Corporate Governance Feature: Using Social Media Technology In Proxy Solicitations

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Social media is everywhere. From blogs to Facebook to Twitter, social media technology, seemingly overnight, has dramatically changed the way we communicate with each other, whether keeping up with friends and family or organizing political campaigns. While many companies have begun to embrace these new online tools to communicate with various constituencies, such as customers, employees and shareholders, they have been slower to utilize social media in proxy solicitations, the corporate equivalent of political campaigns. Given the increasingly pervasive role of social media technology in today’s society and recent efforts by the Securities and Exchange Commission to encourage the adoption by corporate issuers of newer technologies to communicate with their shareholders, this is likely to change. This article examines the application of the proxy rules to the use of social media technology in proxy solicitations. It also considers some of the advantages and potential downsides to using these forms of communication and suggests some practical guidelines for companies as they begin to employ social media technology in their solicitation strategies.

What is social media technology?
Social media has been defined as “primarily Internet- and mobile-based tools for sharing and discussing information ... The term most often refers to activities that integrate technology, telecommunications and social interaction, and the construction of words, pictures, videos and audio.” According to Wikipedia, the term includes blogs, Internet forums, micro-blogs, of which Twitter is currently the most popular, social networking services, such as Facebook, MySpace and LinkedIn, and file-sharing web sites like You-
Compared with traditional media, such as print newspapers, social media technology offers a number of advantages, including:

1. **Speed**—communication is virtually instantaneous and often takes the form of a live report.
2. **Low cost**—there are no printing and mailing expenses.
3. **Accessibility**—information is generally freely accessible from any computer and, in some cases, other mobile communication devices.
4. **Efficiency**—materials can be sent in a targeted manner to interested persons without needing individual physical or email addresses.
5. **Flexibility**—options include multimedia displays and user interactivity.

As has been amply demonstrated in the political arena, these attributes make social media a potentially powerful tool for soliciting shareholder votes. For example, subject to compliance with the rules discussed below, one can imagine a company that is engaged in a proxy contest posting a Twitter update or “tweet” to its “followers” containing a “tinyurl” link to a YouTube video of a presentation by management.

Many companies are already using social media technology, including blogs, Twitter, and Facebook and YouTube pages, to improve their businesses by opening new lines of communication with their customers. According to a recent Wall Street Journal article, a growing number of public companies, including General Motors Corp. and General Electric Co., have also begun using their corporate blogs to communicate with shareholders on investor relations matters. To date, however, there have been few situations in which companies have utilized social media technology to communicate with shareholders for the purpose of soliciting proxies. For the most part, companies’ use of online technology in proxy solicitations has been limited to e-proxy delivery, employee emails (given that employees at many companies are also shareholders, such emails, depending on their content, can constitute soliciting material), and the use of their corporate web sites (generally on the company’s investor relations page or a hyperlinked microsite) to enable visitors to those sites to access proxy materials that were principally delivered physically or through traditional media. By contrast, the focus of this article is on the use of social media technology as a primary means of communicating soliciting material to shareholders.

As discussed in greater detail below, in recent years the SEC has encouraged—and to a certain extent required—registered companies to adopt new online technologies to disseminate information to investors. In addition to EDGAR, the SEC’s electronic filing and database system (which will be replaced by a new interactive system, IDEA), other recent Internet-oriented rules and initiatives include mandatory posting of Section 16 reports on company web sites, the “notice and access” method of electronic proxy statement delivery, and the adoption in early 2009 of rules requiring issuers to provide, and post on their web sites, financial statements presented in XBRL. As advances in online technology further improve the quality, quantity, usefulness and timeliness of information available to investors, the SEC is likely to continue to seek to “facilitate experimentation, innovation, and greater use of the Internet to further shareholder communications.” Indeed, the SEC already has its own Twitter account.

### Applying the proxy rules to social media communications

As a general matter, electronic communications via social media technology, such as blog posts and Twitter “tweets”, are treated no differently than traditional paper and print ad communications for purposes of the proxy rules. The initial inquiry is whether the communication is “soliciting material”. A solicitation includes any communication “reasonably calculated to result in the procurement, withholding or revocation of a proxy.” Written communication materials—and the SEC has made clear that electronic communications constitute written materials—are required to be filed with the SEC no later than the date they are first published, sent or given to security holders. In the case of soliciting material that is communicated prior to the furnishing of a proxy statement meeting the requirements of Rule 14a-3, the communication must include information regarding the participants in the solicitation or a legend advising shareholders where such information can be obtained, as well as a legend advising shareholders to read the proxy statement when it is available and explaining how they can obtain the proxy statement and other relevant materials.
In addition, soliciting communications are subject to the antifraud provisions of Rule 14a-9, which prohibits any statement which, at the time and under the circumstances under which it is made, is false or misleading with respect to any material fact or omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any earlier communication. The notes to Rule 14a-9 include examples of statements that, depending on the facts and circumstances, could be considered false or misleading, including predictions as to specific market values and statements which directly or indirectly impugn character, integrity or personal reputation or allege improper, illegal or immoral conduct or associations without factual foundation.

