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SECURITIES DISCLOSURE

Is Your Company Tweeting Towards Trouble?— Twitter and Securities Law Compliance

Public companies and their executives increasingly are using the social media tool Twitter to communicate with shareholders and investors. The risks and compliance concerns that this raises under the federal securities laws must be considered.

by Julie Jones and Cynthia McMakin

Among Internet social media tools, Twitter has dominated press coverage of late. The use of Twitter, a free Internet-based social networking and micro-blogging tool, is no longer limited to Hollywood stars and Silicon Valley computer whizzes. Corporate America has begun to use Twitter broadly for marketing and public relations, customer service and support, and employee communication (both external and internal).

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As a result of Twitter's popularity, public companies and their executives also have begun to use this tool to communicate with shareholders and other investor constituencies, likely due to its broad reach and the immediacy of its distribution of information. These types of communications raise new risks and compliance concerns under the federal securities laws. Public companies should be cognizant of these risks, and employ best practices to manage them, when considering whether and in what ways they will use Twitter.

Twitter in a Nutshell

Twitter is a service that allows users to send and receive text-based messages (known as "tweets") from computers, PDAs, and cell phones. A single tweet cannot exceed 140 characters in length, and each tweet is displayed on the user's profile page and is delivered to other users who have selected to "follow" the user. Unless users disable that feature, Tweets also are posted on Twitter's public timeline, which is a continuously updated list of all recent public Tweets.

How Are Large Public Companies Using Twitter?

Most Fortune 100 companies are using Twitter for one or more of the following purposes.

Marketing, Advertising, and Public Relations

Large public companies commonly use Twitter as a free marketing, advertising, and public relations tool. Companies post good news and accomplishments, events, press releases, ongoing promotions, exclusive offers for Twitter users and product announcements. Retail and consumer-based companies twittering for these purposes include Alcoa, ChevronTexaco, Cisco, Coca-Cola, ConAgra Foods, Dell, Dupont, General Electric, Hewlett-Packard, Home Depot, Honeywell International, Intel, Lowe's, Microsoft, Motorola, PepsiCo, Sprint, Viacom, and Walt Disney. As of August 2009, Dell's outlet Twitter page, which posts discounts and promotions, had more than one million followers (up more than 594,000 followers since April 2009).¹ Twitter increasingly has been used as a way to address potential PR problems or to dispense useful information quickly.² For example, reports indicate that companies including Ford, Pepsi, Southwest Airlines, Home Depot, and Whole Foods use Twitter to respond to complaints and rumors or to provide people in need with helpful information.³ In addition, Twitter can be used as a free channel of communication to publicize job opportunities. Companies using Twitter for this purpose include HCA, IBM, Kroger, Lockheed Martin, and Walt Disney.

Customer Service and Support

Many retail and banking/service-based Fortune 100 companies including Bank of America, Ford, UPS, Wachovia, and Wells Fargo, use Twitter to provide customer service and support. For example, Wachovia uses its general Twitter page for customer service and as an alternative way for its customers to contact Wachovia to receive customer support. In addition to establishing a Twitter account to receive questions, comments and complaints, some

companies, including UPS and General Motors, are using the search function on Twitter to follow Twitter chatter about the company, its products, and brand names and even respond to tweets about the company in an effort to build customer relations.⁴

Employee Use

Many Fortune 100 companies are allowing employees, both executives and non-executives, to use Twitter to discuss the company and its services and products. For example, Cisco's chief technology officer regularly tweets about her personal and professional life, from food and vacations to Cisco and its profitability. Employees of Best Buy, CocaCola, ConAgra Foods, Dell, eBay, Ford, General Motors, Intel, Johnson & Johnson, Microsoft, PepsiCo, Sprint, and Viacom also are twittering, and Best Buy even hosts a Web site that aggregates its employee Twitter pages so that they are all available at one Internet site location: *www.bestbuyinc.com/connect*.

