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To Tweet Or Not To Tweet? Lessons In Careful Use Of Social Media

We live in a social media age where even foreign policy is announced via Twitter with ease and speed. But recent events serve as a reminder to public companies that the federal securities laws operate as an important limitation on the use of social media and that public companies should carefully review their social media policies to avoid costly pitfalls.

On August 7, 2018, Elon Musk, the founder and CEO of Tesla, Inc., announced via Twitter that he was "considering" taking Tesla private and had secured funding to do so.[1] The surprise announcement threw the market into a frenzy of speculation about the trajectory of the company and led to 17 days of volatile trading for Tesla stock. Late in the day on Friday, August 24, 2018, Musk tweeted that Tesla was "staying public" and linked to a blog post he authored with greater detail on the decision.[2]

The initial tweet unleashed a firestorm of media coverage, and analysts, investors, and Tesla employees pressed Musk and the company for greater detail on a daily basis about the prospect and potential consequences of going private. A prominent public figure, Musk has over 22.4 million Twitter followers and is no stranger to everyday media scrutiny. In just weeks after Musk's Twitter remarks in August, on September 27, 2018, the Securities Exchange Commission (SEC) charged Musk with securities fraud, characterizing his tweets as "materially false and misleading."[3] Two days later, the SEC announced a settlement with Musk and Tesla, in which without admitting or denying the SEC's allegations, Musk agreed to pay a $20 million fine and step down as Chairman of Tesla's board of directors within 45 days.[4] That same day, the SEC brought charges against Tesla for failing to have required disclosure controls and procedures relating to Musk's tweets despite its notification to the market that it intended to use Musk's account to announce material information.[5] Tesla agreed to pay an additional $20 million fine and to implement certain corporate governance measures.[6] The settlement was approved by U.S. District Court Judge Alison Nathan on October 16, 2018.[7]

The possibility of going private is an indisputably material event for a public company, and securities law experts were quick to confirm that Musk's statement on August 7, 2018 "'could be seen as manipulation' of Tesla's share price".[8] Indeed, the SEC's quick enforcement action only underscores the significance of these types of disclosures. It's clear that in the eyes of a regulator or prosecutor, social media posts will be treated the same as more traditional public disclosures like press releases and securities filings.

Though there has been limited guidance from regulators on the use of social media by non-regulated public companies,[9] and what does exist has not been updated to address the prevalence of social media use in today's business environment, we can still develop useful guidance within the existing regulatory framework. In a world where one person can reach an audience of millions at any time of day or night with the same ease as sending an email or a text message from one's mobile phone, companies must develop controls and adhere to best practices for use of social media to insulate themselves from potential liability.

SOCIAL MEDIA USE BY PUBLIC COMPANIES

At present, companies' use of social media is virtually universal. Studies tracking social media adoption among the Fortune 500 emerged beginning in 2008, with a focus on corporate blogging. The most widely cited study, from the University of Massachusetts – Dartmouth, has published annual statistics every year since 2008, with analysis considering corporate blogging plus usage of Twitter and Facebook, two popular mainstays in social media, as well as other popular social media platforms and tools including Google+, Instagram, YouTube, Pinterest, and for the first time in 2017, Snapchat.[10] In addition, the study includes business networking platforms (LinkedIn) as well as indicators of engagement such as the number of Twitter followers and Facebook "likes."[11] Tellingly, there are only three companies of the 2017 Fortune 500 with no active social media presence at all.[12]

LinkedIn remains the number one most used social networking site for the 2017 Fortune 500 since 2014 (the year the study began recording LinkedIn usage), currently at 98%.[13] In addition, four hundred and thirty-eight companies (88%) in the 2017 Fortune 500 have active corporate Twitter accounts, and four hundred and twenty-three (85%) have Facebook pages.[14] The undeniable level of engagement on these platforms begs the question: from a regulatory perspective, what is permissible to post, and what is, conversely, likely to draw the (unwelcome) attention of the SEC?