In 2008, the SEC adopted amendments to the proxy rules to facilitate the use of electronic shareholder forums for communications between issuers and their shareholders and among shareholders. Rule 14a-2(b)(6) generally exempts from the proxy rules (but, importantly, not the antifraud provisions) any solicitation in an electronic shareholder forum operated by a registrant, a shareholder or a third party acting on behalf of either. The SEC did not prescribe any particular technology or structure for electronic shareholder forums. In order to be able to rely on the exemption, the person making the solicitation must not seek directly or indirectly, on its own or another’s behalf, the power to act as proxy and must not furnish or request a form of revocation, abstention, consent, or authorization. In addition, the solicitation must be made more than 60 days prior to the date announced by the registrant for its next annual or special meeting (or, if such date is announced less than 60 days prior to the meeting, the solicitation may not be made later than two days after such announcement). Unlike the so-called “disinterested person” exemption provided by Rule 14a-2(b)(1), which prohibits the person relying on the exemption from seeking proxy authority at any time during the solicitation, Rule 14a-2(b)(6) expressly allows a participant to “test the waters,” provided that any communications issued after the last date on which the electronic shareholder forum exemption is available (or, if earlier, after a participant furnishes or requests proxy authority) are made in full compliance with the proxy rules. At the time it adopted the electronic shareholder forum exemption, the SEC also added Rule 14a-17 to clarify that any registrant, shareholder or third party acting on behalf of a registrant or shareholder that operates an electronic shareholder forum will not be liable under the federal securities laws for any statement made by any other person on such forum.

While the basic proxy rules are familiar to most practitioners, their application to electronic communications is not always straightforward. The SEC has issued interpretive guidance regarding the application of the federal securities laws to electronic communications on several occasions, most recently in 2008. In Release No. 34-58288 (the “2008 Interpretive Release”), the SEC addressed a number of issues relating to the use of company web sites. Among other things, the staff provided guidance regarding when companies may be liable for information on their web sites, including third-party information accessed by “hyperlinks” and postings on interactive sites such as company-sponsored blogs and electronic shareholder forums.

Blogs and other social media postings commonly include hyperlinks to other web pages, including third-party content. When the communication in which the hyperlink is embedded is itself soliciting material (e.g., a blog from the CEO seeking support for the incumbent board), the hyperlinked information should generally be considered part of the solicitation and, therefore, subject to the proxy rules. However, there may be situations during a proxy solicitation where hyperlinked third-party information that may influence a shareholder’s vote is used for an entirely different purpose (e.g., an article lauding a company’s management for a successful product roll-out may be posted on a consumer-oriented blog page). When would such third-party information be considered soliciting material? Although the 2008 Interpretive Release addressed a company’s liability for hyperlinked third-party information for purposes of the antifraud rules, a similar analysis would likely be applied in determining whether the information is soliciting material. In particular, the third-party information could be attributable to the company either because the company involved itself in the preparation of the information, such as a scripted press interview (this is known as the “entanglement” theory), or because the company explicitly or
implicitly endorses the information (this is known as the “adoption” theory). The SEC will consider a non-exhaustive list of factors in determining whether a company has implicitly adopted hyperlinked information, including the context of the hyperlink, the risk of confusing investors and the presentation of the hyperlinked information. While the use of explanatory language regarding the source and purpose of the hyperlink and “exit notices” telling a viewer that he or she is leaving the company’s web site and entering a different web page are encouraged, they may not be sufficient to avoid responsibility for the hyperlinked information.

Assuming that hyperlinked third-party information is being used as soliciting material, a copy of such information (or a transcript in the case of a link to a recorded audio or video file) must be filed with the SEC. Note that Rule 14a-12(c)(2) includes specific disclosure requirements with regard to the use of reprints or reproductions of previously published materials in contested elections. While some of this required information will be obvious from the hyperlinked web page (e.g., the name of the author and publication and date of prior publication), the rule also requires disclosure of whether the author and publication have consented to the use of the previously published material as proxy soliciting material and whether the participant or anyone acting on its behalf paid or will pay consideration in connection with the previously published material.