Investor Relations

Companies also are increasingly using Twitter as a free method of real-time dissemination of information being disclosed on Web casts and conference calls. Richard Brewer-Hay, eBay Inc.'s corporate blogger, has been conducting live Twitter sessions of the company's quarterly earnings conference calls for the last five consecutive quarters and conducted a live Twitter session of its March 2009 annual shareholders' meeting. Also Walmart, Johnson & Johnson, Ingram Micro, and United Airlines, via designated employee "tweeters," held tweet sessions from their respective 2009 annual shareholders' meetings.⁵ Topics discussed included revenue results, non-GAAP earnings per share figures, general discussion about the company's financials, the recent increase of dividends and the company's growth strategy. In addition, while not posting tweets via earnings calls, Best Buy's chief marketing officer advertised earnings calls: "Earnings call 9am today. You can listen live or on replay at *www.bestbuy.com*" and later posted:

“Earnings out today. My take on Best Buy’s 1stQ numbers at www.barryjudge.com. Let me know there what you think.”⁶ Companies and their executives are likely to increase their use Twitter for these purposes, as Twitter’s popularity as a social medium continues to grow.

Securities Laws Compliance

Due to Twitter’s innovative, yet immediate and informal, nature, tweets made by public companies and their employees may create a higher risk of violating US securities laws because the substance of each tweet may not be as thoroughly vetted as information that is disclosed through traditional channels of communication. Twitter’s appeal as a tool for companies to use to quickly dispense information to the public heightens these risks. We briefly outline key areas of compliance risk below.

Regulation FD

Regulation FD, promulgated under the Securities Exchange Act of 1934, prohibits the selective disclosure of material non-public information to market professionals and stockholders. Absent an exemption, an issuer must disclose material non-public information to the public at the same time it is disclosing such information to prohibited persons. Issuers commonly satisfy Regulation FD by disclosing material non-public information in a broadly disseminated press release or Form 8-K or on a publicized call or Web cast to which the public has access. While it is unclear whether a tweet by a company or its executives would be deemed a communication to shareholders or market professionals, the broad reach of Twitter means that companies should presume that Regulation FD applies to tweets. The SEC recently issued guidance to indicate that a company may use its Web site as an FD compliant disclosure tool, subject to certain conditions.⁷ Notwithstanding this positive sign of the SEC recognition of the importance of non-traditional communication methods, the guidance does not extend to social media such as Twitter. Moreover, most

companies are not yet comfortable relying on their Web sites, due to concerns that the guidance fails to provide certainty on whether Web site disclosure is sufficiently broad-based and through a recognized channel of communication.

Regulation FD does not require that each public company make its public disclosure in the same manner. Accordingly, companies can choose the method of disclosure that they believe is best suited to their constituencies while satisfying the regulation’s requirement of effective, broad, and non-exclusionary public disclosure. As noted above, disclosure of material non-public information by company representatives via Twitter likely is insufficient to satisfy Regulation FD’s disclosure requirements because it alone does not distribute the information to the public in a broad, non-exclusionary way. As a result, Twitter should not be considered a primary method of disclosing and disseminating information; rather, it should only supplement the more traditional forms of disclosure and dissemination.

To the extent that a company uses Twitter in conjunction with some other method to disclose material information, it should take the steps it normally would take when disclosing such information to the public. For example, it should provide the interested public with advance notice of a live-tweet session that is in conjunction with a Web cast or conference call that will contain material non-public information. Such advance notice would need to provide the interested public with the date, time, and instructions for accessing the live-tweet session.

Exchange Act Rule 10b-5

Exchange Act Rule 10b-5 prohibits untrue statements of material fact and omissions of material facts that make what have been said misleading.⁸ These antifraud provisions apply to statements made by a company via Twitter in the same way they would apply to any other statements by the company. Employees acting as company representatives cannot avoid responsibility for material misstatements or omissions by purporting to speak in their individual

capacities. The casual and immediate nature of tweets and the appeal of being able to quickly disseminate information poses risk that a statement could be made that would create a Rule 10b-5 violation. In addition, the 140 character limit imposed on each tweet post presents a unique challenge and a heightened risk not present with other social media tools. Using shorthand to meet the 140 character limit creates additional risk that followers could misinterpret official statements from a company or its employees acting on behalf of the company or that the substance of a Web cast or conference call is not adequately communicated.