REGULATION FD & SOCIAL MEDIA DISCLOSURES

The SEC adopted Regulation FD (for "fair disclosure") in 2000 to prevent selective disclosure of material information by public companies. Regulation FD is not itself a disclosure regime and does not provide a substitute method for regular company filings required under the Securities Exchange Act of 1934 (Exchange Act)—rather, it was adopted to ensure that material nonpublic information disseminated to individuals who may trade on that information is simultaneously made public (or, in cases of inadvertent disclosure, promptly made public after the initial disclosure).[15] Regulation FD prohibits certain conduct that would amount to selective disclosure and provides guidance on the appropriate way to effect full disclosure and requires that the "public disclosure" be effected by filing a Form 8-K or by "another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public."[16] The SEC has stated that Regulation FD "does not require use of a particular method, or establish a 'one size fits all' standard for disclosure."[17]

In 2008, the SEC issued Guidance on the Use of Company Websites (the "2008 Guidance"), to clarify that company websites can be an appropriate forum for disclosures under certain circumstances, consistent with Regulation FD.[18] Per the 2008 Guidance, to determine whether information posted to a company website is sufficiently "public," companies must consider "whether and when: (1) a company web site is a recognized channel of distribution, (2) posting of information on a company web site disseminates the information in a manner making it available to the securities

marketplace in general, and (3) there has been a reasonable waiting period for investors and the market to react to the posted information."[19]

At the time, the 2008 Guidance did not expressly apply to social media. The question of whether social media presents an appropriate forum for company announcements in the eyes of the SEC most prominently arose when Reed Hastings, Chairman & CEO of Netflix, posted new information pertinent to Netflix investors on his personal Facebook page on July 3, 2012. Hastings wrote, "Congrats to Ted Sarandos [Netflix's Chief Content Officer], and his amazing content licensing team. Netflix monthly viewing exceeded 1 billion hours for the first time ever in June. When House of Cards and Arrested Development debut, we'll blow these records away. Keep going, Ted, we need even more!"[20] The revelation represented a 50% increase in streaming hours from Netflix's January 25, 2012 announcement that it had streamed 2 billion hours over the preceding three-month period.[21] At the time, Hastings' Facebook page had approximately 200,000 followers.[22] The disclosure caused Netflix's shares to rise 13%, with momentum gaining throughout the trading day in the hours after his post.[23]

Hastings' July 2012 post prompted an SEC investigation into the adequacy of the disclosure, resulting in the SEC issuing a Section 21(a) Report of Investigation, providing guidance on the application of Regulation FD to social media disclosures, and expressly extending the 2008 Guidance to the realm of social networking content.[24] The Netflix 21(a) Report made clear that social media is a permissible outlet for company announcements, as long as investors have adequate access and notice.[25]

The Section 21(a) Report confirmed that the SEC will use a facts and circumstances analysis to determine whether an announcement made on social networking sites satisfies Regulation FD. In addition, the Section 21(a) Report confirmed that any social media platform can serve as an effective, legal method by which to broadly disseminate material information to shareholders, so long as the company provides investors unrestricted access to the information, and provides shareholders with advance notice that the social media platform will be used for that purpose.[26]

Tweets or Facebook posts from a company's CEO or founder with a broad base of millions of followers are unlikely to present a Regulation FD issue where the company has given shareholders advance notice that those channels or accounts are likely to provide additional information on the company. That said, the Section 21(a) Report provides guidance that is highly relevant for companies with less prominent leadership or with actively engaged lower-level management who may take to their own, person social media channels to talk about company matters. Companies should set up a practical and enforceable social media policy that proactively defines acceptable use, thereby minimizing the many risks associated with employee use of social media.

TRUTHFULNESS IN SOCIAL MEDIA DISCLOSURES & ANTI-FRAUD LIABILITY

Even if the method of dissemination of information via social media is not problematic under Regulation FD, what about the content? Even in brief, offhand remarks, public companies and their spokespersons have an ongoing obligation to be truthful and complete in their disclosures. Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder prohibit companies from making any untrue statement of material fact, or failing to state a material fact necessary to make a statement not misleading.[27] Rule 10b-5 applies to all corporate communications, social media being no exception.

Notably, in evaluating a social media statement for 10b-5 liability, the SEC need not show intent to defraud—recklessness will also satisfy the liability standard.[28] If a company's leader, authorized under Regulation FD to make disclosures, was nonetheless reckless in making statements that were misleading or incomplete, she may be exposed to liability. The gravity of this is no more apparent than in the Musk SEC matter, where the SEC charged Musk with violations of Section 10(b) and Rule 10b-5 for knowingly or recklessly making materially false and misleading statements on his Twitter account.

