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Investor Relations in the Age of Social Media

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With social media sites such as Twitter and Facebook proving to be more than mere fads, investor relations departments increasingly are utilizing these sites, in addition to their own websites and corporate blogs, to connect with investors. In fact, some companies even have begun using social media sites, rather than traditional media outlets, as a means of releasing certain corporate information.

While social media can be an effective means of quickly and efficiently connecting with investors, as with any new technology, pitfalls will be likely. Because these forums are real or near-time communications that can survive indefinitely with little or no ability to fix errors, and are often in abbreviated formats, corporate legal departments need to work closely with investor relations and press departments to craft guidelines for using these communication outlets. These guidelines should help to bridge the gap among the sometimes conflicting challenges that these forms of media present from a legal and investor relations perspective.

Investor relations departments rightfully are focused on getting the message out clearly and quickly, as a consequence they may be frustrated by legal restrictions that seemingly conflict with the corporate disclosure goals of transparency, clarity, and plain English. But as we know all too well, it is better to prevent significant legal issues before they occur even if it creates some initial frustration. Compounding these discussions is the fact that existing legal frameworks were not drafted with these new forms of communication in mind. This simply means that lawyers often will have to be creative in forging a path through social media that does not run afoul of legal requirements while meeting the company's investor relations objectives. Challenging for sure, but no doubt achievable.

This article briefly presents some issues for legal and investor relations teams to consider as they increasingly seek to use social media to communicate with investors.

Focus on Brevity

One of the key challenges of many web-based forums and communications—whether it be corporate blogs, Twitter, or other sites—is the focus on brevity. Brevity of course can enhance investor understanding and be consistent with plain English disclosures; messages that are too short, however, can be confusing and, when taken out of context, misunderstood by investors. For example, on Twitter, each individual tweet is limited to 140 characters, and although one could break up a message into multiple tweets, each tweet may be read separately and re-tweeted. Accordingly, each message should standalone or be placed in a context such that it clearly is part of a longer message. Moreover, the summary nature of the communication should be obvious to readers; if it is not, a cautionary note (or link to a cautionary note) may be warranted. If the tweet or blog posting is

commenting on or summarizing a press release or an earnings call, it may be helpful to include a link to the full text of the press release or the webcast itself.

Regulation FD

Although posting new, previously non-public information on a public investor website or Twitter should not itself create Regulation FD issues,[1] companies will need to evaluate carefully these types of disclosures if they wish to have a subsequent private disclosure (such as discussions with analysts) without violating Regulation FD. In its August 2008 Interpretive Release, the SEC provides additional guidance as to when information on websites may be considered public for purposes of Regulation FD and subsequent non-public disclosures. Factors that issuers should take into account include:

- whether investors and the market are aware that the issuer intends to disclose material information in this manner;
- the design of the website and whether important information readily is accessible;
- the extent to which investors are made aware that this is the way in which the issuer intends to make public material information;
- the extent to which information on the website readily is picked up by the market and reported in the media, or the extent to which the issuer has advised news wires and the media about such information, as well as the size and market following of the company and how quickly the market absorbs this information; and
- the extent to which information on the website is accurate and current.

Notably, the SEC's 2008 Interpretive Release indicates that the guidance does not address whether information considered public for Regulation FD purposes is public for insider trading purposes, and issuers should exercise caution when permitting trading by insiders if information has been disseminated only on the website. The 2008 Interpretive Release also provides guidance as to the amount of time an issuer should wait between issuing a public disclosure and having a subsequent private discussion.

Given the multitudes of different avenues for disseminating material information beyond traditional news releases, issuers should be clear with investors as to how they will release important information. Aside from Regulation FD concerns, issuers also should make sure that if they have used a particular forum in the past to provide important updates, that they either consistently use and update that forum or inform investors that they are no longer using that forum for updates, in order to avoid investor confusion and allow investors sufficient time to turn to other locations to receive important updates.

Regulation G

Blog entries, tweets, or other communications that disclose or repeat earnings or other financial information also will need to be monitored for Regulation G non-GAAP financial measure compliance. Even repetition of previously disclosed non-GAAP financial measures would be considered public disclosure of non-GAAP information, and issuers will need to include the appropriate GAAP reconciliations. The SEC's rules do not contemplate specifically these types of communications and therefore do not address the required format or location of the reconciliation. Nevertheless, it should be reasonable to rely on links to the issuer's website that contain the required reconciliations.

Liability for Information and Forward-looking Information

Web postings by corporate representatives could subject issuers to liability under the antifraud

provisions of the securities laws, including Rule 10b-5 under the Securities Exchange Act of 1934. The SEC's 2008 Interpretive Release cautions that issuers cannot avoid liability for such statements by having employees who are acting as representatives of the issuer purport to speak in their "individual" capacities. Legal and investor relations departments should work together with corporate bloggers and others to ensure that an accurate and consistent corporate message is being published. To the extent that errors are identified in corporate communications, including in blogs or Twitter sessions, steps should be taken to correct the communication or post an update as soon as possible. Especially in the case of earnings or other material announcements, investor relations departments should take steps to coordinate the various corporate communications so that sources (whether it be blogs, websites, or others) are aligned from both a content and timing perspective.

Issuers seeking protection under the securities laws for forward-looking statements also may wish to include a forward-looking statement legend, or a link to a legend, in connection with their web-based communications.

Special Situations

In certain special situations, legal departments may have to place additional restrictions on corporate web-based communicators, consistent with restrictions generally placed on corporate communications. Given the interactive nature of many web-based communications, legal departments may find that it is more difficult to control these types of communications. Corporate bloggers and others also may find it challenging simply to ignore significant events happening in a corporation's life. However, in situations such as securities offerings, proxy contests, tender offers, or acquisitions, communicating about the event or, in the case of securities offerings, issuing communications that may be viewed as offers under the securities laws, could potentially be problematic in light of legending and filing requirements, or in some instances, strict prohibitions on such communications. Accordingly, before any type of special corporate event, it will be important for all constituencies (legal, investor relations, and public relations) to have a collective communications game plan, with sufficient guidance to help those on the public communications "front line" respond as appropriate on a real-time basis.

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Although to some it can appear that legal limitations present significant challenges to reaping the benefits of social media, that need not be the case. With care, creative thinking, and frequent communication among the legal, investor relations, and press departments, new media can contribute to fulsome investor communications and improved corporate transparency. As the power of social media grows and expands, it will become no doubt increasingly relevant to businesses and their investors. As lawyers, we are key to facilitating the proper use of these new communication outlets to meet the company's investor relations agenda.

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The views expressed in this article are their own and do not necessarily reflect the views of Sullivan & Cromwell LLP or its clients.

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[1] According to a 2008 Securities and Exchange Commission (SEC) interpretive release, "posting information on a company's web site in a location and format readily accessible to the general public would not be 'selective' disclosure. . . ." SEC Release Nos. 34-58288, IC-28351 (Aug. 1, 2008); File No. S7-23-08 (2008 Interpretive Release).