Corporate Communications & Social Media

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Introduction to Social Media

- What is social media?
  - It has been described as a form of media that does not just give you information, but interacts with you while giving you that information

- Why does it matter?
  - Overall budget for interactive in the U.S. is projected to grow from $34.4 billion in 2011 to $76.6 billion in 2016
    - Social media spending is expected to increase from $1.6 billion to $5.0 billion
  - 36% of social media users post brand-related content
  - 50% of people follow brands in social media
  - 38% of CEOs label social media as a high priority, and 57% of businesses plan to increase their social media spend in 2012
Introduction to Social Media

- Public companies as well as companies contemplating initial public offerings must consider the applicability of federal securities laws to their social media disclosures.

- While the SEC has issued guidance that addresses certain social media issues, new issues are arising.
  - The SEC has noted that "technological advances, and the reduced costs associated with the implementation of technologies over time, now allow companies to include more 'interactive' and current information on their websites."
    - The SEC has specifically noted that "interactive" investor-related tools, such as "blogs" and electronic shareholder forums promote direct communications.
  - As the digital age continues to evolve, securities laws must be interpreted and adapted to address emerging issues.
Forms of Social Media

- Corporate websites
  - Evolved into more traditional means of communication

- Twitter
  - Over 465 million active accounts
    - 175 million tweets per day
    - Lady Gaga has 19.3 million followers
  - 62% of Fortune 500 companies have an active Twitter account
    - @google has 4.3 million followers
    - Companies are using Twitter to get information to the public
      - Actively used to respond quickly to negative customer feedback
      - Some companies use to report financial information or alert shareholders to its availability
Forms of Social Media

- **Facebook**
  - 901 million monthly active users
  - 58% of Fortune 500 companies have a Facebook page
    - Highest concentration in the insurance, specialty retail and food service industries
    - Coca Cola has 40.1 million "likes"

- **Blogs**
  - 23% of Fortune 500 and 23% of INC 500 have corporate blogs
    - Specialty retail industry has the most
Forms of Social Media

- **Other Forms of Social Media**
  - Electronic shareholder forums

- **LinkedIn**
  - 161 million users around the world
  - Two new members every second

- **YouTube**
  - One hour of video is uploaded to YouTube every second

- **MySpace**

- **Wikis**
  - Allows users to interact by adding and editing articles
Securities Law Implications

- Rule 10b-5
- Regulation FD
- Forward-Looking Statement Safe Harbor
- Regulation G
- Proxy Solicitations
- Securities Offerings
Rule 10b-5

- Anti-fraud provisions of the federal securities laws apply to company statements made on the internet in the same way they would apply to any other statement made by, or attributable to, the company.
  - According to the SEC, companies are responsible for the accuracy of their statements that reasonably can be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the internet.
    - However, "a company is not responsible for the statements that third parties post on a website the company sponsors, nor is a company obligated to respond to or correct misstatements made by third parties."
  - A company can be held responsible for third party information to which it directs visitors to its website and which could be attributable to the company.
Rule 10b-5

- Companies can be held responsible for information provided in tweets, blog posts and other forms of social media.
- In providing information, companies must be careful to avoid disclosing material, non-public information as well as information that could lead to market manipulation.
- Insider trading issues:
  - Insider trading occurs when a person uses material non-public information to trade securities of a publicly-held company, and where the insider obtains a personal benefit in exchange for breaching a fiduciary duty or other relationship of trust and confidence.
  - SEC and DOJ will focus on social media in investigating insider trading issues.
  - Issues go beyond companies to individuals who may be privy to inside information.
Regulation FD

- Prohibits selective disclosure of material, non-public company information
- Reg FD applies to:
  - Directors and executive officers
  - Investor relations or public relations officers or persons with similar functions
  - Any other officer, employee or agent who regularly communicates with the public
- Disclosure through a method designed to result in broad distribution of the information is permitted
Regulation FD