The greatest challenge in avoiding potential 10b-5 liability is the capacity for real-time communication afforded by social media platforms. Tweets and status updates are limited in length and method of presentation, in contrast to formally filed SEC disclosures with dense, carefully worded language. Statements made by officers and directors of a company are attributable to the company, and may lack the typical oversight and review of a corporate filing. It can be challenging to give the appropriate context to a Twitter announcement or disclosure that would be necessary to ensure it is not misleading and does not open the company to liability. The same 10b-5 issues may plague companies where lower level employees are able to make potentially material statements in posts to the company's Facebook page, without understanding or taking the time to consider the consequences.

Social media posts linking to third-party content may also form a basis for liability. The 2008 Guidance made clear that "a company can be held liable for third-party information to which it hyperlinks from its web site and which could be attributable to the company."[29] Whether third-party information is attributable can hinge on whether the company has "explicitly or implicitly endorsed or approved the information."[30] The risk of implicit endorsement runs high where social media posts from the company's own accounts, or the accounts of its senior leadership, provide hyperlinks to such external content.

DISCLOSURE CONTROLS & PROCEDURES

As a result of the Sarbanes-Oxley Act of 2002, public companies are responsible for establishing, maintaining, and implementing disclosure controls and procedures, and the chief executive officer and chief financial officer must include certifications on these disclosure controls and procedures with every annual and quarterly report filed with the SEC.[31] Exchange Act Rules 13a–15(e) and 15d–15(e) define "disclosure controls and procedures" as those controls and procedures designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is: (1) "recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms," and (2) "accumulated and communicated to the company's management . . . as appropriate to allow timely decisions regarding required disclosure."[32]

Annual and quarterly reports must also include disclosure regarding the CEO and CFO's conclusions regarding the effectiveness of disclosure controls and procedures. The legislative purpose behind requiring disclosure controls and procedures was to enhance investor confidence in the quality and reliability of a company's periodic reports by prompting CEOs and CFOs to take a more proactive role in the processes for public disclosures of financial and other information. The more proactive role is forced by mandates that they assume individual responsibility for the accuracy and completeness of periodic report disclosures.

In its 2008 Guidance, the SEC underscored that "[p]ostings on a company's website also may implicate Exchange Act rules governing certification requirements relating to disclosure controls and procedures."[33] In addition to the charges against Musk individually, the SEC's settlement of the Tesla inquiry also included a charge that Tesla had no disclosure controls or procedures in place to determine whether Musk's tweets contained information required to be included in Tesla's SEC filings and did not have sufficient processes in place to ensure that Musk's tweets were accurate or complete.[34]

The importance attached by the SEC to disclosure controls and procedures is further reflected in another case brought earlier this year against Altaba (f/d/b/a Yahoo! Inc.) in which that company settled charges that it violated Section 17(a)(2) and (a)(3) as well as the disclosure controls provisions of the Exchange Act in connection with its failure to disclose a material data breach for nearly two years.[35] The company paid a $35 million penalty to resolve these charges, also ranking as one of the largest penalties over the past year.[36]

The Altaba case followed shortly after the SEC issued its Commission Statement and Guidance on Public Company Cybersecurity Disclosures on February 21, 2018 which included a strong reminder about the importance of robust and inclusive disclosure controls and procedures.[37]

Social media posts must be subject to the same disclosure controls and procedures as other company communications.

AVOIDING PITFALLS – PRACTICAL GUIDANCE

In avoiding the regulatory landmines of social media content, the first step should be to develop a robust internal social media policy for the company that takes into account not just the federal securities law, but employment, labor, privacy, data protection, and other relevant laws as well. Consistent with these legal requirements, and subject to their limitations, an internal social media policy should:

