La gestione dei rapporti con investitori istituzionali e strumenti di disclosure

4 – La gestione corretta della disclosure

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L’IR manager è chiamato a gestire: comunicazione dei risultati, operazioni ed eventi straordinari, evoluzioni del mercato e delle sue regole, altre notizie impreviste, cambi nel management … e molto altro

CONSOB
COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA

N. 1/2017
Ottobre 2017

Investor relations vs Internal relations

- Braccio operativo sul mercato del CEO e del CFO
- Portavoce e sentinella della «one story» dell'Azienda
- Necessari continui e approfonditi rapporti con C-level management
- Fondamentale comprendere bene il business, il profilo finanziario, la governance e le regole della propria società
- Chi aspetta che gli arrivino i risultati a fine trimestre è perduto…

Jack of all trades

- **Curiosità, conoscenza dei mercati, intraprendenza, fiuto, precisione, rispetto delle regole, saper vendere,**
  studiare molto, costruire rapporti duraturi col mercato, forte capacità di lavoro, gestione delle scadenze, saper pianificare e improvvisare, ragionare con la «testa» del top management

- **Promotore e difensore dell'immagine della propria Società**

- **Precisione e qualità nella *delivery***

- ***Conoscere a fondo le cornici di legge della propria attività***

L’attività IR si evolve

- **Il contesto normativo italiano ed europeo per gli emittenti quotati è cambiato in modo significativo nel corso degli ultimi anni, in buona parte per via delle nuove regole MAR, SD2 e MiFID2.**

- **In particolare, viene dato un nuovo stimolo all’interazione tra IR e CdA, visto che occorre adeguarsi al nuovo contesto di aumentate aspettative in tema di comunicazione finanziaria (e non) da parte degli investitori istituzionali, nel rispetto dei vincoli legali.**

- **E’ sempre più importante che il Head of IR sieda nei Comitati Esecutivi, e che stabilisca un rapporto di correntezza con i Consiglieri.**

- **Le recenti crisi (COVID, evoluzione del conflitto Russia / Ucraina, andamento mercato energia) accelerano ulteriormente questo processo.**

Come il contesto corrente sta cambiano l'attività di IR: la comunicazione deve essere continua

The pandemia and current context has generated a deep upheaval in the operations and the capital allocation priorities of companies. Short-term results have been impacted, and even more so, long-term targets and the way they are internally set and externally communicated.

Therefore, **every quarter**, on top of communicating results, **management now needs to show the impacts of the pandemic and other extraordinary contexts and how the company is dealing with them.** Investors need to know **how existing business is being adapted** and **how new opportunities are being pursued**.

L’interazione con il Vertice, con il mercato e tra i due è facilitata dal web

A new, proactive approach is needed also towards shareholders. To deal with MIFID-2 related analyst erosion, IR departments have already stepped-up investor access. This must now be done through **virtual communication**, which could become an ally, as it will make more investor time available for C-level management, while travel is not practicable.

The IR website needs to be upgraded to the cutting edge. The quality and format of the uploaded material are now more important than ever, as in-person meetings are off the table. On the top of easily accessible historical reporting and comprehensive information on the company, **new options** include video clips on business premises, operational aspects and strategy, accompanied by recent interviews with top management, offering an **on-going “Investor Day” experience**.

Un altro elemento impatta l'attività IR: la direttiva MiFID II

DIRECTIVE 2014/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 15 May 2014

on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

(recast)

(Text with EEA relevance)

MiFID (Markets in Financial Instruments Directive) **-2** EU regulation entered into force on 3 January 2018. Among other, **it introduced the requirement of economic self-viability for sell-side research, causing it to become accessible for investors only against a fee. This consequently crowded-out brokers**

Gli obiettivi di MiFID II

Centralità della Market Abuse Regulation: comunicare appena possibile

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REGULATION (EU) No 596/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 16 April 2014
on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

...

Article 7

Inside information

1. For the purposes of this Regulation, inside information shall comprise the following types of information:

(a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;

...

CHAPTER 3

DISCLOSURE REQUIREMENTS

Article 17

Public disclosure of inside information

1. An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.

The issuer shall ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, in the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC of the European Parliament and the Council (1). The issuer shall not combine the disclosure of inside information to the public with the marketing of its activities. The issuer shall post and maintain on its website for a period of at least five years, all inside information it is required to disclose publicly.

