DAY PITNEY LLP

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Social Media and Issues Under the Federal Securities Laws

Many companies rely heavily on social networks for advertising and marketing. Facebook, Twitter and YouTube all offer new ways to connect with consumers and create brand awareness—but social media also has significant legal risks, including issues and risks under the federal securities laws. Outlined below are certain issues that, under the federal securities laws, companies need to consider as part of their social media policies and guidelines.

Regulation FD. Regulation FD—the "fair disclosure" rule of the SEC—fully applies to social media. Regulation FD prohibits selective disclosure by senior company representatives of company information that is both nonpublic and material. Permitted disclosure under Regulation FD means disseminating the information through a method designed to result in broad distribution of the information to the public. While this is all pretty basic, some of the problems that can arise are less so.

Social media is generally not being used by companies as a *replacement* for their normal methods of disseminating nonpublic information. Instead, social media is being used by companies as a *supplement* to their earnings releases, earnings calls, public webcasts, investor conferences, and the like. For example, many companies use Twitter concurrently with their earnings calls to "tweet" some of the main points from the published earnings release. This has become common.

Although a company may use social media to supplement what has been disseminated publicly, the social media itself has to be fully compliant with Regulation FD.

For example, in October 2011 the SEC released a comment letter involving an Internet company, WebMediaBrands, where the SEC staff challenged the CEO's regular tweeting and blog posts of company information.

The company defended the CEO's practices on the grounds that the particular tweet and blogged information at issue did not involve material, nonpublic information. In terms of a company "disclosure guideline," however, using what may or may not be material, nonpublic information does not seem to be a very clear or easily applied company guide.

The company also defended its CEO's social media practices on the basis that these tweets and blog posts were equivalent to public distribution and,

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therefore, were Regulation FD compliant as a "recognized channel" of public distribution, at least for this company and this CEO. Although the SEC comment process has concluded, we may hear more about this issue as time goes on.

A couple of other problems to be aware of: One, companies need to be careful as to *timing*. For example, when a company issues its quarterly earnings release, there usually is a very short period of time, maybe two or three minutes, before the release becomes available on Bloomberg or Yahoo! Your company obviously wants to make sure any tweet of select information from that earnings release—the company's revenues or EPS, for example—does not precede the actual public availability of the earnings release.

One other problem a few companies have had is uploading an earnings release to an unsecure area of the company website while awaiting the issuance and public distribution of the earnings release. The problem is, through various technology means, there have been instances when these releases or previously taped interviews or similar information, which were intended to be "published" on the company website *coincident* with the formal public release of the news, have in fact been accessed by outsiders *before* the news is actually released. Obviously, companies need to be careful when they preliminarily post material, nonpublic information on the company website; make sure it is secure and password protected.

Forward-Looking Safe Harbor. When companies tweet information as a supplement to their other channels of public distribution, these tweet messages—in and of themselves—must comply with the federal securities laws. For example, if the tweeted information includes any forward-looking information, the safe harbor rules require that the company's customary cautionary statement be included in the tweet. Tweets are not oral but rather written statements, so the same rules apply to tweeted information as to any other written forward-looking information. Failure to comply with the safe harbor for tweeted forward-looking information could be the difference between lengthy litigation and early dismissal of a securities claim.

Regulation G. To the extent tweeted information includes any adjusted or non-GAAP numbers, SEC Regulation G requires a company to satisfy all Regulation G rules, including clear identification of where the required GAAP and reconciliation information is located.

Rule 10b-5. SEC Rule 10b-5—the general anti-fraud rule—applies to any company statements, whether written or oral, including information in tweets. This may be problematic because, first, tweeted information is very abbreviated and, second, the company personnel creating the tweet may or may not be trained IR personnel.

One further matter: when a company becomes subject to a securities law claim, tweeted information—whether company sponsored or simply tweeted by company employees—obviously is more available and accessible to outsiders than internal company e-mails. Such tweets are likely to become significant additional information that plaintiffs' attorneys may seek to use to support the claim.

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Analysts' Reports/Potential Entanglement Claims. When a company tweets information relating to analysts' reports, particularly when a report includes projections, it is important to follow the same rules as when the company posts analysts' reports on its website.

When analysts' reports are included on a company website (which is fairly common), companies are generally vigilant in making sure appropriate limitations and disclaimers are included and the location on the company website is segregated. But that may be less likely to occur when a company IR professional is tweeting analysts' reports by hyperlink, in which case a company may run the risk of adoption or entanglement claims by not following the same careful procedures followed with a company's normal website postings.

Annual Meetings. It is becoming more common for companies to tweet information during the course of their annual shareholders' meetings, which, for many companies, are poorly attended. If the annual meeting is not publicly webcast, the company needs to ensure that no company representative is tweeting information that may contain material, nonpublic information.

Insider Trading. Tweets or other use of social media by company employees are subject to the same insider trading rules as other information. A company employee who uses social media to communicate outside the four walls of the company, whether concerning sales or performance or a possible acquisition, not only is likely to be in violation of the company's confidentiality policy but also is likely risking insider trading claims, regardless of whether that employee himself or herself trades on that information.

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