Rule 14a-17 of the Exchange Act permits the use of “electronic shareholder forums” to facilitate communication within certain limits.⁹ A company that sets up or runs an electronic shareholder forum will not be liable under federal securities laws for any statement made or information provided “by another person” on the forum. If the SEC were to take the position that Twitter constitutes an online discussion forum because it has an open format that allows interactive communication between a company and its investors, customers, clients and suppliers akin to that of a traditional electronic shareholder forum, then Rule 14a-17 would provide express protection to a company for the statements made by third parties. However, the company will remain responsible for its own statements and statements made on its behalf and also could be held responsible for a third party statement if the company takes actions to adopt, endorse, or approve such statement. For example, if a user tweets a false or misleading statement about a company, and the company then tweets in a way that appears to be approving that statement (*e.g.*, through an exchange of tweets with the user), the company could be held responsible for the third party statement and thus subject to antifraud liability.

The age of company information on Twitter also presents new problems. Companies often monitor the age of information on their Web sites, and archive information as “historical” and often delete material that is stale. However, it is unclear whether such care

can be taken on Twitter. First, the required brevity of a tweet limits a user’s ability to include disclaimers regarding date, staleness, etc. Furthermore, a post that is later viewed as problematic cannot be edited to include such disclaimers.¹⁰ Further, Twitter’s format is such that a user’s newest tweet shows up first in a list of chronological tweets.

Therefore, historical materials and statements, while lower on the list, cannot be archived to a separate section of the Twitter page to store the information. A post can be deleted,¹¹ but this function has been known to be suspended by Twitter, and the post is not immediately removed from Twitter’s advanced search function.¹² To remedy this problem, users need to contact Twitter, but if a third-party Internet search engine (*e.g.*, Google) is retrieving the deleted tweet, the posting party is required to contact that third-party directly.¹³ There is even a Web site set up to for the sole purpose of searching for deleted tweets.¹⁴ These issues create a challenge for companies that want to monitor the age of information on their Web sites and delete, revise, or edit material that is stale or incorrect.

Another area of concern regarding information posted on Twitter is the use of hyperlinks to third-party Web sites. There has long been a worry that a hyperlink exposes a company to liability for the hyperlinked material if there is a reasonable inference that the company approved or endorsed the information. In its 2008 Release, the SEC reiterated its position from a 2000 Release that companies that hyperlink to third-party Web sites run the risk of being held liable for the content of the information presented by the third party if the company is regarded as having endorsed, approved, or adopted the information.¹⁵ While reaffirming its view that a disclaimer alone is insufficient to insulate a company from antifraud liability, the SEC encouraged issuers to describe explicitly the purpose of the link, use an “exit notice” or “intermediate screen” so that a user knows that the third-party content is not company information and avoid selective hyperlinks to only favorable information.¹⁶ A company tweet that hyperlinks to third-party Web sites is not immune

from this risk and companies should take steps to evaluate and minimize the risk to antifraud liability when permitting the use of hyperlinks with authorized Twitter use.

Regulation G

Regulation G addresses public companies' disclosure or release of certain financial information that is calculated and presented on the basis of methodologies other than in accordance with generally accepted accounting principles (GAAP). It requires public companies that disclose such non-GAAP financial measures to accompany the measure with a presentation of the most directly comparable GAAP financial measure and a reconciliation to the most directly comparable GAAP financial measure. The risk that a company would fail to comply with Regulation G is most notably high in connection with the live-tweets for earnings calls, which often present non-GAAP numbers. To comply with Regulation G, a company that tweets a non-GAAP financial measure must also tweet a presentation of the most directly comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure.

eBay's effort to comply with Regulation G and still permit its employee, Richard Brewer-Hay, to tweet during the company's earnings calls resulted in Brewer-Hay twittering a five-tweet disclaimer before he commenced his April and July 2009 live-tweeting earnings call sessions. The five-tweet disclaimer for the July live-tweet session was as follows:

Tweet 1: "Important info about the nature of this session. Forward-looking statements and non-GAAP financial measures. [Hyperlink to eBay's blog with traditional cautionary language.]"

