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Play by the Rules and Stay out of Trouble: Some Tips for Public Companies Engaging in Social Media

By Brandon Batt

Social media has always been “fun” but it is only in the past few years that companies are taking advantage of the ability it gives them to communicate with their investors on a day-to-day basis. While companies may not have the Twitter® followings of Ashton Kutcher or Kim Kardashian, social media is being used by companies today like never before. As of December 27, 2011, for example, Pearson PLC (NYSE: PSO) had posted 4,043 tweets to 1,823 followers, Nordstrom (NYSE: JWN) had posted 15,335 tweets to 156,797 followers, and at the top of the Twitter® following for a public company, Whole Foods Markets (NASD: WFM) had posted 23,655 tweets to 2,151,172 followers. Whole Foods’ numbers effectively mean it is able to communicate with and inform over 2.1 million people and organizations on a daily basis free of charge. That’s pretty powerful.

While websites like Twitter® and Facebook® allow public companies to reach a large audience almost instantly, it is important to be aware that written communications via social media websites are subject to the same securities regulations and other applicable laws as any other written communications. The tips below can help a company benefit from social media while complying with laws applicable to public companies.

Tip: A Company’s Social Media Communications are Regulated

Regulation FD

Regulation FD is the SEC's "fair disclosure" rule that generally applies to all communications made by a public company (including via social media). Regulation FD stands for the proposition that an issuer's disclosure of material nonpublic information must be broad, effective and non-exclusionary. The traditional recognized channels of distribution for broad and non-exclusionary disclosure include filings with the SEC and widely disseminated paid wire services such as BusinessWire. Regarding the use of other non-traditional media for disseminating information, the SEC will apply a facts and circumstances test that analyzes whether the company is reasonable to believe its chosen medium (e.g., the company's website) is a recognized channel of distribution. To avoid inadvertent disclosure of material nonpublic information through social media, companies should ensure that their social media communications are subject to the same review and control processes as any other public communication.

Endorsements and the Federal Trade Commission (FTC)

Social media communications are also regulated by the FTC. The FTC is concerned with endorsements or testimonials made by a user about its products or services. The FTC's rules require that when a person publicly makes an endorsement, the person making the endorsement must identify any material connection between themselves and the seller of the products that may affect the credibility of the endorsement.^[1] If the statements are being made by an employee of a company, that employee should identify him or herself, the name of their employer and if they are receiving special compensation for the endorsement. The same guidance applies when an employee is discussing an employer's client in public communications. It is important to note that even if that employee was not specifically instructed by his employer to make an endorsement, the existence of the employment relationship may qualify their statements as endorsements. To combat this potential for liability, companies should adopt corporate policies (discussed in more detail below) that advise employees about these issues and their responsibilities with regards to social media.

Other Legal Considerations

A company's "social media guru" or outside legal counsel should also consider^[2] if a proposed communication triggers any of the following issues:

- Rule 10b-5: Rule 10b-5's anti-fraud provisions apply to written or oral communications. Social media communications are subject to these regulations.
- Insider trading laws: Confidential information transmitted via social media may subject an employee to insider trading claims, regardless of whether that employee trades on such information.
- Disclaimers: Consider including customary disclaimers as done with any written communication. For example, if the message contains forward-looking statements or non-GAAP measures, a company should include the necessary disclosures or a hyperlink to those items.

Given the myriad issues, it is important to consider requesting review by legal counsel or trained personnel before communicating the message of potentially sensitive information.

Tip: Actively Enforce Corporate Policies and Properly Train Employees

Written policies regarding social media are incredibly useful. Written policies help companies avoid potential issues, educate employees and help companies to combat problems after they have occurred.^[3] Companies that carelessly engage in social media are more likely to encounter damage to the company's brand, violate securities laws, or lose control of the company's confidential information, to name a few. Depending on a company's social media usage, there are many different types of corporate policies that may need to be adopted to govern the company's conduct (e.g., social media policy, privacy policy or general code of conduct).

All employees should be aware of the company's social media rules, guidelines and "best practices," who is responsible for transmitting social media communications on behalf of the company, and the consequences for making unauthorized public communications. Even if only one person is in charge of communicating on behalf of the company, training of all employees is recommended because it may not be practical to completely restrict social media activities to just a few individuals in a large organization. Proper training for employees includes providing regular updates to all parties regarding current issues as well as the reinforcement of standing policies.

Tip: Have Social Media Communications Reviewed by Legal Counsel or Trained Personnel (a "Social Media Supervisor") before Transmission

It is a good practice to have employees seek approval from a social media supervisor prior to transmitting any communications about the company. Social media supervisors are better able to spot the myriad of issues that may be present with even a simple communication. Oftentimes companies task their marketing and/or advertising departments with this responsibility. These non-legal departments are excellent at presenting the company in a creative and positive light, but the communication's compliance with applicable laws should be given due consideration. Further, a company can better coordinate its preparation and release of any required SEC filings or press statements that must be made in conjunction with the social media communication. Having a structure in place also helps to ensure that any applicable disclaimers or disclosures are made at the correct times.

For additional social media news and other related business issues, you can follow Brandon on Twitter[®] under the name [@SocialLawNews](#).

Notes:

^[1]16 C.F.R. § 255.5. [\[back\]](#)

^[2]The laws and regulations discussed in this article do not propose to be inclusive of all laws applicable to social media. Readers should consider consulting with an attorney as the issues and applicable laws change depending on the proposed communication. [\[back\]](#)

^[3]The FTC has indicated that well-drafted social media policies will benefit a company should an employee fail to follow applicable regulations. Furthermore, the existence of corporate policies and proper training for all employees can provide the company with a better foundation to avoid and defend any litigation created by a "rogue" employee. [\[back\]](#)

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