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# APPLYING CANADIAN SECURITIES LAWS TO SOCIAL MEDIA

## A Square Peg in a Round Hole (OWTTE[1])

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IOO[2] the time has come for Canadian securities regulators and stock exchanges to revisit the application of securities laws and policies to the use of electronic communications for the disclosure of material information. Existing regulatory guidance concerning the ability of issuers to use their company web sites to disseminate material information is SRSLY[3] dated and in need of modernization, as the use of social media, now such a large part of the dissemination of information globally, is largely unaddressed. Consideration should be given to providing specific guidance on the use of social media platforms for purposes of meeting (or at least not violating) public disclosure requirements.

ICYMI,[4] currently, the general principles governing the disclosure of material information, including through electronic communications, are described in National Policy 51-201 – *Disclosure Standards* (NP 51-201) and, for Toronto Stock Exchange (TSX)-listed companies, the TSX's *Electronic Communications Disclosure Guidelines* (TSX Guidelines), both of which were first published over a decade ago and have only been updated with limited incremental changes since that time.

### What's the Big Deal?

In its *35th Quarterly C-Suite Survey* (Gandalf Group Survey), the Gandalf Group found that 51 per cent of the companies surveyed had a corporate Twitter account, 43 per cent had a Facebook page, 41 per cent had a LinkedIn page and 21 per cent had an official blog. Fifty-seven per cent of respondents said that social media either greatly or somewhat helped to support investor relations. One-third of companies interviewed had a specific budget for social media. Clearly, social media has become a part of the corporate world.

Social media provides an easy and cost-effective way to connect with investors around the world in real time. Evidence suggests this is particularly advantageous for smaller issuers. A 2014 study by professors from Stanford University and the University of Michigan[5] tracked whether technology companies tweeting a link to an original corporate announcement impacted their stock price spread (i.e., the price at which sellers are willing to sell versus the price at which buyers are offering to buy). The study found that for highly visible firms, there was no impact. However, for firms that are not highly visible, dissemination of news via Twitter reduced the bid-ask spread on their stock, consistent with a reduction in information asymmetry, making the stock more liquid and easier to trade.

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1 Or Words To That Effect
2 In Our Opinion. This paragraph expresses the personal views of the individual authors.
3 Seriously
4 In Case You Missed It
5 Elizabeth Blankespoor, Gregory S. Miller & Hal D. White, "The Role of Dissemination in Market Liquidity: Evidence from Firms' Use of Twitter" (2014) 89 *The Accounting Review* 79.

Personal usage of social media can also create disclosure headaches for issuers. Of the executives surveyed in the Gandalf Group Survey, 53 per cent had a personal LinkedIn account, 38 per cent had a Facebook account, 25 per cent had a Twitter account and three per cent had a blog. You can be sure that the results for younger, more junior employees are much higher.

References to social media usage have begun to appear in rules and policies of Canadian securities regulators,[6] but there has been no definitive guidance provided to issuers regarding the use of social media from a disclosure compliance perspective. In particular, Canada is behind developments in the United States that are permissive of using websites and social media as platforms for the dissemination of corporate information.

## Regulatory Regime in the United States, FYI[7]

Recent (and not so recent) developments in the U.S. concerning the approach to regulation by the Securities and Exchange Commission (SEC) regarding the dissemination of material information through websites and social media outlets may provide an indication of potential future regulatory approaches in Canada, but for now it is important to recognize the differences between the regimes currently applicable on each side of the border.

**2000**

In 2000, the SEC adopted Regulation Fair Disclosure (Reg FD) to address concerns regarding the selective disclosure of material non-public information by public issuers, particularly to analysts and favoured investors. Reg FD generally requires U.S. issuers that disclose material non-public information to securities market professionals to also simultaneously make "public disclosure" of the information. To comply with the principles in Reg FD, a U.S. issuer's disclosure may be made by filing or furnishing a Form 8-K with the SEC or "if it instead disseminates the information through another method (or combination of methods) that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public".

**2008**

In August 2008, the SEC issued the Commission Guidance on the Use of Company Web Sites (2008 SEC Guidance), which clarified that a company makes "public disclosure" when it distributes information "through a recognized channel of distribution", which may include a company website.