For purposes of the antifraud provisions, the SEC’s longstanding view is that a company’s reliance on material that was prepared and published by an independent third party for purposes other than in connection with a proxy solicitation must be reasonable and must be made in good faith.16 The use of an express disclaimer will not shield a company “from antifraud liability for hyperlinking to information it knows, or is reckless in not knowing, is materially false or misleading.”17

The 2008 Interpretive Release also provided guidance on the use of interactive web site features, such as blog pages that allow comments and electronic shareholder forums. While making it clear that the antifraud rules apply no differently to statements by or on behalf of the company on such forums, the SEC confirmed that a company is not responsible for statements posted by third parties and has no duty to respond to or correct any misstatements by third parties. Although companies can impose terms and conditions on third-party access to, or participation on, blogs and online forums (e.g., no defamatory statements), requiring users to waive protections under the federal securities laws is prohibited.

**Limited use of social media technology in proxy solicitations**

Based on anecdotal evidence and a review of Regulation 14A filings on EDGAR, issuers have yet to employ social media technology in proxy solicitations in any meaningful way.

One recent example occurred during Carl Icahn’s proxy fight against Yahoo! Inc. in 2008. During that campaign, a video replay of a joint interview given by Yahoo!’s CEO and its President at a digital technology conference was posted to Yahoo!’s corporate blog, “Yodel Anecdotal”. Yahoo! added the appropriate Rule 14a-12 legends for pre-proxy statement communications to the blog post and filed a complete transcript of the interview with the SEC as soliciting material. Yahoo! subsequently filed another blog post directing readers to a dedicated microsite for materials relating to the company’s upcoming annual meeting.18

More recently, the editor of “eBay Ink”, the corporate blog for eBay, Inc., issued a post announcing the filing of the company’s preliminary proxy statement for its 2009 annual meeting. In addition, the post’s author expressed his (supportive) thoughts regarding a proposed employee option exchange that was described in the preliminary proxy statement. The blog post included several legends—the author noted that since eBay is a public company and must comply with SEC regulations, any future blog posts relating to the option exchange, including responses to questions, will include such legends—and was filed with the SEC.

Interestingly, eBay also announced the preliminary proxy statement filing on Twitter and included a tinyurl link to the related blog post. eBay may be the first public company to use Twitter to communicate on investor relations matters. In March 2009, the editor of eBay’s blog and Twitter pages explained, under the heading “New Social Media Guidelines for Reporting Company Information,” the company’s newly-adopted compliance practices
for micro-blogging and live-blogging. In particular, live Twitter reports during corporate events, such as analyst conferences, would be prefaced by four separate tweets, each with its own disclaimer or legend covering forward-looking statements and non-GAAP financial measures.

Despite the SEC’s encouragement of electronic shareholder online forums, few companies appear to have established such forums. In addition to continuing questions regarding the practical application of the rules governing the exemption, some commentators have raised concerns that such forums will be co-opted by activists. One noteworthy development was the recent launch by Broadridge Financial Solutions, Inc. of an online network for reporting companies and validated investors, which is intended to facilitate electronic shareholder forums. In April 2009, Broadridge announced that Intel Corporation had become the first company to use the new online network to host an electronic shareholder forum in connection with an upcoming annual meeting. A less formal type of shareholder forum was recently employed by Microvision, Inc., which used its corporate blog, “The Displayground”, to solicit questions in advance of Microvision’s fourth quarter and full year earnings call. According to a subsequent blog post, the company received almost 40 responses. Although it did not involve the electronic shareholder forum exemption under the proxy rules, this kind of interactive exchange with shareholders illustrates the potential power of social media technology.

Traps for the unwary

While the cost, speed and reach advantages make it likely that social media technology will become more prevalent in proxy solicitations, there are some risks and disadvantages to bear in mind.

1. **Same day filing deadline.** One of the great advantages of social media technology is the speed with which information can be disseminated. However, if a blog, Facebook update or Twitter tweet is soliciting material it needs to be filed with the SEC no later than the same day it is first posted or sent. This means that the text—or in the case of a recorded audio or video posting, such as a YouTube link, a transcript of the information—must be “EDGARized” and filed no later than 5:30 p.m., Eastern time, making it very difficult to post “real-time” messages or unscripted videos in compliance with the proxy rules. Hyperlinks to additional information can exacerbate the problem.

