website should be considered an acceptable channel of communication for Regulation FD purposes, including whether the "company has made investors, the market, and the media aware of the channels of distribution it expects to use, so these parties know where to look for disclosures of material information about the company or what they need to do to be in position to receive this information."

¹ The SEC's press release and related report can be located on the SEC's website at: <http://www.sec.gov/news/press/2013/2013-51.htm>.

Adapting its 2008 guidance, the SEC explained how its prior guidance will continue to "apply with equal force to corporate disclosures made through social media channels." Accordingly, an issuer seeking to use social media to electronically disseminate material, non-public information should take steps to properly alert the market about its intent to use social media and about the types of information that may be disclosed through any social media channel. While determining whether an issuer has properly complied with Regulation FD will always be a facts and circumstances analysis, the SEC reiterated some methods that an issuer could use to properly alert the public that it wishes to utilize social media as a Regulation FD compliant channel of communication. These time tested methods include, but are not limited to, disclosing (i) in an issuer's periodic reports and press releases the issuer's corporate website address and the fact that the issuer regularly posts important information on its website and (ii) on its website the social media channel(s) that the issuer intends to use to disclose any material, non-public information and information that would enable investors to subscribe to that particular channel.

CORPORATE GOVERNANCE GROUP

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