If this e-mail does not display correctly, click here to load it in your browser.

FEBRUARY 2011

Social Media And IR Functions: Heaven-Made Marriage Or Compliance Nightmare?

Today, many of a company's stakeholders, that is, your customers, employees, suppliers, partners and shareholders, get much of their information from online sources. The use, pervasiveness and ubiquity of social media and networks have radically changed the way we communicate.

There is no doubt that marketing and advertising professionals are making effective use of social media. But what of investor relations (IR) departments? Should they adopt social media as a means to achieve corporate communications and required disclosure? Or should they still be weighting the risks and opportunities associated with leveraging the power of social media?

INCREASING USE OF SOCIAL MEDIA

There are many things to consider before adequately integrating blogs and other social media into a corporate disclosure or IR program, least of which is compliance with applicable legislation. This is quite a predicament as the adoption of social media has exploded and continues to be a medium of choice for millions of individuals hungry for instant information. In March 2010, InSites Consulting, *available here*, reported that 72% of Internet users are part of at least one social network (according to InSites Consulting, this translated to 940 million users worldwide).

Following in the footsteps of consumers, large international companies are now becoming active participants in social media. A March 2010 study by Burson-Marsteller, *available here*, found that 79% of the largest 100 companies in the Fortune Global 500 index are using at least one of the social media platforms it reviewed (Twitter, Facebook, YouTube or corporate blogs).

In their 2010 whitepaper, *Public Company Use of Social Media For Investor Relations*, *available here*, Q4 Web Systems, a Toronto-based IR web consultant, reported seeing an increasing number of companies using Twitter

to share previously disclosed information such as news and presentations that link back to associated content on their corporate or IR websites. Q4 Web Systems also saw an increased adoption by public companies of other social networks such as Facebook, blogs, YouTube and SlideShare to post investor-related material, including corporate videos showcasing company assets and CEO/CFO interviews regarding quarterly results, industry-related news, conferences, analyst days and annual meetings.

COMPLIANCE WITH SECURITIES REGULATIONS

Public companies that engage (or want to engage) their constituents through social media must, obviously, do so in a manner that is compliant with existing disclosure rules and obligations under applicable securities legislation. *By way of a reminder, Canadian securities legislation requires timely disclosure of material changes in the affairs of an issuer, which **must** be disclosed by way of a press release describing the changes (followed by the timely filing of a material change report).* Canadian securities legislation also generally prohibits selective disclosure, that is, the disclosure of material non-public information to one or more persons and not broadly to the investing public.

Other than the prescribed manner for disclosing material changes, securities legislation does not generally require a particular method of disclosure. National Policy 51−201 − *Disclosure Standards* (NP 51−201), *available here*, provides guidance on "best disclosure" practices and informs us that a corporate disclosure policy should promote consistent disclosure practices aimed at informative, timely and broadly disseminated disclosure of material information to the market.

Both the Toronto Stock Exchange and the TSX Venture Exchange have adopted policy statements that require the timely disclosure (through an immediate, widely-disseminated news release) of "material information" (which includes both material facts and material changes relating to the business and affairs of a company). The timely disclosure obligations in the exchanges' policies exceed those found in securities legislation.

Interestingly, NP 51−201, which was adopted in 2002 and has not been materially amended since, warned that only posting information to a company's Web site would not likely satisfy the "generally disclosed" requirement. At the time, the Canadian Securities Administrators (CSA) did not consider that investors' access to the Internet was sufficiently widespread and were concerned as to whether a Web site posting alone would be a means of dissemination "calculated to effectively reach the marketplace." One of the then-noted shortcomings of corporate Web sites, was their inability to alert interested parties to new postings as they typically do not "push" information out into the marketplace. Ironically, it is the broadcast nature of social media that may make them so appealing for IR departments. In some ways, social media are indeed the quintessential (and often dreaded) "*Send to All* " button!

In 2008, the United States Securities and Exchange Commission (SEC) released guidance on the use of company websites for providing information to investors, *available here,* and recognized corporate blogs and the posting of information on a company's website as a form of public disclosure. The SEC acknowledged that technological advances allow for greater speed and breadth when delivering reports and news to the investor and the markets. The SEC also accepted that investors are increasingly turning to electronic media, company and third-party websites to read information about current investments and seek out new opportunities.

“NEW-AGE” DISCLOSURE

The increasing number of communications channels available to convey one’s message do not, *per se*, change the underlying principle of NP 51−201 that “the consistent application of “best practices” in the disclosure of material information will enhance a company’s credibility with analysts and investors, contribute to the fairness and efficiency of the capital markets and investor confidence in those markets, and minimize the risk of non-compliance with securities legislation.”