2. **Informal tone of messages.** The tone of most blogs is informal and conversational, with plenty of shorthand and jargon. As noted above, however, these forms of communications “will not be treated differently from other company statements when it comes to the antifraud provisions of the federal securities laws.” While corporate investor relations and public relations departments are accustomed to working closely with counsel on proxy solicitation communications, bloggers often operate with little supervision and may resist attempts to edit their posts, as well as the time delays needed to review them. Nevertheless, blog posts that touch on subjects relating to a proxy solicitation must be reviewed by counsel for compliance with the antifraud rules (and, where appropriate, should be reviewed by the broader proxy team for consistency of message).

3. **Brevity of communications.** Social media communications are generally intended to be brief. Bloggers will be reluctant—and, in the case of Twitter, which limits tweets to 140 characters, unable—to include the lengthy legends required by Rule 14a-12 for pre-proxy statement communications. While the precise wording of the legends is not prescribed, the legends are required to be “prominent” and in “clear, plain language,” so “e-speak” will not suffice. Where space is limited, it may be possible for participants to use hyperlinks to attach the required legends—the approach that was adopted by eBay, as described above. Readers should note, however, that the SEC has not explicitly endorsed this method of using hyperlinks to include required legends in communications. Hyperlinks can also be used effectively to provide appropriate support for summary statements in a post in order to mitigate concerns that such summary statements are false or misleading. In such cases, the social media post should include adequate disclosure to alert the reader that more detailed information is available by clicking the hyperlink.
4. **Unauthorized postings.** The accessibility of social media may result in unauthorized postings by employees that may be attributed to their companies. When company employees post entries on corporate blogs and other social media sites, the company will not be protected from liability merely because those employees claim to be speaking in their “individual” capacities. It is imperative, therefore, to maintain policies and guidelines regarding social media communications by employees. Such policies should restrict employees from posting blogs, tweets and other social media communications—whether on company-hosted blogs and forums or third-party sites—regarding sensitive corporate matters. In addition, employees who post communications that could constitute solicitations should clearly identify themselves and their affiliation to the company. The failure to properly identify the source of the soliciting material could result in a violation of Rule 14a-9 or other adverse consequences. (Readers may recall the adverse publicity and reported SEC informal inquiry following the revelation that Whole Foods Market, Inc.’s Chief Executive Officer, John Mackey, was posting online messages under a pseudonym.26) Issuers should also be mindful that employees who post online during a proxy solicitation may be deemed to be soliciting on behalf of the company and, therefore, may become “participants” in the solicitation. The proxy rules require certain disclosures with respect to participants.27

5. **Responding to posts and comments.** Issuers should also be aware of the dangers of responding to investor comments, whether on a blog site, electronic shareholder forum, Twitter or elsewhere. While the 2008 Interpretive Release makes clear that an issuer is generally not liable for third-party statements on such interactive electronic forums, it also leaves open the possibility that the company can be liable for such third-party statements through either the “adoption” theory or the “entanglement” theory. This risk may arise, for example, when a corporate blogger explicitly responds to a third-party post, especially if that third-party post is hyperlinked or otherwise embedded in the company’s response and even more so if the third-party statement is edited for purposes of the response. Accordingly, extra care should be taken before responding to investor comments.

**Final thoughts**

There can be little doubt that social media technology will play an increasingly important role in corporate communications, including proxy solicitations. Issuers should note that while the advantages of social media technology over traditional proxy communications like shareholder mailings and newspaper ads will benefit both corporate boards and dissident shareholders, activists will especially appreciate the cost savings and the ability to communicate directly with interested shareholders on a broad basis. Increased use of social media technology by activists will put pressure on public companies to respond in kind.

It is also likely that, as both the technology and its uses continue to evolve, the SEC will update its rules and guidance both to encourage and to further regulate the use of social media technology to communicate with investors. In the 2008 Interpretive Release, the SEC solicited comments “on any other approaches or issues involved in facilitating the use of electronic media, including as a result of technological developments, to further the disclosure purposes of the federal securities laws.”28

Whether or not a company is already using social media technology to communicate with investors or other constituencies, it may want to consider, as part of a takeover preparedness strategy, how social media technology can be used in a proxy solicitation, including a protocol for preparing, reviewing and filing blog posts, tweets and similar communications. In addition, to the extent that a particular social media technology permits (for example, Twitter has a search function that can be used to track “tweets” on a particular topic), companies would be well-advised to monitor blogs and other social media sites for postings of interest in the same manner they would otherwise search traditional press stories.