- Social media must be compliant with Reg FD
  - Issues have arisen especially with respect to Twitter
- Generally companies fulfill the Reg FD requirements where:
  - Information is published in a recognized channel of distribution
  - Information is disseminated in a manner intended to reach the general public
- According to one commentator, whether Twitter constitutes a "recognized channel" depends on the efforts made by the company to disclose to its investors the use of Twitter as a channel for the release of financial information
Forward-Looking Statement Safe Harbor

- The Private Securities Litigation Reform Act provides a “safe harbor” for companies that make forward-looking statements as long as they include a meaningful cautionary statement that actual results could be materially different.
- Social media disclosures of forward-looking information should include a reference to the issuer's customary cautionary statement:
  - Creates an issue with respect to posts that include forward-looking statements:
    - For example, a tweet with forward-looking information should include the company's customary cautionary language.
Regulation G

- Regulation G has two requirements triggered by the use of a non-GAAP financial measure:
  - Presentation of the comparable GAAP financial measure; and
  - Reconciliation to the comparable GAAP financial measure

- Social media disclosures of non-GAAP numbers must include location of GAAP and reconciliation information
Proxy Solicitations

- Rule 14a-1 defines "solicitation" and "solicit" to include any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy".
- Proxy solicitations are subject to certain filing requirements and the anti-fraud rules.
  - Social media communications could be deemed to be proxy solicitations.
  - Rule 14a-17 permits the use of electronic shareholder forums to facilitate communications.
    - Uncertain whether social media channels would enjoy protection of the rule.
Securities Offerings

- Use of social media can raise issues in connection with public and private offerings of securities
- Potential issues:
  - Impermissible general solicitation
  - Gun-jumping
  - Free writing prospectus rules
- Statements made through electronic means can be deemed written offerings under the securities laws
  - Website postings
  - Emails
- The SEC will review company websites, media outlets and other sources in connection with IPO comment process
Securities Offerings

- Private offerings
  - Regulation D provides an exemption for companies conducting private offerings pursuant to Rule 502
  - Rule 502(c) prohibits offering or selling securities pursuant to a general solicitation
    - Prohibited communications include:
      - Advertisement
      - Article
      - Notice
      - Other communication
  - Social media likely included
Investment Advisors

- Social media risk alert
  - Compliance strategies
    - Urges investment firms to adopt specific media use compliance programs, rather than relying on existing general programs that may lack specificity
  - Third party postings
    - Recommends implementing explicit policies and procedures on what types of third-party postings are permissible
- Record-keeping obligations
  - Records must be preserved if they contain information that satisfies the recordkeeping obligations
Other Regulatory Issues

- Investigations of violations of Section 5 of the Federal Trade Commission Act in connection with providing gifts to bloggers who the company expected would post blog content about the company's products
Practice Tips

- **Social Media Policies**
  - Many issuers have adopted policies that govern the use of social media
    - Whether or not a company is actively using social media, it may wish to adopt a policy to guide its employees' use of social media
  - Designate specific personnel who are authorized to speak on behalf of the company
  - Human resources issues
    - Discourage insults, obscenity and other posts that could be offensive or harmful to the company

- ** Insider Trading Policies**
  - Companies should consider revising insider trading policies to remind employees of potential risks
Practice Tips

- Timing Issues
  - For issuers that wish to use Twitter, Facebook or other social media outlets to disclose material information, be sure to wait for dissemination of information through SEC filings, press releases and website disclosure.
  - Any tweet, Facebook or blog post or similar disclosure of material company information should follow more traditional disclosure methods with sufficient time for the market to absorb the new information.
  - Website posts should also be delayed until the related information has been released through more traditional means.
    - May require implementation of security measures that protect posts until press releases are issued and/or SEC filings are made.
Practice Tips

- For companies with active Twitter accounts, consider creating multiple accounts to distinguish between corporate disclosure and customer service or other public relations matters.