Social media are just additional channels that may be used to communicate with the marketplace. If one uses social media within the spirit of full, fair and non-selective disclosure to make material information about a public company as widely available as possible, then there should not be any compliance problem. In this context, *it’s not a case of either/or, but of “and.”*

The CSAs encourage consistency in a company’s disclosure practices. The use of social media should not constitute a sudden change from your current and usual method of generally disclosing material information. In our view, the well thought out use of social media should complement a company’s existing traditional corporate disclosure mechanisms. The tools may be different but the underlying principles remain the same.

Under NP 51−201, a corporate disclosure policy should generally include a number of consideration and should specifically deal with the use of electronic media and corporate Web site. Accordingly, and to some extent it goes without saying, the first step in creating a “social media policy” is reviewing your existing corporate disclosure policy with a view of updating it, if necessary.

There are a number of considerations in adopting or integrating social media as a means of corporate communications. By all means, the following is not meant to be an exhaustive list, but rather a reminder of some of the things to consider in connection with the implementation of the social media component of a corporate disclosure policy. Just as each existing corporate disclosure policy is germane to the relevant company, there is no single blueprint or set of guidelines on integrating social media into an IR program.

Third-Party Content

As a whole, social media make linking or republishing third-party content a relatively simple task. In devising a “new age” corporate disclosure policy, companies should specifically consider whether linking to, or republication of, third-party content on a corporate social media account should be permitted.

Just as a company that redistributes an analyst’s report to people outside the company risks being seen as endorsing that report, linking or republishing might be construed as an endorsement. Care must also be taken to ensure that all reports, negative as well as positive ones, are in fact linked. Moreover, the very nature of how one interacts on social media brings about a need to adequately consider the social media’s own types of implied or explicit endorsement for third-party content. On Facebook, one can “like” another user’s comment or post. This seemingly mundane gesture could be construed as the company endorsing the third-party user’s entire statements. The same could be thought of the very normal and common activity of “re-tweeting” (forwarding) messages on Twitter.

This is in-line with draft guidance published on February 7, 2011 by the self-regulatory Investment Industry Regulatory Organization of Canada (IIROC), *available here*. While the IIROC guidance is specific to investment dealers and their employees, it could influence how securities regulators view the same activities by public companies on their social media accounts.

Missing Disclaimers

The very nature of communications on most social media will, most certainly, lead to the inconsistent use (if not universal absence) of disclaimers about forward-looking information and non-GAAP financial measures, for example, that accompany your current corporate communications.

For example, Twitter's 140-character limit for messages makes it virtually impossible to include disclaimers with every tweet. This, of course creates a compliance nightmare. Several workarounds have been designed to apply disclaimers to communications on Twitter (see this *article* by Mike Reilly relating how eBay's lawyers devised a disclosure policy to ease worries about live tweeting of company events). Unfortunately, these workarounds do not ensure compliance since people can access a companies' tweets without ever seeing the relevant disclaimers or having direct access to them.

Synchronization of Information

Invitations to follow a company on a social network often come with an expectation that the company will keep its followers informed of important news in a timely manner. This is particularly true of companies who position their social media accounts as channels through which investors can receive timely updates.

One of the very real potential downsides in increasing the number of available channels to communicate with the investment community is poor synchronization of information distribution. Having several channels means (and requires) that they be managed concurrently. The information should (and must) be made available through all of the company's communication channels at the same time. Companies must also take steps to ensure that their activities on one network are syndicated to followers on other networks and to their corporate websites, thereby ensuring concurrent full channel synchronization.

Selective Disclosure

The obvious immediate use of social media is as a complement to an existing disclosure procedure, that is, to "push" information about a company or its affairs to the investment community.

However, it may very well be that increasing use of social media by companies will lead to an "uncontrollable" urge by IR departments to reply to individual messages received on Twitter, for example. One obvious benefit is when a question is posted by an investor publicly, everyone in the company's social media "room" has access to the answer. The pitfall, however, is the potential disclosure in one forum while not disclosing the information generally, or even the disclosure to a single person as opposed to all.

Establish a Central Hub for Documents

Whether or not social media are added to a company's communication tool chest, it should establish a hub that sets out all available sources or media to receive company information as it's made public. For example, such a central repository could identify all the press release services employed by the company, provide a directory of relevant blogs with URLs (uniform resources locators) and RSS (most commonly expanded as Really Simple Syndication) Feeds, list all of the relevant social network profiles of the company, share podcast links, and link to a traditional or social media newsroom if he hub is not already the directory where all of this information resides.

