

# THE CONCERNS WITH SOCIAL MEDIA USE BY REPORTING ISSUERS IN CANADA

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On March 9, 2017, the Canadian Securities Administrators (the “**CSA**”) published CSA Staff Notice 51-348 – *Staff’s Review of Social Media Used by Reporting Issuers* (the “**Staff Notice**”), which describes some of the concerns that arise when reporting issuers use social media as a public disclosure platform.

The Staff Notice highlights the findings of a review by securities regulatory authorities regarding disclosure on social media, including websites such as Twitter, LinkedIn, Facebook, Youtube, Instagram, Google Plus, and issuers’ own websites. The CSA assessed whether the disclosure of such reporting issuers via social media was consistent with the principles outlined in National Policy 51-201 *Disclosure Standards* (“**NP 51-201**”) and the requirements of National Instrument 51-102 *Disclosure Obligations* (“**NI 51-102**”), specifically with respect to unbalanced and misleading disclosure, selective disclosure, and forward-looking information.

The Staff Notice identifies three key issues with respect to social media use by reporting issuers: (1) selective disclosure on social media; (2) unbalanced or misleading disclosure on social media; and (3) the importance of a social media governance policy.

## Selective Disclosure on Social Media

In disclosing material information, reporting issuers must ensure that such information is “generally disclosed” as required by securities laws. NP 51-201 provides that information will not be considered to have been generally disclosed solely as a result of disclosing such information on the issuer’s website. The Staff Notice further clarifies that information is not generally disclosed if only disclosed on social media.

The CSA’s review disclosed instances where selective disclosure was made solely on social media with respect to forward-looking information such as expected timing of significant milestones, revenue, earnings per share and cash flow targets. The concern with such selective disclosure of material information is that some investors may have received the information and been aware of same when making an investment decision, while others may not have been aware of the selective disclosure.

In addition, the Staff Notice identifies concern where information is released on social media prior to general

disclosure. The CSA notes that some reporting issuers had time delays of weeks prior to general disclosure on SEDAR or via news release. Reporting issuers must ensure that general disclosure is made prior to disclosing material information via social media, including providing investors a reasonable amount of time to analyze the material information.

The CSA notes that arm's length third parties often provide commentary about issuers through online blogs or social media websites. The Staff Notice describes instances where third parties would comment on material events of an issuer, although such events had not been disclosed by the issuer. While these circumstances are not directly related to the issuer's own social media disclosure, it outlines the concern that some investors are receiving material information on social media that the reporting issuer itself has not generally disclosed, resulting in selective disclosure of material information.

#### Unbalanced or Misleading Disclosure on Social Media

NP 51-201 states that disclosure must be factual and balanced. Issuers must balance both favourable and unfavourable news. Under its review, the CSA identified instances where social media posts were promotional or unbalanced creating concerns of compliance with securities laws.

The Staff Notice notes that some social media posts were either untrue or promotions to such degree that investors could have been misled. In addition, there were concerns where financial information contained in social media posts was inconsistent with, or not contained in, their continuous disclosure record.

The CSA also expressed concerns with issuers providing links to other documents or commentary, including analyst reports and research, in their social media posts. If reporting issuers provide links or copies of independent analysis, the Staff Notice advises that such issuers should ensure that they provide the names and/or recommendations of all independent analysts which cover the issuer in order to prevent issuers from selectively disclosing only favourable reports.

#### The Importance of a Social Media Governance Policy

The Staff Notice notes that improper disclosure on social media can have several harmful effects, including reputational, regulatory and other costs incurred to address deficiencies. As a result, issuers are strongly recommended to implement or improve their social media governance frameworks. The CSA recommends that social media governance policies include specific information on who can post information on social media, what types of sites can be used, what type of information can be posted on social media, approvals that are required before information can be posted, and who is responsible for monitoring the issuer's social media accounts.

#### **Conclusion**

Reporting issuers should be mindful that high quality disclosure practices are required to remain compliant with securities laws, regardless of the venue for disclosure. Even if a reporting issuer attempts to restrict social media use to only a marketing tool, there can be unintended consequences where material information is disclosed improperly. Accordingly, reporting issuers who choose to use social media should ensure that they have specific policies in place regarding social media use and that they understand the concerns with using social media as it relates to compliance with securities laws.

For further information with respect to the Staff Notice or compliance with applicable securities laws when using social media, please contact us.

by Will Van Horne and Jason Haley

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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