Differire la comunicazione: si può, in casi ben specifici

13 July 2016 | ESMA/2016/1130

3. Disclosure of inside information

21. Article 17(4) MAR provides an exemption from the obligation to disclose inside information immediately, stating that issuers and emission allowance market participants may, on their own responsibility, delay disclosure to the public of inside information provided that certain conditions are met:

(a) immediate disclosure of the information is likely to prejudice the legitimate interests of the issuer or the emission allowance market participant;

(b) the delay of disclosure is not likely to mislead the public; and

(c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

An issuer is required to satisfy all three requirements before being able to rely on the exemption contained in Article 17(4) MAR.

Casi di legittimo differimento di comunicazione

13 July 2016 | ESMA/2016/1130

3.2. Legitimate interests of the issuer for a delay of the disclosure

3.2.1 Guideline 1 a) (issuer is conducting negotiations)

26. According to ESMA's CP, the following circumstances could constitute a legitimate interest: "the issuer is conducting negotiations, where the outcome of such negotiations would likely be jeopardized by immediate public disclosure of that information".

3.2.2 Guideline 1 b) (issuer is in grave and imminent danger)

28. According to ESMA's CP, the following circumstances could also constitute a legitimate interest: "the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, and immediate public disclosure of the inside information would seriously prejudice the interests of existing and potential shareholders, jeopardising the conclusion of the negotiations aimed at ensuring the financial recovery of the issuer".

Casi di legittimo differimento di comunicazione (cont.)

13 July 2016 | ESMA/2016/1130

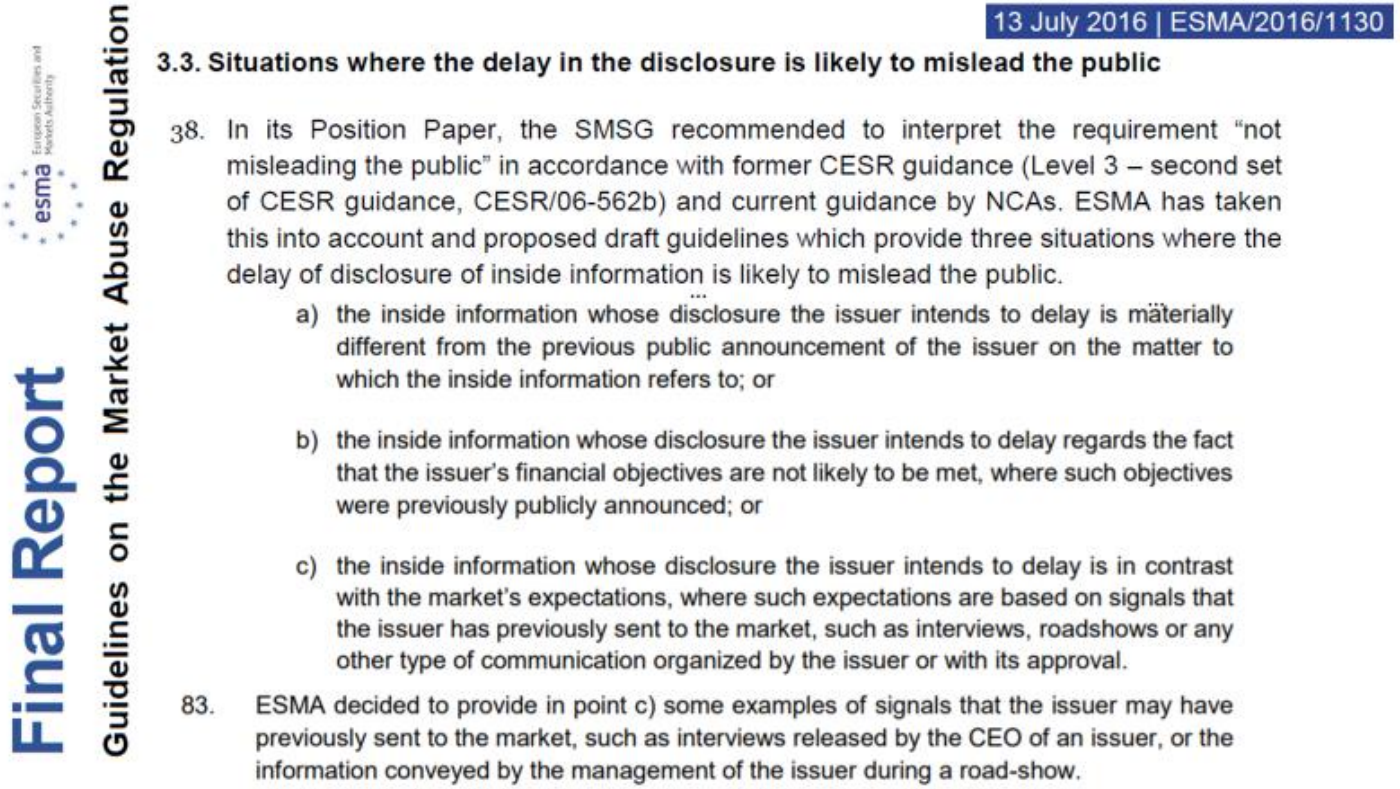
3.2.3 Guideline 1 c) (decisions taken or contracts entered into by an issuer with a two-tiered board structure)

