

Play by the rules and stay out of trouble: Tips for public companies engaging in social media

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Social media has always been “fun” but it is only recently that companies are taking advantage of the platform’s ability 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, companies are using social media like never before. As of Jan. 12, for example, Pearson PLC had posted 4,140 tweets to 1,896 followers, Nordstrom had posted 15,954 tweets to 159,111 followers, and at the top of the Twitter following for a public company, Google Inc. had posted 3,165 tweets to 4,104,195 followers. Google’s numbers effectively mean it is able to communicate with and inform over 4,104,195 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 all written communications via social media websites are subject to the same securities regulations and other applicable laws as any other written communications. Here are some tips on how your company can benefit from social media while still complying with the law.

Tip: Your company’s social media communications are regulated. Regulation FD is the Securities and Exchange Commission’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 mediums 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: The FTC also regulates social media communications. The FTC is concerned with endorsements or testimonials made by a user about its products or services. Its rules require that when a person publicly makes an endorsement, that person must identify any material connection between him or herself and the product’s seller that may affect the endorsement’s credibility. If the statements are being made by an employee of a company, that employee should identify him or herself, the name of the employer and if he or she is receiving special compensation for the endorsement. The same guidance applies to when an employee is discussing an employer’s client in public communications. Even if that employee was not specifically instructed by his employer to make an endorsement, the existence of the employment relationship may qualify the 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: Your company’s “social media guru” or outside legal counsel should also consider whether 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 customary disclaimers as you would with any written communication. For example, if your message contains forward-looking statements or non-GAAP (generally accepted accounting principles)

measures, you should include the necessary disclosures or a hyperlink to those items.

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

Tip: Companies should actively enforce their corporate policies and properly train their employees. Written social media policies are incredibly useful. Written policies help companies avoid potential issues, educate employees, and combat problems after they have occurred. 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 your company's social media usage, there are many different types of corporate policies that may need to be adopted to govern your 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 everyone regarding current issues as well as the reinforcement of standing policies.

Tip: Social media communications should be reviewed by legal counsel or trained personnel (a "social media supervisor") before transmission. It is a recommended practice to have employees seek approval from a social media supervisor prior to transmitting any communications about the company. These supervisors are better able to spot the myriad of issues that may be present with even a simple communication. Oftentimes, companies task their marketing 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 the law should be given due consideration. This allows the company to 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 ensures that any applicable disclaimers or disclosures are made at the correct times.



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