Tweet 2: "This session will contain non-GAAP financial measures"

Tweet 3: "The preso of this financial information isn't intended to be considered in isolation or as substitute for GAAP financial measures"

Tweet 4: "A reconciliation of these measures to the nearest comparable GAAP measure can be found here: [link to financial presentation]:"

Tweet 5: "Follow along with the earnings preso here: [link to financial presentation]:"¹⁷

Regulation 14A; Gun Jumping

Regulation 14A governs the solicitation of proxies. No solicitation subject to this regulation can be made unless each person solicited concurrently is furnished or has previously been furnished with the company's proxy statement. If the SEC were to take the position that Twitter constitutes an electronic shareholder forum, then 14a-2 would provide express protection to a company with respect to proxy solicitation rules as long as it occurs more than 60 days prior to the date of the company's annual or special shareholders meeting. Even with this potential protection, a company should note that its tweets may be deemed to be soliciting materials subject to the proxy rules if made in close proximity to a shareholder meeting. Additionally, companies in the registration process for an initial public offering or a registered direct follow-on offering should closely monitor any Twitter activity by employees because tweets that hype or talk up the company (not to mention those that may refer to offering preparation) could, absent an exemption such as the one in Securities Act Rule 168 for regularly released factual business information, be deemed to be prohibited offers of the company's securities.

Protection of the Private Securities Litigation Reform Act of 1995

To obtain the benefit of the securities law safe harbor, forward-looking statements must be identified as such and accompanied by meaningful cautionary statements. Forward-looking statements made orally (*e.g.*, a Web cast or conference call) obtain the benefit of a less stringent standard. Safe harbor requirements allow a person who presents information orally to refer the listeners elsewhere to a written document that contains the risk factors associated with the information.¹⁸ Written information (including a transcript of a speech), however, is required to contain the associated risk factors in the written

document and cannot refer to a separate document that contains the risk factors. Live-tweets made during a Web cast or conference call do not obtain the benefit of the looser standard applied to oral forward-looking statements. Therefore, a company that allows its employees to tweet about a forward-looking statement made orally on a Web cast or conference call without accompanying such tweet with the traditional cautionary language runs the risk of losing safe harbor protection. Companies must remember to treat tweets as written statements and to be sure that the tweet either includes the risk factors and cautionary language necessary to get the benefit of the safe harbor, or it should at least provide a hyperlink to a document with such language.

Other Legal Risks

In addition to the securities law compliance issues raised above, companies should consider the broad set of legal issues raised by its and its employees' use of Twitter including labor and employment, litigation discovery, and intellectual property issues. Labor and employment risks include the use of Twitter to post inappropriate content that could be viewed as defaming, harassing, discriminatory, or disparaging. Risks associated with litigation discovery relate to whether Twitter messages are discoverable under the Federal Rules of Civil Procedure.¹⁹

With respect to intellectual property rights, the risks include the unauthorized disclosure of proprietary information (*e.g.*, copyrights, trademarks, or other trade secrets). Additionally, choosing not to monitor Twitter could result in the tarnishment of (i) a company's brand or (ii) the reputation of one of its high-profiled executives. For example, an imposter could reserve what would appear to be an official company or executive Twitter page and subsequently disseminating false, disparaging, or misleading statements. Exxon Mobil confronted this issue when a person by the name of "Janet" posted negative press about Exxon Mobil on what appeared to be an official company Twitter page (www.twitter/exxonmobil-corp).²⁰ Once Exxon Mobil discovered the imposter,

the company had Twitter shut the site down, and it now controls the Twitter page. Companies should consider acquiring the Twitter account names that its clients, customers, service representatives, and investors likely would view as official accounts. Account names can be reserved on Twitter at no cost, thus reducing the risk that a third party establishes what would appear to be an authorized account. Furthermore, public companies should be diligent in monitoring what is being said about them in social media space such as Twitter.

Best Practices

As Twitter becomes increasingly popular as a social media communication tool, public companies should consider taking advantage of its benefits, while evaluating and managing the associated risks. Set forth below some best practice suggestions that public companies should consider when evaluating whether to use and to allow its employees to use Twitter.