30. A further example of a possible legitimate interest refers to issuers with a two-tiered board structure. ESMA describes the situation in which a delay might be justified as follows: "the inside information relates to decisions taken or contracts entered into by the management body of an issuer which need, pursuant to national law or the issuer's bylaws, the approval of another body, other than the shareholders' general assembly, of the issuer in order to become effective."

3.2.4 Guideline 1 d) (issuer has developed a product/invention)

36. A further case where immediate disclosure of the inside information is likely to prejudice the issuers' legitimate interests is described as follows: "the issuer has developed a product or an invention and the immediate public disclosure of that information is likely to jeopardise the intellectual property rights of the issuer."

Quando <u>non</u> si può differire



esma European Securities and Markets Authority

Final Report

Guidelines on the Market Abuse Regulation

13 July 2016 | ESMA/2016/1130

3.3. Situations where the delay in the disclosure is likely to mislead the public

38. In its Position Paper, the SMSG recommended to interpret the requirement "not misleading the public" in accordance with former CESR guidance (Level 3 – second set of CESR guidance, CESR/06-562b) and current guidance by NCAs. ESMA has taken this into account and proposed draft guidelines which provide three situations where the delay of disclosure of inside information is likely to mislead the public.

a) the inside information whose disclosure the issuer intends to delay is materially different from the previous public announcement of the issuer on the matter to which the inside information refers to; or

b) the inside information whose disclosure the issuer intends to delay regards the fact that the issuer's financial objectives are not likely to be met, where such objectives were previously publicly announced; or

c) the inside information whose disclosure the issuer intends to delay is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously sent to the market, such as interviews, roadshows or any other type of communication organized by the issuer or with its approval.

83. ESMA decided to provide in point c) some examples of signals that the issuer may have previously sent to the market, such as interviews released by the CEO of an issuer, or the information conveyed by the management of the issuer during a road-show.

La MAR non deve impedire una ordinata gestione dei risultati

13 July 2016 | ESMA/2016/1130

Other issues: verifying accounts / preparation of results - Paragraph 64 of the explanatory text

101. One respondent considers there might be circumstances where a short delay may be acceptable to clarify the situation of the accounts of a subsidiary.

102. Two respondents welcome the clarification that verification of accounts does not amount to legitimate interest to delay disclosure under Article 17(4) of MAR.

103. Another respondent however considered that further clarity is needed for the process of preparing results as this does not trigger the requirement to disclose inside information before the planned date of the publication of the results. The respondent considers it is important that the practice of issuers to publish results in accordance with a planned (and usually disclosed) timetable (except for when a profit warning is required) and would like ESMA to clarify how it believes issuers should analyse the issue.

Negli States c'è la Regulation FD

U.S. SECURITIES AND
EXCHANGE COMMISSION

Fair Disclosure, Regulation FD

Regulation FD addresses the selective disclosure of information by publicly traded companies and other issuers. Regulation FD provides that when an issuer discloses material nonpublic information to certain individuals or entities—generally, securities market professionals, such as stock analysts, or holders of the issuer's securities who may well trade on the basis of the information—the issuer must make public disclosure of that information. In this way, Regulation FD aims to promote the full and fair disclosure.

