

SEC You Later

**By Reg P. Wydeven
December 12, 2012**

Last week I was disappointed to learn that Brett Bielema was stepping down as coach of the Wisconsin Badgers football team and bolting to the Arkansas Razorbacks. My disappointment soon faded after learning that the legendary Barry Alvarez would once again be donning his headphones and patrolling the sidelines at the Rose Bowl on New Year's Day.

I was also disappointed that the sports world used Bielema's decision to leave as the basis for the argument that a mid-tier coaching job in the SEC was more attractive than a premier position in the Big Ten. I hope this does not start a trend of the SEC raiding coaches from the Big Ten.

I was also surprised to discover last week that the SEC was going after Reed Hastings, the CEO of Netflix Inc. I can understand why Arkansas wanted a coach that appeared in three consecutive Rose Bowls, but I couldn't imagine why a university would want the head of America's biggest provider of on-demand Internet streaming media to coach its football team.

Then I figured out that the SEC pursuing Hastings was the U.S. Securities and Exchange Commission, not the Southeastern Conference. That made much more sense.

A common theme in my legal columns is the law's struggle to evolve as quickly as the world around it. Hastings' case is a perfect example.

Netflix, headquartered in Los Gatos, California, was established in 1997 and offered a DVD-by-mail service to subscribers. The company shifted to digital downloads, offering over 100,000 titles on DVD and boasting over 25 million subscribers worldwide.

On July 3, proud of his company's accomplishments, Hastings posted on Facebook that Netflix's online video viewing "exceeded 1 billion hours for the first time ever in June." As a result of the exciting news, the company's stock rose more than 6% that day, and another 13% on the first day of trading following the July 4th holiday.

It turns out the SEC also found the news to be exciting. The agency informed Netflix that it was filing a civil action against the company and Hastings personally because the Facebook posting didn't amount to fair public disclosure of information that was material to investors. SEC rules dictate that companies must disclose material investor information in a regulatory filing or news release.

Hastings went back to Facebook to respond to the investigation, which he called a "fascinating social media story." Hastings argued that the information was not material to the stock price and had been disclosed on Netflix's blog in June. Plus he claimed that because he had 200,000 Facebook followers, the posting constituted a wide dissemination. The SEC disagrees.

Coincidentally, Hastings has been a member of Facebook's board of directors since June of 2011, and he owns 72,639 shares of the company's stock.

Many companies will be following this case to see how social media will ultimately fit into SEC rules. While the SEC may win in court, I just hope the Big Ten wins on the field.

This article originally appeared in the Appleton Post-Crescent newspaper and is reprinted with the permission of Gannett Co., Inc. © 2012 McCarty Law LLP. All rights reserved.