- Clearly state what types of speech are permitted and prohibited by employees, whether made on behalf of the company or in their personal capacity. Employees should be warned against using company e-mail addresses to register or post on personal social media networks, and should limit personal social media use while at work. Companies may want to consider barring access to social media sites at work, except for those employees expressly charged with using or monitoring social media.
- Contain clear consequences for violating the policy. The policy should require adherence to, and be linked to, the company's code of ethics or conduct, including prohibiting disclosure of any nonpublic information via social network posts, and should expose employees to the same range of consequences as other violations of the code.
- Clearly define who is permitted to post on behalf of the company and establish a process for review and approval of social media postings.
- Encourage use of a disclaimer for any unofficial posts made by company employees in their personal capacity that relate or refer to the company (e.g., "I am an employee of [COMPANY]. My statements and opinions on this site are my own and do not necessarily represent those of [COMPANY]."). Moreover, management and executives should bear in mind that, even with an appropriate disclaimer, their statements could still be construed by the public as speaking on behalf of the company, and they should therefore use extra care in crafting social media posts.
- Consider requiring all social media posts to provide a link to a more fulsome disclosure to provide appropriate context. In traditional, formal disclosures such as a Form 8-K or press release, context is easier to establish, because there would never be a single sentence in isolation—unlike what we see on a daily basis with Twitter or Facebook updates. With that in mind, investors and the observing public will have better access to context if short tweets or posts are accompanied by a link to a press release, corporate filing, or even a company blog post.
- Address the pitfalls of re-tweeting or re-posting links to existing content (such as company press releases). Republishing previously disclosed information will not garner as much scrutiny as the original disclosure, but if any additional commentary is inconsistent with the original disclosure or skews the context, it could lead to material misstatements or convey incorrect impressions. And, if any length of time has passed from the date of original publication, even a reposting with no additional commentary runs the risk of being inaccurate at the time of republication, unless the author makes clear that the post contains historic information. In light of this, companies may want to consider prohibiting altogether the republishing or reposting of previously disclosed company information by company leadership and employees. If such a rule is too limiting for the nature of the company's business and the importance of employee engagement on social media, internal policies could instead clearly establish guidelines outlining what is permissible in terms of elaboration and additional language (e.g., "Take a look at this press release"

with a link to the release is appropriate; “Our best year ever!”—with the same link—may not be), and require qualifying language about the historical nature of the content to any later-in-time republication.

- Address, and perhaps outright prohibit, social media posts linking to third-party sites so as not to inadvertently adopt content that has not been subject to the same disclosure controls and procedures as company communications.
- Consider employment law and privacy issues that could arise when scoping any surveillance of employee social media.

Just as important as a robust social media policy is the need to train employees, at all levels, when implementing the policy. As with any good policy, there should be documentation of its implementation, including of the review and approval/denial of every proposed social network posting subject to the policy. The policy should provide a contact person for questions on its applicability, and the company should enforce it consistently. Especially in light of the ever-shifting social media landscape, the company should periodically review and update the policy.

CONCLUSION

Recent, high-profile social media activity such as the August 2018 Elon Musk tweets and subsequent SEC settlement have put a spotlight on the intersection of regulatory compliance and companies’ social media use. Twitter, Facebook, and other social networking sites can offer a viable platform for broad, public disclosures to company shareholders, but companies should remember that social media disclosures are subject to the same strict anti-fraud provisions requiring truthfulness, along with Regulation FD requirements concerning the method of fair disclosure. Accordingly, all public companies should develop a robust internal social media policy that proactively defines acceptable use, thereby minimizing the risks outlined here.