Un esame dei confini della FD ci fornisce utili riferimenti

Rule: Regulation FD prohibits a public company from selectively disclosing material nonpublic information about itself or its securities to certain persons outside the company, unless it also discloses the information to the public.

Covered speakers: Speakers prohibited from making selective disclosures of material nonpublic information include public companies and persons "acting on their behalf," *i.e.*, directors, executive officers, investor or public relations officials, and others who "regularly communicate" with securities market professionals or the company's shareholders.

Covered audiences: Regulation FD prohibits a public company from selectively disclosing material nonpublic information to, among others, buy and sell side analysts, institutional investment managers, broker-dealers, investment advisers, investment companies, hedge funds, Form 13F filers, and shareholders reasonably likely to trade on the information.

Regulation FD: con chi si può parlare

Non-covered audiences: Regulation FD does not prohibit a public company from disclosing material nonpublic information to:

- Employees;
- Attorneys, investment bankers, accountants and others who owe a duty of confidence to the company;
- Persons subject to a confidentiality agreement;
- Persons in connection with certain registered primary public offerings by means of specifically approved forms of written or oral communications.

Quando l'informazione trapela, si deve renderla pubblica al più presto

Timing of public disclosures: If selective disclosure of material nonpublic information occurs, Regulation FD requires that the information be disseminated to the public either simultaneously or promptly, depending upon whether the selective disclosure was "intentional" or "non-intentional."

- **Intentional disclosures:** In the case of an intentional disclosure by a Covered Speaker, the company must disclose the information to the public simultaneously. A disclosure is intentional if the person making the disclosure either knows, or is reckless in not knowing, that the information is both material and nonpublic.
- **Inadvertent disclosures:** In the case of a non-intentional disclosure by a Covered Speaker, the company must disclose that information to the public promptly. Promptly means "as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) after a senior official of the [company] learns that there has been a non-intentional disclosure ... that the senior official knows, or is reckless in not knowing, is both material and nonpublic."

Alcuni esempi di material information

Examples of potentially material information include information relating to the following topics:

- Earnings and revenue;
- Market or industry trends;
- Mergers, acquisitions, tender offers, joint ventures, or changes in assets;
- New products or discoveries, or developments regarding customers or suppliers (*i.e.*, the acquisition or loss of a contract, significant changes in backlog);
- Regulatory developments such as FDA approval;
- Changes in control or management;
- Events regarding the company's securities (*e.g.*, defaults, calls, stock splits, dividends, public or private sales of additional securities);
- Bankruptcies, receiverships, or a significant increase in indebtedness or a default under existing indebtedness;
- Significant litigation or other events requiring the filing of a Form 8-K;
- Additional information that corrects a misinterpretation of a prior public disclosure; and
- In certain circumstances, confirmation of previously issued guidance.

Punti di attenzione per un IR – Compliance con la Market Abuse Regulation / Fair Disclosure non vuol dire imbavagliarsi da soli

- **Disclosing an earnings shortfall from guidance to your sell-side analysts achieves full disclosure because they will then issue research notes to investors detailing the miss**. True or False? (**False**. These notes only go to a select group of investors.)
- **It is acceptable to provide immaterial, non-public information to select investors**. True or False? (**True**. Reg FD applies to material information. Every effort should be made, however, to provide all information broadly to ensure minor information is truly immaterial or at least covered in your 10Q/K.)
- **Attending an investor conference just days before you report a shortfall in earnings relative to consensus expectations is OK so long as you only reference the last public information available from your prior quarter**. True or False? (True, technically – but **generally not a best practice**, especially if the shortfall is material. Better to issue a press release disclosing the news before the conference presentation or decline the invitation.)
- **Holding a private dinner meeting with a handful of investors is acceptable and not a Reg FD violation**. True or False? (**True, provided that no material, non-public information is disclosed** unintentionally. If it is, the situation must be promptly rectified via an 8K.)
- **Inviting a board member to join management in a meeting with an exclusive group of people at an investor conference is Reg FD compliant**. True or False? (**True, provided that the board member sticks to the company's public disclosures** and doesn't share material, non-public information.)