Social media is here to stay; adopt or revise your policies to address this form of communication. If a company does not have a comprehensive written disclosure policy on the use of the Internet and social media tools, it should create one. If a company already has a disclosure policy in place, it should review it in light of new social media tools such as Twitter and re-circulate it to employees. Within the policy, a company should outline the ways in which the company and its employees are authorized to use Twitter (*e.g.*, marketing, customer service, live-tweets of earnings calls, etc.). This will allow the company to address and adequately assess the various risks involved with each type of use. The policy also should outline prohibited content (*e.g.*, prohibiting the disclosure of proprietary or material non-public information via tweets) so that employees are "on notice" about what they are prohibited from twitting about.²¹ Additionally, if a company is going to allow the use of social media, it should consider mandatory training to review its communications policy, especially for any employee who will be

micro-blogging on Twitter and using other forms of social media.

Don't turn a blind eye—monitor information. Companies should routinely monitor information posted on Twitter by its authorized representatives to determine whether information is accurate and not misleading. In its release on the use of company Web sites and electronic forums, the SEC expressly noted that companies should consider putting in place controls and procedures to monitor statements made by or on behalf of the company in electronic forums, including policies about who may speak on behalf of the company. A company also should consider hosting a Web site, such as Best Buy's Connect site or Walmart's Twitter page on its investor relations Web site, that aggregates the authorized company and employee Twitter pages to both confirm authorized use and easily monitor the tweets. Ideally, the person monitoring such information should be someone with knowledge of the company's proprietary information and future plans, as well as securities law.

Hyperlink headaches. If a company decides to insert a hyperlink from its Web site to an official Twitter page, it should be particularly careful to monitor the content on the page to which it is hyperlinking. In order to minimize risk, companies should consider using a pop-up message or exit screen to explicitly inform readers that they are leaving the company's site. Additionally, a company should include disclaimers that explain the reason for including the hyperlink and state that the company does not approve of or endorse the content on the third-party site. Despite the challenge of a 140 character limit per tweet, if a tweet is going to contain a hyperlink to a Web site that is not the company's official Web site, it should consider requiring similar language that tells the reader the reason for including the hyperlink and states that the company does not approve of or endorse the content on the third-party site.

Turning the other cheek. If a company discovers false or misleading statements on Twitter made by third party users, it should not authorize employees to engage in Twitter conversation for the purpose of correcting such statements. A company's policy

should instruct its employees to consult with the company's general counsel's office to consider the appropriate course of action.

Publicize your tweeting. If a company authorizes a live-tweet session by an employee for Web cast or conference calls where the general public is invited to attend, the company should provide the public with adequate advance notice of the live-tweet session (e.g., by posting it on its investor relations Web site and wherever else the company notifies the public of its press conferences or conference calls) and the means for accessing it.

Avoid being an ostrich. In an age of computer hackers and imposters, it is important that companies monitor their Twitter accounts to ensure that both the company's accounts have not been wrongfully accessed and altered without the company's consent and imposter accounts have not been established purporting to be official company Twitter accounts.

Don't drop the disclaimers. Companies should consider disclaimers in the following areas:

- Employees should remind their followers that the opinions that they express do not represent the views of management.
- Tweets containing forward-looking statements should be accompanied by the traditional cautionary statements and the tweet should include a hyperlink to the full disclaimers and risk factors.
- If a Company decides to live-tweet its earnings calls or its annual meeting, it should include the customary disclaimers that it would include when disclosing the information through traditional channels of communication.

Notes

1. See <http://twitter.com/delloutlet> (last visited August 13, 2009).
2. See Sarah E. Needleman, "For Companies, a Tweet in Time Can Avert PR Mess," *The Wall Street Journal*, August 3, 2009, <http://online.wsj.com/article/SB124925830240300343.html>.
3. See *supra* n.2. See also, Melissa Bounoua, "Why Europe's CEOs Should Twitter," *Forbes*, Jan. 19, 2009, <http://www>.

