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### Why You Need a Social Media Policy

by Derek Dundas, Partner, Rutan & Tucker, LLP

**F**acebook, Twitter, Yelp, LinkedIn and other social media sites have transformed traditional company communications from a one-way channel controlled by businesses to a conversation among Internet users. Social media is a category of websites based on user participation and user-generated content that has changed the way people interact on the Internet. Businesses are seeing the benefits of using social media to promote their products and brand, disclose information, receive customer feedback and respond to criticism. Many of our clients, our apparel clients in particular, have conducted consumer promotions through social media to increase participation in their promotions and maximize exposure of their brand. However, companies using social media to promote their brand must be aware of the associated legal risks.

#### What companies should have a social media policy?

A social media policy outlines the expectations for the company's and its employees' use of social media. Companies that are actively using social media should certainly have a policy articulating who in the company can make statements or post information on the company's behalf. However, even companies that are not actively using social media should consider adopting a policy or, at a minimum, updating their employee handbooks to address the company's policies for the use of social media.

A company cannot opt out of social media. Regardless of whether the company is using social media for its own business purposes, not only will its employees be using social media but, in addition, it is very likely that consumers will be posting information about the company on social media websites such as Yelp. Adopting a social media policy enables a company to eliminate internal confusion about acceptable social media uses by setting standards regarding the use of social media by the company and its employees and implementing procedures to protect its brand.

The law applies equally to online and offline behavior. The statements being made on social media sites by companies and employees can have legal and financial consequences. Consequences of not properly managing social media can include harm to the company's reputation, disclosure of confidential information and unfair advertising liability.

#### What should a social media policy address?

There is no one generic policy that can be adopted by all companies. Each social media policy should be tailored to the specific needs of the company. The final policy will be as much a reflection on the company's corporate culture as it will be about protecting the company. A good social media policy will not only let employees know what they cannot do but also eliminate confusion by informing employees about what they can do with social media. A policy should set expectations and clearly delineate consequences for non-compliance.

**Federal Trade Commission Guidelines.** The law treats marketing and advertising through social media in the same manner as it treats those activities when conducted through traditional media. In 2009, the Federal Trade Commission revised its "Guides Concerning the Use of Endorsements and Testimonials in Advertising" to clarify that truth-in-advertising principles can apply to social media and other new media. Essentially, the FTC requires that endorsements on social media sites: (i) not be misleading and (ii) include disclosure of any material connection between an endorser and the marketer of the product. This material connection, as explained by the FTC, is a connection that would not be obvious and may impact the credibility of the endorsement. Such material connections could include the endorser being paid or receiving some benefit for endorsing the product or being employed by the marketer of the product. A social media policy should address the FTC guidelines by requiring employees and paid third parties who are giving reviews or endorsements about the company or its products or services through social media to disclose their relationship with the company.

**Brand Protection.** Social media enables companies to communicate and promote their brand on a real-time basis. However, the informal nature of social media sites increases the risk that third parties could potentially violate a company's trademarks and copyrights. A social media policy should include monitoring aspects requiring an employee or hired third party to regularly search the Internet for information and social media posts about the company that could be violating its intellectual property. Social media sites should also be checked for user names that match or are similar to the name and trademarks of the company. Further, companies may want to consider reserving user names on various social

media sites that are the same as or similar to their trademarks. Most social media sites have user policies which prohibit impersonation of businesses and violations of trademarks or copyrights can lead to measures taken by the social media site to suspend the offending account and delete any associated content.

**Company and Employee Participation in Social Media.** If a company is actively engaged in social media and maintains a Facebook page or a Twitter account, for example, that company's social media policy should explicitly lay out which employees are permitted to post information on the company's accounts. Many companies do not use the same procedures when making disclosures through social media as they do with a traditional form of advertising or promotion. However, because the same issues arise through social media as through traditional media, companies should establish processes for approving information disseminated through social media.

A social media policy should also establish standards for information being posted about the company by employees on their personal social media accounts. Employees should, at a minimum, be asked to consider how a certain post would reflect on the company or its customers. In particular, the policy should remind employees that they are obligated not to reveal confidential information about the company.

Finally, social media could lead to negative comments about a company made by customers or other third parties. Companies should monitor any negative comments and consider responding to any criticism. The social media community often engages in discussion and expects a company to address criticism rationally rather than simply remaining silent.

**Compliance with Social Media Terms and Conditions.** Social media sites have terms and conditions applicable to their users. In particular, many also have special conditions applicable to marketing and commercial activity conducted through their website. For example, LinkedIn prevents users from distributing unsolicited and unauthorized marketing materials and Facebook has specific guidelines for running promotions and sweepstakes on their sites. Companies actively using social media sites should be aware of the applicable terms and conditions of social media sites and comply with them.

**Compliance with Other Laws.** Whether it is a company or an employee making statements on a social media site, there are many other legal issues to consider (too many to address in depth here): laws regulating promotions, sweepstakes and contests, privacy and data security issues, employment issues, defamation and securities law issues.

#### What next?

Social media cannot be controlled but it can be managed. All companies should consider adopting a social media policy to better manage the information being spread about the company through the social media networks. Companies and their employees should be informed of what the expectations and standards are when participating in social media.

An effective policy is tailored to the needs and uses of each business. Consult with your employees who participate in social media as well as an attorney who is well versed in social media and the laws governing it, so that an effective policy can be implemented.

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