Metodi accettabili per comunicare informazioni rilevanti sono comunicati stampa, conference calls, pubblicazione sul sito web. Altri metodi sono inaccettabili o rischiosi.

Unacceptable methods of making public disclosure

- Disclosing the material nonpublic information at a meeting open to shareholders and the public, if the meeting is not otherwise webcast or broadcast by other electronic means.
- Disclosing the material nonpublic information at a non-public meeting attended by Covered Audiences even if the press is in attendance.

Analysts

- **One-on-one meetings:** Avoid one-on-one meetings with analysts.
- **Two-on-one meetings:** A preferred alternative (if meetings are deemed necessary) is to have two company representatives (preferably one of whom is legal counsel) present at analyst meetings so that the second person can confirm the subject matter of the discussion.
- **Scripts:** Use a script during analyst calls (together with draft questions and answers) to keep the message on topic.

Regulation FD: il caso Netflix

SECURITIES AND EXCHANGE COMMISSION

SECURITIES AND EXCHANGE ACT OF 1934
Release No. 69279 / April 2, 2013

Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings

I. Introduction

The Division of Enforcement has investigated whether Netflix, Inc. ("Netflix") and its Chief Executive Officer, Reed Hastings ("Hastings") violated Regulation FD (17 C.F.R. §243.100 *et seq.*) and Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act"). The Commission has determined not to pursue an enforcement action in this matter. The investigation concerned Hastings's use of his personal Facebook page, on July 3, 2012, to announce that Netflix had streamed 1 billion hours of content in the month of June. Neither Hastings nor Netflix had previously used Hastings's personal Facebook page to announce company metrics, and Netflix had not previously informed shareholders that Hastings's Facebook page would be used to disclose information about Netflix. The post was not accompanied by a press release, a post on Netflix's own web site or Facebook page, or a Form 8-K.

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Regulation FD: il caso Netflix

On July 3, 2012, just before 11:00 a.m. Eastern time, Hastings posted the following message on his personal Facebook page:

> Congrats to Ted Sarados, and his amazing content licensing team. Netflix monthly viewing exceeded 1 billion hours for the first time ever in June. When House of Cards and Arrested Development debut, we'll blow these records away. Keep going, Ted, we need even more!

This announcement represented a nearly 50% increase in streaming hours from Netflix's January 25, 2012 announcement that it had streamed 2 billion hours over the preceding three-month quarter.

Prior to his post, Hastings did not receive input from Netflix's chief financial officer, the legal department, or investor relations department. Netflix did not file with or furnish to the Commission a Current Report on Form 8-K, issue a press release through its standard distribution channels, or otherwise announce the streaming milestone. Also on July 3, 2012, and after the Facebook post, Netflix issued a press release announcing the date of its second quarter 2012 earnings release but did not mention Hastings's Facebook post. Netflix's stock continued a rise that began when the market opened on July 3, increasing from $70.45 at the time of Hastings's Facebook post to $81.72 at the close of the following trading day.

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Regulation FD: il caso Netflix

We take this opportunity to clarify and amplify two points. First, issuer communications through social media channels require careful Regulation FD analysis comparable to communications through more traditional channels. Second, the principles outlined in the 2008 Guidance — and specifically the concept that the investing public should be alerted to the channels of distribution a company will use to disseminate material information — apply with equal force to corporate disclosures made through social media channels.

...

Although every case must be evaluated on its own facts, disclosure of material, nonpublic information on the 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 a method "reasonably designed to provide broad, non-exclusionary distribution of the information to the public" within the meaning of Regulation FD.[23]

...

V. Conclusion

There has been a rapid proliferation of social media channels for corporate communication since the issuance of the Commission's 2008 Guidance. An increasing number of public companies are using social media to communicate with their shareholders and the investing public. We appreciate the value and prevalence of social media channels in contemporary market communications, and the Commission supports companies seeking new ways to communicate and engage with shareholders and the market. This Report is not aimed at inhibiting corporate communication through evolving social media channels. To the contrary, we seek to remind issuers that disclosures to persons enumerated in Regulation FD, even if made through evolving social media channels, must still be analyzed for compliance with Regulation FD.

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