Training

Any change to a company's disclosure policy or procedure is likely to bring about its fair share of training for managers and employees. This is particularly true with respect to changes brought about by adopting social media policies. Establishing the proper corporate communications reflexes is sometimes a daunting task as it is, let alone if one is to manage public communications in dynamic environments such as social media.

Adding social media to the tools used by a company will also likely cause the company to have to reinforce the application of its disclosure policies to blogging or the use of social media by individuals associated with the company on a personal level.

SO WHICH IS IT: HEAVEN-MADE MARRIAGE OR COMPLIANCE NIGHTMARE?

Clearly, social media can be powerful additions to existing investor and public relations programs. Social media are definitely not a fad and are here to stay. Companies and their IR officers are presently at a crossroad: they can be trailblazers and take the proverbial quantum leap to engage their investors online through social media or they can continue to use traditional IR practices (some will say at the risk of playing catch up once the use of social media truly explodes).

When was the last time you received something by fax? Yet, it was not so long ago that telecopiers replaced telexes as a means of communication. Today, e-mails and portable documents format (*pdf)* have pretty much sent the telecopier the way of the dodo.

It will be interesting to watch, as more companies adopt social media tools to connect with their constituents in dramatically new ways, whether the securities regulatory authorities will refine and tailor their guidelines to evolve with the "new age" corporate disclosures.

For the record, at this time, each of the Ontario Securities Commission, the Alberta Securities Commission, the New Brunswick Securities Commission, the British Columbia Securities Commission and the Nova Scotia Securities Commission are on Twitter and can be respectively followed at @OSC_News, @ASCUpdates, @NBSecuritiesCom, @BCSCInvestRight and @B4UInvest.

NEED ASSISTANCE?

Thinking about social media for your IR Needs? Not sure how to align social media and your existing IR program? We can help. Heenan Blaikie has considerable experience in helping public companies design and implement

corporate disclosure policies that foster effective and efficient disclosure of material information to the investment community. If you have any questions on the subjects addressed in this Securities E-News, please feel free to contact your usual Heenan Blaikie contact or any member of our Securities Group.

The Securities E-News is published by Heenan Blaikie LLP. The articles and comments contained herewith provide general information only. They should not be regarded or relied upon as legal advice or opinions. Heenan Blaikie LLP would be pleased to provide more information on matters of interest to our readers. © 2011, Heenan Blaikie LLP

Montreal
1250 René-Lévesque Blvd. West
Suite 2500
Montreal, Quebec
H3B 4Y1
T 514 846.1212
F 514 846.3427

Toronto
Bay Adelaide Centre
P.O. Box 2900
333 Bay Street, Suite 2900
Toronto, Ontario M5H 2T4
T 416 360.6336
F 416 360.8425

Vancouver
1055 West Hastings Street
Suite 2200
Vancouver, British Columbia
V6E 2E9
T 604 669.0011
F 604 669.5101

Québec
900, boul. René-Lévesque Est
Bureau 600
Québec (Québec)
G1R 2B5
T 418 524.5131
F 418 524.1717

Calgary
12th Floor, Fifth Avenue Place
425 - 1st Street SW
Calgary, Alberta
T2P 3L8
T 403 232.8223
F 403 234.7987

Sherbrooke
455, rue King Ouest
Bureau 210
Sherbrooke (Québec)
J1H 6E9
T 819 346.5058
F 819 346.5007

Ottawa
55 Metcalfe Street
Suite 300
Ottawa, Ontario
K1P 6L5
T 613 236.1668
F 613 236.9632

Trois-Rivières
1500, rue Royale
Bureau 360
Trois-Rivières (Québec)
G9A 6E6
T 819 373.7000
F 819 373.0943

Victoria
737 Yates Street
Suite 514
Victoria, British Columbia
V8W 1L6
T 250 381.9321
F 250 381.7023

Paris
7, place d'Iéna
Paris 75116
France
T +33 1 40 69 26 50
F +33 1 40 69 26 99

Singapore
Representative Office
80 Anson Road, Suite 28-03
Fuji Xerox Tower
Singapore 079907
T 65 6221 3590
F 65 6887 4394

Lawyers I Patent & Trade-mark Agents • Montreal Toronto Vancouver Québec Calgary Sherbrooke Ottawa Trois-Rivières Victoria Paris Singapore • heenanblaikie.com

Our Website

Unsubscribe