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A Checklist of Best Practices for Companies' Social Media Communication

The Securities and Exchange Commission (SEC) recently confirmed that companies may use social media to announce material information without violating Regulation FD as long as they comply with certain rules. If your company is considering using social media as a regular means of disseminating information covered by this regulation, it is important to construct and implement a social media policy to protect the company from claims of selective disclosure. If your company has an existing policy that covers the use of social media as part of the corporate communication strategy or operation, the policy should be amended to reflect the application and use of social media for purposes of disclosures under Regulation FD. Likewise, any policy governing the disclosure of information covered under the regulation through traditional media outlets should be amended to reflect the addition of social media as an approved method to disseminate information. The following best practices checklist provides a starting point for your company to develop a policy aimed at efficient and effective communication.

I: Adopt or Amend Relevant Policies and Procedures to Contemplate the Use of Social Media

☐ 1. Conduct a cost-benefit analysis to determine whether using social media as a means to communicate information to the investment community will add value or overly burden the company. For example, the company should consider:

The time and effort required to draft and review tweets, blog entries and other posts.

The time and effort required to respond to tweets and comments.

The time and investment required to develop or amend a social media plan to contemplate the use of social media as a communication tool for information covered by Regulation FD.

The time and investment necessary to administer plans, policies and procedures required to comply with the guidance provided by the SEC.

☐2. If you decide to use social media as a communication method to investors and the public, you should carefully consider and address the following issues in any relevant policies and procedures:

Identify which social media outlets your company will use to publicize information covered by Regulation FD and any limitations on the use of certain sites to disclose specific types of information.

Create official corporate media accounts that are easily accessible and do not limit or restrict users (the SEC specifically noted that use of an executive's personal account to disclose information did not qualify as broad-based distribution to the public under Regulation FD without advance notice).

Consider using RSS feeds or other methods to "push" notices to investors when new information is posted to social media sites.

Insert prominent links on the company's website to all social media channels being used and consider inserting links or site identification information in press releases and SEC filings.

Identify who within the company is authorized to utilize social media to disclose information, beginning with those who are authorized under the company's Regulation FD policy.

Define the types of communications that will use social media and any limitations:

- i. We recommend against using social media for proxy solicitations to avoid the appearance of encouraging investors to vote a certain way or present facts or opinions that appear to argue for or against a ballot item.
- ii. We recommend cautious use of social media for any communications concerning a securities offering as any posting is considered a "written communication" within the rules applicable to the Securities Act of 1933.
- iii. Ensure that social media posts are well balanced between positive and negative announcements from the company.

Define content requirements for social media posts, including

- i. Each post should be dated and electronically archived.
- ii. If space is limited (140-character limit for Twitter), provide links to the full context of the communications.
- iii. Require that any forward-looking statement should contain a legend, cross-referenced to risk factors, and cautionary statements identifying factors that could cause actual results to materially differ.
- iv. Ensure that each communication is accurate regardless of its brevity.
- v. Protect against disclosing confidential information, trade secrets, customer or supplier information, and other nonpublic information.
- vi. If links to third-party content are included in the post,
 1. Include a notification that the company is not responsible for the content and neither endorses nor approves it.
 2. Alternatively, establish an intermediary page between the company's social media site and the third party to include this disclaimer.
 3. Include an explanation of why the link is included.

Identify who within the company will be responsible for reviewing communications that will be posted to social media sites.

Consider requiring that the disclosure committee to oversee determinations on the materiality of information and disclosure obligations.

Ensure that the applicable stock exchange rules are followed with respect to advance notice before releasing material, nonpublic information.

Define the review process to ensure compliance with insider trading rules, Regulation FD, and other company policies and procedures applicable to the release of any other company statements or communications.

Require that the individuals responsible for monitoring the company's corporate governance and compliance with securities laws are informed about the use of social media in any company communication.

Define the process through which comments and other responses to the company's social media posts will be reviewed and responded to consistent with the process used to respond to press inquiries.

Include a contingency plan to address inappropriate or inaccurate disclosure and cure process for Regulation FD violations.

Create a process to periodically review all relevant policies and procedures to evaluate recent changes in social media, including risks, vulnerabilities and applicable regulations.

Document the decision-making process about the decision to use social media, the social media sites selected for use and revisions to your disclosure controls and procedures.

☐ 3. Other legal and regulatory considerations:

Determine whether regulatory issues may prohibit your industry from disseminating information about certain subjects or types of content through social media.

Review new policies, procedures, and guidelines for compliance with employment (National Labor Relations Board decisions) and privacy laws.

☐ 4. Conduct training for impacted officers and employees, including investment relations personnel, public relations personnel and third-party contractors, and managers responsible for marketing and social media.

Discuss the risks, complications and limitations imposed by securities and disclosure laws in general and with regard to certain types of social media (e.g., forward-looking statement legends with Twitter's 140- character limit).

Warn against "liking" comments on third-party sites as doing so may lead to informal adoption attribution.

Issue reminders that anti-fraud provisions are applicable to such statements.

Ensure that all communications indicate whether statements are being made on behalf of the company or not.

II: Publicize the Company's Use of Social Media

- ☐1. Post updates to relevant company policies concerning investor communications and other disclosures on the company's website.
- ☐2. Draft or amend existing statements or descriptions concerning investor communications to advise investors on who, what, where, and when information will be posted to social media sites.

Who: Specify that only certain authorized employees may speak on behalf of the company.

What: To the extent known, identify the type of information that will be regularly posted to social media sites (e.g., annual and quarterly reports, press releases, and the investor relations section of the company's website).

Where: Identify social media outlets where the company will post information.

When: Describe the expected timing of any releases on social media sites. For example, inform investors so they have immediate access to the company's earnings report on the designated social media site(s) at the same time that it is released to traditional media outlets.

III. References

Regulation FD – Requires that a company's initial disclosure of material information must be to the public at large and not to select groups or individuals) and related SEC guidance.¹

Company's disclosure controls and procedures.

Rule 10b-5 – The enforcement mechanism used by the SEC and the public against companies that mislead in connection with the purchase or sale of a security).

Regulation G – Provides rules regarding measures that are not generally accepted accounting principles (GAAP) in financial reporting.

JOBS Act rules about communications and offers of securities for qualified emerging-growth companies.

Rules related to the prohibition on general solicitation for certain unregistered offerings such as Regulation D.

Proxy solicitation rules.

Applicable Nasdaq/New York Stock Exchange rules and policies.

Company's insider trading policy.

Company's code of conduct, code of ethics or other applicable governance policies.

Related employment and privacy laws.

¹ In 2008, the SEC provided guidance stating that, under certain circumstances, information posted on a company website can fulfill the public disclosure aspect of Regulation FD, as long as its dissemination is through a "recognized channel of distribution" and "reasonably designed to provide broad, nonexclusionary distribution of the information to the public." Relevant factors include: (1) the type of information disclosed on the social media site; (2) the manner in which the company has informed the public that it uses a specific social media site; (3) whether the information is actually distributed and available to the securities market through the social media site and the extent to which the market reacts to these disclosures; (4) how prominently the information is displayed on the website; (5) whether other means of disclosure are used; and (5) if there is a "reasonable" waiting period for the public to react to the information. The SEC did provide guidance on what it deems "reasonable."

Contact Information

If you have questions about this or any related matter, please contact your Husch Blackwell attorney, Amy Goostree at 816.983.8298 or Jeff Haughey at 303.749.7231.

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