- forbes.com/2009/01/18/twittereurope-blog-tech-ebiz-cx_mb_0119twitter.html*. The Forbes article reports that Ford used Twitter to answer allegations that it was shutting down its fan Web sites with cease and desist orders, General Motors used Twitter to respond to rumors that it was shutting down its Volt electric car factory, and Home Depot and Whole Foods used Twitter during a hurricane to inform people where they could obtain emergency generators and water.
4. Dave Barnes, Chief Information Officer at UPS, was on a panel with technology executives from leading companies at the Economist CIO Agenda in New York. About UPS' use of Twitter he said, "[W]e have Thomas at UPS, which is an employee of ours in an interactive communications group, which is part of our marketing communications team. And he has developed a persona there. So people will go and seek him out and he will seek out people—it works both ways—who are talking among themselves and to and from themselves about problems they've had with UPS or issues or concerns. He'll interact with them and give them a way to accelerate their problem into a more effective channel. If they want to stay in Twitter, so be it. If they want to pass on to a phone center, so be it. If they want to pass over to email, so be it. So it's been a very good way for us to seek out customers proactively and solve their issues." See Executive speeches, http://www.pressroom.ups.com/About+UPS/UPS+Leadership/Speeches/David+Barnes/The+Intelligent+CIO:+Shaping+future+strategies+for+the+enterprise?srch_pos=4&srch_phr=twitter (last visited August 13, 2009). The Deal.com reports that General Motor's Chief Executive Officer, Fritz Henderson, uses Twitter to respond to Twitter users who complain about GM's products (even if the Twitter user has not reached out to engage Henderson in conversation). See, Lou Whiteman, "GM CEO Twitter Session Shows Site's Limits," *TheDeal.com*, June 17, 2009, http://www.thedeal.com/dealscape/2009/06/gm_ceo_twitter_session_shows_l.php.
 5. Sample Walmart tweets included: "Official meeting materials are available at [hyperlink to Walmart's Web site]," "Time to review the company's financials," and "News release just issued about share repurchase: [hyperlink to Walmart's Web site]." See <http://twitter.com/Walmartmeeting>. Posts dated June 5, 2009 (last visited June 19, 2009).
 6. See <http://twitter.com/bestbuyCMO>. Posts dated June 16, 2009 (last visited June 19, 2009).
 7. A company must evaluate whether: (1) the Web site is a recognized channel of distribution; (2) posting information on the Web site disseminates the information in a manner that makes it available to the securities marketplace in general, and (3) there has been a reasonable period of time for investors and the market to react to the posted information.
 8. Commission Guidance on the Use of Company Web Sites, Release No. 34-58288 (August 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.
 9. See Exchange Act Rule 14a-17.
 10. See "Can I Edit a Tweet Once I Post It?" Frequently Asked Questions, <http://twitter.zendesk.com/forums/10711/entries/13920> (last visited August 13, 2009).
 11. *Id.* (last visited August 13, 2009).
 12. See "Fixed: Can't Delete Individual Tweets, Known Issues," <http://help.twitter.com/forums/31935/entries/30905> (last visited June 19, 2009) (Twitter acknowledged that it had temporarily disabled the delete function while it researched a bug). See also "Twitter Search Shows My Deleted Updates!" <http://help.Twitter.com/forums/10713/entries/15363> (last visited June 19, 2009) (acknowledging that deleted posts can be viewed through use of Twitter's search function).
 13. *Id.* (last visited June 19, 2009).
 14. See "Tweleted," <http://tweleted.com/> (last visited June 19, 2009).
 15. See generally Use of Electronic Media, Release No. 33-7856 (April 28, 2000); 2008 Electronic Release, *supra* n.8.
 16. *Id.*
 17. See <http://twitter.com/ebayinkblog>. Post dated July 22, 2009 (last visited August 13, 2009).
 18. See Exchange Act 21 (E)(c)(2).
 19. See Steven C. Bennett, "Look Who's Talking: Legal Implications of Twitter Social Networking Technology," *New York State Bar Association Journal*, Vol. 81, No. 4, May 2009 (questioning whether Twitter messages would be required to be produced as part of the discovery process or used as part of evidence in a litigation proceeding).

20. See Heather Havenstein, "Exxon Mobil's brand "hijacked" by an impersonator on Twitter" (Aug. 4, 2008), available at <http://www.itworld.com/news/54050/exxon-mobils-brand-hijacked-impersonator-twitter> (last visited June 19, 2009).
21. See Janet Cecelia Walthall "Employers Urged to Tread Carefully When Investigating Workers' Web Posts" (July 15, 2009), available at http://news.bna.com/ccln/CCLNWB/split_display.adp?fedfid=13963838&vname=ccwnewsallissues&fn=13963838&jd=a0b8z6a5r0&split=0 (last visited July 17, 2009).

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