**2013**

In April 2013, the SEC released a report of investigation,[8] which explained that, consistent with the 2008 SEC Guidance, U.S. issuers can use social media outlets to announce key information in compliance with Reg FD, provided that investors have been previously alerted to which social media will be used to disseminate such information and access to the social media outlet is not restricted.

**2014**

In 2014, the SEC provided further guidance in the form of a question and answer release intended "to facilitate the use of social media for certain communications" which generally permits U.S. issuers making disclosure via social media to satisfy general requirements to include certain prescribed legends by using an active hyperlink to a document with the required legends.

6 See CSA Multilateral Staff Notice 51-336 *Issuers Using Mass Advertising*, CSA Staff Notice 31-325 *Marketing Practices of Portfolio Managers* and the recently proposed new prospectus exemptions in Ontario relating to distributions to family, friends and business associates and crowdfunding.

7 For Your Information

8 The report stemmed from an inquiry by the Division of Enforcement into a post by the Chief Executive Officer of Netflix, Inc. on his personal Facebook page indicating that Netflix's monthly online viewing had exceeded one billion hours for the first time.

## Regulatory Regime in Canada

*Prohibition of Selective Disclosure*

Securities legislation in Canada generally prohibits a reporting issuer and any "person or company in a special relationship with a reporting issuer"[9] from informing, other than in the "necessary course of business,"[10] anyone of a "material fact"[11] or a "material change"[12] before the information has been "generally disclosed" (i.e., the information has been disseminated in a manner calculated to effectively reach the marketplace and public investors have been given a reasonable amount of time to analyze the information)[13].

As securities legislation does not require a particular method of disclosure to satisfy the "generally disclosed" standard, it would seem plausible for certain uses of social media to meet the standard. However, while Canadian regulators have not expressly addressed social media in this context, they have, in NP 51-201, made specific statements that the use of websites will not meet the "generally disclosed" standard (largely predicated on a view that the Internet is not widely accessible),[14] which, by extension, effectively prohibits the use of social media to satisfy continuous disclosure obligations. The TSX Guidelines take a similar approach.

Currently, to be "generally disclosed," material information must be communicated through a news release distributed through a widely circulated news or wire service and/or press conference or conference call that interested members of the public may attend or listen to either in person, by telephone or by other electronic transmission (including the Internet), so long as the public has been provided with sufficient prior notice, by way of a news release, of the date and time of the press conference or conference call, as well as access instructions, a general description of what is to be discussed, and an indication of how long the issuer will make a transcript or replay of the press conference or conference call available on its website. Within the allowance for press conferences or conference calls, one can see the potential for a more U.S.-style approach to permitting issuers to employ widely accessible social media for the purpose of disclosing material information, subject to prior notice to the investing public of the platforms to be used. However, Canadian securities laws are not there yet.

*Social Media as a Supplemental Communications Channel*

While not specifically targeted at social media communications, the guidance set out in NP 51-201 and the TSX Guidelines can be used as a framework for compliant disclosure on social media platforms. Accordingly, Canadian reporting issuers can use social media to supplement, but not replace, traditional channels of disclosure, provided that existing regulatory guidance is adhered to.

9 For example, see Section 76(5) of the *Securities Act* (Ontario) (OSA).

10 See Section 3.3 of NP 51-201.

11 Pursuant to Section 1(1) of the OSA, "material fact," when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

12 Pursuant to Section 1(1) of the OSA, "material change," when used in relation to an issuer other than an investment fund, means, (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or (ii) a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable.

13 See Section 3.5 of NP 51-201.

14 For example, NP 51-201 notes: "Posting information to a company's Web site will not, by itself, be likely to satisfy the 'generally disclosed' requirement. Investors' access to the Internet is not yet sufficiently widespread such that a Web site posting alone would be a means of dissemination 'calculated to effectively reach the marketplace.' . . . As technology evolves and as more investors gain access to the Internet, it may be that postings to certain companies' Web sites alone could satisfy the 'generally disclosed' requirement. At such time, we will revisit this policy statement and reconsider the guidance provided on this issue."