[1] Elon Musk (@elonmusk), TWITTER (August 7, 2018) ("Am considering taking Tesla private at $420. Funding secured.").
[2] Elon Musk (@elonmusk), TWITTER (August 24, 2018), re-tweet of Tesla (@tesla), TWITTER (August 24, 2018) ("Staying Public") (linking to blog post authored by Musk, https://www.tesla.com/blog/staying-public).
[3] Complaint at 2, *SEC v. Musk*, No. 1:18-cv-8865 (S.D.N.Y. Sept. 27, 2018), *available at* https://www.sec.gov/litigation/complaints/2018/comp-pr2018-219.pdf.
[4] Press Release, SEC, *Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge* (Sept. 29, 2018), *available at* https://www.sec.gov/news/press-release/2018-226; *see also* Order Granting Consent Motion for Entry of Final Judgment, *SEC v. Tesla, Inc.*, No. 1:18-cv-8957-AJN (S.D.N.Y. Oct. 16, 2018); Order Granting Consent Motion for Entry of Final Judgment, *SEC v. Musk*, No. 1:18-cv-8865-AJN (S.D.N.Y. Oct. 16, 2018) (collectively, "Settlement Orders").
[5] Complaint at 1, *SEC v. Tesla, Inc.*, No. 1:18-cv-8947 (S.D.N.Y. Sept. 29, 2018), *available at* https://www.sec.gov/litigation/complaints/2018/comp-pr2018-226.pdf.
[6] Press Release, SEC, *Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge* (Sept. 29, 2018), *available at* https://www.sec.gov/news/press-release/2018-226.
[7] *See* Settlement Orders, *supra* n.4.
[8] Dave Michaels and Michael Rapoport, *Elon Musk's Tesla Claim Could Land Him in Regulatory Trouble*, WALL STREET JOURNAL (August 7, 2018),quoting John Coffee, *available at* https://www.wsj.com/articles/elon-musks-tesla-claim-could-land-him-in-regulatory-trouble-1533681833.
[9] Note that regulated entities, such as broker-dealers and investment advisers, have specific guidance on social media use promulgated by the SEC and FINRA. *See, e.g.*, FINRA, Regulatory Notice 17-18, Social Media and Digital Communications: Guidance on Social Networking Websites and Business Communications (Apr. 2017), *available at* https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-18.pdf; SEC Division of Investment Management, IM Guidance Update No. 2014-04, Guidance on the Testimonial Rule and Social Media (Mar. 2014), *available at* https://www.sec.gov/investment/im-guidance-2014-04.pdf.
[10] Nora Ganim Barns and Shannen Pavao, *The 2017 Fortune 500 Go Visual and Increase Use of Instagram, Snapchat, and YouTube*, *available at* https://www.umassd.edu/cmr/socialmediaresearch/2017fortune500/#d.en.963986.
[11] *Id.*
[12] Those three companies are Liberty Interactive (Rank: 269, Industry: Internet Services and Retailing), A-Mark Precious Metals (Rank: 395, Industry: Miscellaneous), and HRG Group (Rank: 418, Industry: Household and Personal Products). *Id*.
[13] *Id.*
[14] *Id.*
[15] SEC Final Rule: Selective Disclosure and Insider Trading, SEC Release No. 34-43154 (Aug. 24, 2000), [17 CFR 240, 243, and 249] *available at* https://www.sec.gov/rules/final/33-7881.htm (the "Adopting Release").
[16] *See* 17 CFR § 243.101(e).
[17] *See* Adopting Release, *supra* n.15, § 4.b.
[18] Commission Guidance on the Use of Company Websites, Release No. 34-58288 (Aug. 7, 2008), *available at* http://www.sec.gov/rules/interp/2008/34-58288.pdf (hereinafter, "2008 Guidance").
[19] *Id.* at 18.
[20] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, SEC Release No. 34-69279 (Apr. 2, 2013), available at http://www.sec.gov/litigation/investreport/34-69279.pdf, at 4
[21] *Id.*
[22] *Id.* at 5
[23] *Id.* at 4-5.
[24] *Id.* at 5 ("[T]he principles outlined in the 2008 Guidance—and specifically the concept that the investing public should be alerted to the channels of distribution a company will use to disseminate material information—apply with equal force to corporate disclosures made through social media channels.").
[25] *Id.* at 7-8.
[26] Despite the 21(a) Report and the 2008 Guidance, relatively few companies today use corporate websites or social media channels alone to satisfy their Regulation FD obligations. Instead, most public companies still file a Form 8-K and/or issue a press release, and many then post the same information, or links to the information, on their corporate websites and/or their Facebook page, Twitter account, or other social media forums.
[27] *See* Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b)] and Rule 10b-5 [17 CFR 240.10b-5] thereunder, as amended.
[28]The Supreme Court has not decided whether recklessness is sufficient scienter for Section 10(b) liability, but every Circuit that has decided the issue has ruled that recklessness is sufficient scienter, though the Circuits disagree on the degree of recklessness required. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007) (citing *Ottmann v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338, 345 (4th Cir. 2003) (collecting cases)).
[29] 2008 Guidance at 32.
[30] *Id.*
[31] *See* Exchange Act Rules 13a-15(e) [17 CFR 240.13a-15(e)] and 15d-15(e) [17 CFR 240.15d-15(e)].
[32] *Id.*
[33] *See* 2008 Guidance at 43.
[34] Press Release, SEC, *Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge* (Sept. 29, 2018), *available at* https://www.sec.gov/news/press-release/2018-226.
[35] *In the Matter of Altaba Inc., f/d/b/a Yahoo! Inc.*, SEC Release Nos. 33-10485, 34-83096, AAER-3937, File No. 3-18448 (Apr. 24, 2018), *available at* https://www.sec.gov/litigation/admin/2018/33-10485.pdf.
[36] *Id.*

[37] SEC, Commission Statement and Guidance on Public Company Cybersecurity Disclosures, SEC Release Nos. 33-10459, 34-82746 [17 CFR Parts 229 and 249], *available at* https://www.sec.gov/rules/interp/2018/33-10459.pdf.