

TWEETING, BLOGGING AND POSTING COMPANY DISCLOSURE: TIME TO UPDATE YOUR DISCLOSURE POLICIES?

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To Our Clients and Friends:

The steady stream of emerging Internet-enabled communications technologies, including Twitter, Facebook, MySpace, LinkedIn and weblogs, can pose serious and novel compliance challenges for public companies. Take one example: the corporate blogger of a Fortune 500 company recently acknowledged posting real-time updates to Twitter¹ during several of the company's earnings calls and analyst presentations without having consulted the company's legal department.

It remains to be seen whether these and other emerging technologies are attractive or even appropriate platforms for reporting corporate information. For instance, Twitter updates, or "tweets," are limited to 140 characters in length, making Twitter seem like an odd fit for communicating the substance of an earnings call. Nonetheless, many emerging Internet-enabled communications technologies appear to be gaining traction as an element of the public company investor relations toolkit. This memorandum provides a brief overview of important U.S. securities law and related considerations for public companies contemplating whether and how to make use of these technologies as part of their investor relations strategies.

The SEC's general anti-fraud rule, Rule 10b-5, applies to all corporate communications, including those effected via Internet-enabled communications technologies. Companies need to be mindful of at least three potential sources of civil liability under this standard. First, the information made available by a company must contain no material misstatements, *i.e.*, the information must be accurate in all material respects. Second, there can be no material omissions in the information, *i.e.*, it must present all facts material to understanding the information posted. Third, companies cannot engage in "selective disclosure," *i.e.*, they

¹ Founded in 2006, Twitter is a relatively recent social networking and micro-blogging service through which a user can send and read other users' updates. Updates are displayed on the sending user's Twitter profile page and are broadcast to other users who have signed up to receive that specific sending user's updates via the Twitter web site, cell phone text messages and other Internet applications. Recent market research indicates that Twitter had as many as eight million users as of March 2009.

cannot disclose material information to certain investors or investment professionals without making this same disclosure on a public basis.

The SEC has stated that as a general matter it is interested in promoting disclosure on company web sites and development by companies of interactive web site features. In providing guidance about how to comply with the anti-fraud provisions of the securities laws in making available interactive web site features, the SEC identified two principles that are equally applicable to emerging communications technologies: (1) companies are responsible for statements made by them or on their behalf; and (2) companies cannot require investors to waive protections under the federal securities laws as a condition to entering or participating in interactive web site features. In addition, the SEC clarified that a company is not responsible for the statements that third parties post on a web site the issuer sponsors, nor is an issuer obligated to respond to or correct misstatements made by third parties.

Because many Internet-enabled platforms enable real-time communication and in some cases impose limits on length and presentation, compliance with the anti-fraud rules may prove to be a serious challenge. Readily foreseeable issues include situations ranging from inadvertent typographical errors that overstate results to emphasizing a potentially positive development without noting the associated risks which are disclosed in other more complete disclosure materials, such as an earnings release filed on Form 8-K or an annual report filed on Form 10-K. In addition, the SEC has consistently identified summary information, information which is no longer current and hyperlinks in statements posted by a company to the Internet as potential sources of liability.

Communications containing forward-looking statements pose additional compliance issues. In order to obtain the benefit of the safe harbor from securities law liability afforded by the Private Securities Litigation Reform Act of 1995, the forward-looking statement must be identified as such and be accompanied by meaningful cautionary language. The more flexible standard applicable to oral forward-looking statements will generally not protect tweets, posts and blogs that are available on the Internet after the presentation is completed. It will be a challenge, within the confines of real-time, space-limited communications, to navigate the safe harbor.

In addition to complying with the general anti-fraud rules, communications over Internet-enabled communications channels also need to comply with more specialized disclosure rules. If the communication includes a non-GAAP financial measure, Regulation G would apply. Similarly, if the communication contains any material information regarding the public company that is not otherwise available to the public, Regulation FD would be triggered. If the communication is made in proximity to a stockholders' meeting, the communication may constitute soliciting material subject to the proxy rules.

Finally, companies listed on a stock exchange, such as the New York Stock Exchange or NASDAQ, must comply with the exchange's rules with respect to public disclosure of certain information. Disclosure of important corporate information that could reasonably be expected to have an impact on the market for the issuer's stock via an issuer's web site, weblog, social networking profile or tweet may not meet the rules of an exchange as they are currently interpreted.

A comprehensive set of disclosure policies will need to address these issues and a host of others, including issues that will arise in connection with securities offerings and the risk that employee or third-party communications could be deemed to have been made by or on behalf of the company. In the face of these challenges, companies should consider whether the time has come to adopt or update policies regarding the use of emerging Internet-enabled communications channels as part of their investor relations strategies.

Please do not hesitate to call us to discuss any of the above or this memorandum generally.

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