## 10 Best Practices to Follow When Using Social Media to Disseminate Corporate Information

1 **Delay social media communications**

Supplemental communications channels (i.e., social media) cannot be used until the information has been "generally disclosed" using traditional means. For disseminated information to qualify as generally disclosed, public investors must have been given a reasonable amount of time to analyze the information. This requirement is intended to ensure that the market price of an issuer's securities has a sufficient opportunity to reflect the information disclosed by traditional means prior to a supplemental method of communication that might not have as broad an audience being employed to repeat the information and thereby potentially favouring certain investors. The length of the delay will depend on a number of factors including the nature and complexity of the information and the nature of the market for the company's securities.

2 **Include all material information disclosed**

Providing incomplete information or omitting a material fact risks a social media communication being misleading. Accordingly, disclosures made by traditional means should be included in their entirety when communicated using social media. However, if this is impractical for a particular disclosure or social medium (for example, due to character limits), a link to the full disclosure should be included as part of the social media disclosure and care must be taken to ensure that a communicated excerpt is not misleading when read on its own. For example, it could be misleading to use social media to highlight positive disclosure from a news release, such as current quarter earnings guidance being met without also noting material negative developments from the same news release, such as the lowering of previously issued earnings guidance regarding future periods.

3 **Present information in a consistent manner**

Investor relations information that is disclosed through social media should be presented in the same manner as it is through traditional means. Important information should be displayed with the same prominence and a single offline communication should not be divided into a series of shorter communications if the result obscures or buries unfavourable information or alters the import of the information. If a disclosure is divided, a link to the full disclosure should be provided.

4 **Treat favourable and unfavourable information consistently**

Issuers should be consistent in their approach to social media communications. For example, if company practice is to supplement earnings pre-release news release announcements with social media communications, the practice should be followed even when the earnings are disappointing.

5 **Do not be overly promotional**

Investor relations information that is disclosed through social media should be viewed as an extension of an issuer's formal corporate disclosure record and not merely as a promotional tool. For example, social media should not be used for the specific purpose of promoting trading or interest in an issuer's securities (for example, by prominently featuring the issuer's stock trading symbol).

6 **Keep a record of social media disclosures**

It is important for issuers to have a record of social media disclosures to ensure that any updates or corrections can be identified and made when necessary. The social media disclosure record should also be regularly reviewed to determine whether any unintentional selective disclosure has occurred.

7 **Do not use social media as an alternative to prescribed filing and disclosure requirements**

Where securities laws or stock exchange policies provide for a particular method of disclosure, social media communications are not a permitted alternative. Similar to NP 51-201, the TSX Guidelines provide that, despite the modern developments in the way members of the investing community communicate, traditional methods are still required for purposes of disclosing "material information"[15]

15 Pursuant to Section 407 of the TSX Company Manual, "Material information is any information relating to the business and affairs of a company that results in or would reasonably be expected to result in a significant change in the market price or value of any of the company's listed securities. Material information consists of both material facts and material changes relating to the business and affairs of a listed company."

in compliance with TSX requirements.[16] Further, Canadian legal requirements provide that upon certain occurrences, such as a material change, issuers must issue and file a news release.

8 **Consider requirements applicable to specific statements within social media communications**

Issuers should ensure that the content of social media communications complies with any applicable requirements relating to specific types of statements, such as: (1) non-GAAP financial measures (for example, including prescribed and cautionary language and ensuring that non-GAAP financial measures are not being disclosed on an overly prominent basis relative to measures from the issuer's financial statements); (2) forward-looking information (for example, including prescribed and cautionary language or, if such a practice enables a reader to readily inform himself or herself of such matters, incorporating by reference the required disclosure regarding the material risk factors and assumptions); (3) mineral project disclosures (for example, identifying the "qualified person" who reviewed the disclosure and cross-referencing any applicable technical report); and (4) oil and gas disclosures (for example, including certain proximate prescribed and cautionary language or, in some cases, a reference to the title and date of a previously filed document containing such disclosure).

