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Public Company Disclosure in the Age of Social Media: A Canadian Perspective

Authors: Jennifer Prieto and James R. Reid

Could your company's next tweet or post violate Canadian securities rules? The answer may be yes, according to a Canadian Securities Administrators (CSA) report on a review of social media practices conducted by the regulatory authorities in Alberta, Ontario and Québec.

Businesses are increasingly using social media websites such as Facebook, Twitter and Instagram to communicate with a broad range of constituencies. But public companies need to ensure that these activities don't put them offside their disclosure obligations under securities laws and stock exchange rules, whether via marketing messages that inadvertently convey material information to investors or by tech-savvy executives selectively disclosing business news to their social media followers.

The social media review described in CSA Staff Notice 51-348 published on March 9, 2017 included 111 non-investment fund reporting issuers. Of the 72% of reporting issuers in this sample group that were actively using at least one social media site, 30% took action to improve their disclosure in response to issues raised by regulators. Most cases involved disclosure inconsistences that were addressed by issuers agreeing to file clarifying disclosure, remove problematic social media disclosure and/or commit to improvements in their practices or policies. However, there were four instances of materially deficient disclosure where the original non-compliant disclosure or the subsequent correction of that disclosure resulted, on average, in a 26% movement in the share price.

So what are the specific concerns and disclosure expectations of securities regulators?

- **Selective or early disclosure.** Material information must first be generally disclosed in a manner that effectively reaches the broader marketplace. Sharing material information via social media does not meet this requirement.
- **Misleading and unbalanced disclosure.** Disclosure should be factual, avoid promotional commentary, give equal prominence to favourable and unfavourable information, include sufficient detail for investors to understand its substance and importance, and be consistent with previously filed disclosure.
- **Insufficient governance.** The policies, procedures and controls adopted by reporting issuers for their formal regulatory filings should also be applied to social media disclosures.

These observations are grounded in the rules and guidance of the Canadian disclosure regime. They include National Policy 51-201, *Disclosure Standards*, and National Instrument 51-102, *Continuous Disclosure Obligations*, and, for issuers listed on the Toronto Stock Exchange (TSX), the timely disclosure provisions of the TSX Company Manual and the *Electronic Communications Disclosure Guidelines* published by the TSX. The Canadian approach of regulating social media use by applying these rules and policies of general application can be contrasted with the more specific and detailed regime of Regulation Fair Disclosure (Reg FD) in the United States.

Despite these differences between Canada and the United States, Canadian companies should consider what happened in 2012 when the CEO of Netflix posted on Facebook that Netflix viewing had exceeded one billion hours in the month of June. Netflix shares rose 5.2% that day and the U.S. Securities and Exchange Commission (SEC) issued a "Wells Notice," indicating that in its view there was sufficient wrongdoing to warrant civil claims. The implication was that the disclosure involved material information and that the Facebook disclosure did not meet the requirement that material information be made available to all investors simultaneously.

How can Canadian reporting issuers avoid similar missteps? Companies should review their current disclosure policies and consider the following recommendations:

1. **Social media policy.** Issuers should have a disclosure policy that appropriately addresses the use of social media. The CSA report found that 77% of issuers had not developed specific policies and procedures that would promote internal governance and compliance with securities law regarding their use of social media.
2. **Type of information and timing of release.** A disclosure policy should identify the types of information that can be posted and restrict who can engage on social media on matters relating to the issuer and its business. If the disclosure of material information on social media is permitted, it must not be posted before its dissemination to the public via news release or otherwise in accordance with securities rules.
3. **Disclosure review.** All posts should be vetted by authorized individuals to assess the materiality of information and ensure that the information is not selective, misleading, overly promotional or inconsistent with previous disclosure.
4. **Forward-looking information.** Issuers disclosing FLI such as financial targets, project milestones and expected product launch dates are required to include accompanying disclosure such as the material factors and assumptions supporting the FLI. FLI should be updated if subsequent events occur that affect previously disclosed targets. The CSA report notes a tendency of non-compliance when FLI disclosure is provided in a social media context.
5. **Linking to third-party materials.** Linking social media posts to media articles and analyst reports is problematic. Issuers may become legally responsible for the content and obligated to provide updates. Consent may be required. In order for the information to be balanced, an issuer would need to link to all analyst reports, both positive and negative, and highlight reports that are not independently prepared.

Canadian issuers should consider the findings of the CSA report and take it as an opportunity to ensure that their policies, practices and controls regarding social media use comply with applicable securities rules and best practices.

Key Contacts: David Wilson and Olivier Désilets