Canadian Securities Administrators provide guidance on use of social media by reporting companies

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The rule of timely disclosure in Canada is, in essence, that a reporting (public) company must make significant information about itself available to the investing public on a timely and equal basis. The primary resultant duty is that "material" facts and changes must be disclosed immediately by press release. Periodic reporting requirements – financial statements, proxy circulars and the like – round out reporting companies' continuous disclosure obligations.

From this tidy starting point arise a number of questions, some with messy answers: What information is material? Who decides that, and how much discretion do they have? What if the information lies with a third party, such as a supplier, a corporate raider or a government? And what if the company's business depends on keeping news confidential for a period of time? Guidance on these issues and more is set out in Canadian securities legislation, regulation, case law, stock exchange rules and policy statements, including National Policy 51-201 *Disclosure Standards*.

The latest addition to this body of law and policy is **CSA Staff Notice 51-348**, relating to the use of social media by reporting companies. It provides the results of a review by provincial securities regulators of social media posts by reporting companies and useful recommendations on how reporting companies should "enhance the strength of their social media governance frameworks".

Methodology and findings

The project involved a survey of disclosure by reporting companies on social media websites such as Facebook, Twitter, YouTube, LinkedIn, GooglePlus and Instagram, as well as the companies' own websites. Its three main findings were:

1. Certain companies have made first time disclosure of material information via social media, which is in breach of their timely disclosure duties.
2. Some social media posts are inconsistent with the company's formal public record on SEDAR or provide a level of detail that is unbalanced.
3. Many companies that use social media do not have effective disclosure controls.

Of the survey sample, being 111 reporting companies in a range of industries, 72 percent were active users of at least one social media website. Of those companies, 30 percent were flagged as having disclosure practices that were deficient to the extent that the regulator required corrective measures. This included making clarifying statements, removing or editing certain disclosure, and committing to improve their social media disclosure policies as a result of the review. The survey also identified four companies where very significant share price changes resulted (on average a 26 percent movement) from either the non-compliant disclosure or its correction, which could lead to regulatory discipline or liability to aggrieved shareholders.

Forward-looking information

One aspect of disclosure that the review focused on was that of forward-looking information (FLI). This is information relating to a company's future prospects, and can be significant to the investing public. Continuous disclosure rules provide that FLI must be accompanied by warning language, including a statement of the applicable risks, and the material factors and assumptions on which the FLI is based, and that it be updated when events change the likelihood of any FLI targets from being met.

The review identified that FLI, such as projected revenue and cash flow targets, had made its way into the social media postings of certain companies without being "generally disclosed" to the investing public through normal disclosure channels (such as press releases). This type of selective disclosure is a breach of securities laws. As well, when projections posted on social media are more favourable than other information in the company's public record on SEDAR, it violates the rule that material information be disclosed to the investing public on an equal basis, and may result in significant share price changes. In addition, the review noted that the required cautionary language often does not accompany FLI posted on social media.

One point about FLI that is not stated in the review – and that is frequently unacknowledged in such regulatory statements – is the one that is most important for public companies: a properly worded cautionary statement can help protect a company from liability for FLI that turns out to be wrong, as long as the company had a reasonable basis for stating the FLI. This rule applies to disclosure documents such as news releases as well as public oral statements, and can be a key defence for companies in areas such as the still-developing field of statutory liability for secondary market disclosure.

Social media governance tools

The most useful part of the CSA Staff Notice is its recommendation for having a rigorous social media governance policy. These disclosure processes, procedures and controls could be incorporated into or supplement a company's current disclosure policy, and according to the notice, should address at least the following matters:

- Who can post information about the company on social media;
- What type of sites (including personal social media accounts vs. corporate) can be used;
- What type of information about the company (financial, legal, operational, marketing, etc.) can be posted on social media;
- What, if any, approvals are required before information can be posted;
- Who is responsible for monitoring the company's social media accounts, including third party postings about the company; and
- What other guidelines and best practices are to be followed (for example, if an employee posts information about the company on a personal social media site, they should identify themselves as an employee of the company).

For further information about implementing effective controls over public disclosure, please feel free to contact a member of Dentons' **Securities and Corporate Finance group**.

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