9 **Avoid "gun-jumping" or other prohibited disclosures during a prospectus offering**

As regulators do not want issuers conditioning the market for pending securities sales, the only written information that can be disseminated to potential investors during the "waiting period"[17] is the preliminary prospectus, a "prospectus notice,"[18] "standard term sheets,"[19] "marketing materials"[20] and ordinary course, factual disclosures concerning an issuer's products and services. During the waiting period, issuers themselves are not permitted to distribute standard term sheets and marketing materials (only investment dealers are permitted to do so) and issuers should not use social media to distribute a preliminary prospectus or prospectus notice. However, careful use of social media to distribute ordinary course, factual press releases concerning an issuer's products and services can be continued throughout the waiting period provided such disclosures have historically been routinely made by the issuer.

10 **Avoid soliciting proxies before a management proxy circular has been filed**

Canadian corporate and securities laws generally prohibit management of an issuer from soliciting proxies for a shareholder meeting unless a management proxy circular has been filed with securities regulators.[21] If an issuer has not yet filed its circular, the issuer must refrain from making statements on social media that could objectively be regarded as being likely to result in the giving, withholding or revocation of a proxy. This concern is particularly acute if a dissident shareholder has launched a campaign targeting the issuer and is making inflammatory public statements soliciting proxies in accordance with applicable law before the issuer has filed its own proxy circular. In a rush to counter the dissident's statements, the issuer or its employees may inadvertently breach soliciting prohibitions.

16 For example: "Disclosure of information by an issuer through its web site or e-mail will not satisfy the issuer's disclosure obligations. The corporation must continue to use traditional means of dissemination. . . . Electronic communications do not reach all investors. . . . An issuer must not post a material news release on a web site or distribute it by e-mail or otherwise on the Internet before it has been disseminated on a news wire service in accordance with TSX Timely Disclosure Policy."

17 Pursuant to Section 65(1) of the OSA, the "waiting period" is the period between issuance of a regulatory receipt for a preliminary prospectus and issuance of a regulatory receipt for a final prospectus in respect of an offering of securities.

18 Pursuant to Section 65(2)(a) of the OSA, a "prospectus notice" is a notice, circular, advertisement or letter distributed to, or any other communication with, any person or company identifying the security proposed to be issued, stating the price thereof, if then determined, the name and address of a person or company from whom purchases of the security may be made and containing such further information as may be permitted or required by the regulations, if every such notice, circular, advertisement, letter or other communication states the name and address of a person or company from whom a preliminary prospectus may be obtained.

19 Pursuant to Section 1.1 of the National Instrument 41-101 *General Prospectus Requirements* (NI 41-101), "standard term sheet" means a written communication intended for potential investors regarding a distribution of securities under a prospectus which is comprised of disclosure that fits into specified limited categories of permitted information, but does not include a prospectus notice.

20 Pursuant to Section 1.1 of the NI 41-101, "marketing material" means a written communication intended for potential investors regarding a distribution of securities under a prospectus that contains material facts relating to an issuer, securities or an offering but does not include a prospectus or any amendment, a standard term sheet and a prospectus notice.

21 For example, see Section 150 of the *Canada Business Corporations Act* and Section 9.1 of National Instrument 51-102 *Continuous Disclosure Obligations*.

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*Mitigating Risks*

To mitigate the securities law risks presented by the use of social media, issuers should:

- Adopt a general Disclosure Policy[22] that, among other things:
  - informs employees of disclosure-related requirements under Canadian securities laws
  - establishes policies for disclosure of material information
  - appoints limited company spokespeople and prohibits speaking on behalf of the company without authorization
- Adopt a Social Media Policy that, among other things:
  - explains the issuer's approach to social media
  - reminds employees that professional and personal use may affect the issuer
  - prohibits the violation of laws and company policies
  - warns of consequences (i.e., disciplinary action)
- Pre-approve social media channels and content parameters
- Provide notice within press releases and on the company website regarding social media channels used by issuer
- Provide unrestricted viewing access of social media channels by the Canadian public.

TAFN,[23] but hopefully this is not the EOD.[24] TTYL![25]

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22 Canadian securities regulators have noted that in selective disclosure enforcement proceedings they may consider whether and to what extent a company has implemented, maintained and followed reasonable policies and procedures to prevent contraventions of the selective disclosure provisions.

23 That's All For Now

24 End Of Discussion

25 Talk To You Later

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