Companies should also review their employee policies and guidelines to ensure compliance with the proxy rules and other federal securities laws. For example, Sun Microsystems, Inc. has adopted guidelines that deal specifically with social media.29 While
encouraging employees to participate openly in online communities such as blogs, wikis and online forums, the guidelines prohibit comments “on work-related legal matters unless you are Sun’s official spokesperson for the matter, and have Sun legal and management approval to do so.” The guidelines also caution against disclosure of sensitive business information such as product roadmaps, unannounced financial results and share price information, noting that disclaimers indicating that the author is not speaking officially for the company, while good practice, “may not have much legal effect.”

NOTES
1. The author expresses his appreciation to Michael M. Ettannani, an associate of Skadden, Arps, Slate, Meagher & Flom LLP, for his assistance in the preparation of this article.
2. This article does not address federal securities laws and rules applicable to the use of social media technology in other contexts, such as public and private offerings of securities, tender and exchange offers and compliance with Regulation FD.
10. See http://twitter.com/SEC_Investor_Ed.
13. Rules 14a-4(f) and 14a-12(a) also require that a definitive proxy statement be sent or given to security holders prior to or concurrently with furnishing or requesting a form of proxy, consent or authorization. See 17 C.F.R. §§ 240.14a-4(f), 240.14a-12(a) (2009).
15. One of the principal objectives of the 2008 Interpretive Release was to clarify when information disclosed on a company’s web site, including its corporate blog, is deemed “public” for purposes of Regulation FD. Notwithstanding the SEC’s guidance, companies generally have not sought to rely on their web sites to satisfy Regulation FD primarily because of continued uncertainty as to whether such web sites constitute “recognized channels of distribution” for material business and financial information. But see the February 9, 2009 press release issued by BGC Partners, Inc. announcing that “the Company plans to discontinue issuance of full-text financial news releases via a wire service and will issue only advisory press releases notifying investors when new and material information is available on its websites.” Unlike Regulation...
FD, the proxy rules do not require broad, non-exclusionary distribution of soliciting material as long as it is filed with the SEC not later than the date it is first published, sent or given.


18. Attorneys at Skadden, Arps, Slate, Meagher & Flom LLP, including the author, advised Yahoo! in connection with its proxy fight with Carl Icahn and its related Regulation 14A filings.


21. But see 17 C.F.R. § 232.13(d) (2009), which permits such a filing to be made as soon as practicable on the next business day if “publication or distribution of the material does not occur during the official business hours of the Commission.”

22. Note that if a social media communication contains material, non-public information, it may also be subject to Regulation FD. As mentioned in footnote 15 above, posting such information on a corporate blog page might not constitute “public disclosure” for purposes of Regulation FD. In such case, the company will be required to disclose the information in a manner that complies with Regulation FD, such as by press release or on Form 8-K, not later than simultaneously with its first use in the case of an intentional disclosure or promptly in the case of a non-intentional disclosure. 17 C.F.R. § 243.100(a) (2009).


24. The SEC has stated that when the legend prescribed by Securities Act Rule 165(c)(1) is required in connection with a live presentation that is subsequently made available over the Internet in audio or video form, a company could “include the legend on its Internet site in the same place where viewers are instructed to ‘click here’ for the video or audio presentation of the particular material.” SEC Division of Corporation Finance, Manual of Publicly Available Telephone Interpretations, Third Supplement, pt. I.B., question 15 (2001), available at http://www.sec.gov/interp/telephone/phonesupplement3.html. In that situation, the viewer would see the legend before the offering material, but the legend and the offering material would be at least one “click” apart. See also Use of Electronic Media, Securities Act Release No. 7856, Exchange Act Release No. 42,728, Investment Company Act Release No. 24,426, 65 Fed. Reg. 25,843, 25,845 (May 4, 2000) (clarifying that “an embedded hyperlink within a Section 10 prospectus or any other document required to be filed or delivered under the federal securities laws causes the hypertext link to be a part of that document”).

25. One of the notes to Rule 14a-9 explains that the failure to identify soliciting material so as to clearly distinguish it from statements by other persons soliciting proxies for the same meeting or subject matter may be deemed false or misleading. See 17 C.F.R. § 240.14a-9 (2009).


30. Another good example is the Hewlett-Packard Company’s “Blogging Code of Conduct,” which notes that there are some topics the company will not comment on, including management changes and shareholder issues. See http://www.hp.com/hpinfo/blogs/codeofconduct.html (last visited Apr. 27, 2009). Contrast the terms and conditions to posting on Dell Inc.’s “Dell Shares” blog site, which requires a representation that the poster is not a Dell employee. See http://en.community.dell.com/content/DellSharesTermsConditions.aspx (last visited Apr. 27, 2009).