Advisory
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Ringing in the New Year with a Fresh Look at Public Company Communications in the Era of Social Media

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As we all start the new year with a fresh, renewed outlook, it is a good idea for a public company to do the same and dust off its corporate governance guidelines and charters and its internal securities laws compliance policies. In doing so, and given the explosion of social media communications in society at large, the company should also take the time to consider its policies and approaches to the company's use of social media and how it plans to use social media in future communications with its investors. These considerations are important in putting policies in place to avoid an unintentional violation of the securities laws.

An increasing number of public companies are using social media resources such as blogs, Facebook, YouTube, Twitter and LinkedIn to communicate with their investors. Social media can be very attractive to a company because it provides a quick and cost-effective way to highlight issues and focus an investor's attention as compared to more lengthy and comprehensive SEC filings. It is also more personal and interactive, something today's society finds increasingly desirable. With all of this upside, however, comes risk. Unlike the filing of an amended annual, quarterly or 8-K filing with the SEC, there is no formal way to correct an error in a stream of posts or tweets and the incorrect information can "go viral" without the company having the control to which it may have grown accustomed. The recent introduction of Facebook "Timeline" - a visual representation of a user's profile in which all activity of the user since creation of the user's Facebook account is visible - serves as a reminder of the permanency of material posted in social media spaces. Also, the very real-time and instant nature of social media may tempt company officials to post or tweet before taking the time necessary to consider whether a particular post should be going through the same level of scrutiny and multi-level review as a press release or SEC filing might enjoy.

As your company reviews its internal securities laws policies, below are some securities laws and best practice tips to keep in mind in maintaining compliance in the era of social media.

Regulation FD

When senior company officials act on behalf of the company and disclose material non-public information to some investors, the company must take action to broadly disseminate that information to the investing public at large in order to comply with the SEC's Regulation FD and avoid the selective disclosure of material non-public information.

In its 2008 guidance on the use of company websites to disclose material company information, the SEC stated that for such information to be considered "public," it must be disseminated in a way that is designed to "reach the securities market place in general through recognized channels of distribution." The use of social media and the challenges of compliance with Regulation FD should have companies pausing and evaluating whether a posting of "material" information is being made through "recognized channels of distribution" and whether the company should be taking immediate action to disclose such information to the "securities market place in general" through more traditional Regulation FD-compliant means such as press releases and filings with the SEC on Form 8-K.

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Although there is not an extensive body of SEC actions, the SEC is clearly watching, and given the increased use of social media by public companies, the SEC will continue to monitor company communications. In a comment letter to WebMediaBrands Inc., in response to its 2009 fiscal year 10-K, the SEC inquired as to how the company thought it had complied with Regulation FD where the Chairman and CEO used a blog on the company's website to display his Twitter tweets, which included updates on future acquisitions, stock option purchases and new services. The Company responded that the information was not material non-public information, but that even so, because the company was an internet company, "its website [which had links to the CEO's blog] was the most obvious and recognized source and channel of distribution of company information" and "is widely known and visited by people who follow the Company."

While the WebMediaBrands response satisfied the SEC in that instance, the comment raises important considerations about what a "recognized channel of distribution" may be for any particular company. When a company is considering communications through social media, clear communication about where the investing public should look for important information is critical and the company should be asking whether it has communicated with investors to let them know that information will be posted through those means.

As a general rule, our view is that social media should not be the first place that a company issues important breaking news. Social media can be extremely useful for repeating, reposting or linking to published information, but not as a first source for breaking information. Because social media venues may not be widely disseminated or followed, the SEC may not consider certain posts or tweets sufficiently public - and therefore open the company to Regulation FD compliance issues.

Rule 10b-5

The anti-fraud provisions of the federal securities laws also apply to social media posts. Due to the brief and abbreviated nature of a post, companies may find themselves in hot water where such posts communicate shortened, and thus potentially misleading information, or omit information critical to a proper understanding of the disclosure.

Safe Harbor for Forward-Looking Statements

Like all other written company statements containing forward-looking information, information posted through social media must include the company's cautionary language if the company wishes to seek safe harbor protections under the federal securities laws. But, when limited to the brief nature of blogs and Facebook posts and the strict 140 character limit of a Twitter tweet, the ability to post the legend presents a logistical challenge for companies. Some companies, such as Exxon Mobil Corporation take a conservative approach and issue tweets that simply state "Exxon Mobil Corporation announces estimated third quarter 2011 results" and include a link to the earnings release on the company's website that includes forward-looking statements as well as the legend. Pfizer Inc. takes a similar approach. Other companies, such as DuPont, issue tweets with specific forward-looking statements ("DuPont has raised earnings expectations to range of $3.97 - $4.05 per share . . .") and include a link to the earnings release on the company's website, which contains the appropriate legend.

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Regulation G and the Posting of Non-GAAP Financial Measures

Companies may also be tempted to use social media to highlight and repeat select financial information of the company, especially some of the key metrics that the company and investors use to measure the health and success of the company, and these may often be non-GAAP measures. In order to comply with Regulation G, all such information, even information already provided in an earnings release and then subsequently posted in a social media context, must be accompanied by the necessary GAAP reconciliations and discussion required by Regulation G.

Again, companies are faced with the logistical challenges of just how to fit a GAAP reconciliation into an otherwise brief tweet or post about the company's non-GAAP figure. As with forward-looking statement cautionary language, companies may try to address the logistical issue of posting the required GAAP reconciliation information by including links to the earnings release containing the reconciliation information on the company's website. Some companies are taking this approach, but it remains to be seen whether the SEC agrees that providing only a link to such information satisfies the requirements of Regulation G.

Best Practice Tips

In making a post or tweet, limit the subject matter to what is already, or will be concurrently, publicly disclosed through more conventional disclosure channels. A social media post cannot precede the quarterly earnings release, even if the release is publicly available moments later.

Tweets or other social media posts containing the results or financial condition of the company should include a link to the relevant public filings or releases.

Links to analysts' reports that are shared via tweets or posts should include appropriate disclaimers or, rather than linking directly to such reports, direct the user to a company web page containing such disclaimers along with a link to the report.

Extend the company's quarter-end blackout periods to include prohibitions on social media posts.

Develop or amend a company policy on public disclosures and include social media considerations.

Ensure that those individuals authorized to speak to the press for the company are the only individuals making posts and tweets on behalf of the company.

Appoint an individual at the company who is well versed in the technology of social media and understands the limitations imposed by the federal securities laws to field questions as they arise from those authorized to post or tweet on behalf of the company and avoid improper disclosures before they happen.

Establish special separate rules for "fundamental" corporate events. For example, total prohibition on social media posts when the company is undergoing a proxy contest, material acquisition, securities offering or tender offer.

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Although tweeting or posting live from annual shareholder meetings may help disseminate information to shareholders who are not present at the meetings, caution should be taken to ensure that such tweeting or posting only takes place subsequent to or simultaneously with the meeting being made available to the public (e.g. through streaming via the company website).

Always remember that posts on social media sites are instant and permanent.

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