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Scandal-Proofing the Corporate Brand in the Digital Age

Social Media: The New Frontier of Legal Risk Management

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The Challenges Posed by Social Media to Corporate Brand Management and Why They Cannot be Ignored

A company's reputation is arguably its most important asset. Yet, companies with established brands and stellar reputations are now faced with an unprecedented challenge in the digital age. New forms of electronic social media have sprung up within the last two decades that pose a far greater risk to corporate brand than traditional mass media, such as television, radio, and newspapers. When mass information dissemination was confined to these traditional forms of media, corporations had a greater opportunity to influence and shape the public conversations that concerned them. The world has changed. Now, a single individual—whether it be a disgruntled

employee, an upset consumer, a competitor, or a group with anti-corporate feelings—can potentially threaten a corporation’s reputation within minutes by posting a negative message on Facebook, or a “Tweet” on Twitter. The problem is further compounded by the existence of “social action movements,” composed of individuals who harness the power of social media to disseminate their negative messages about targeted corporations in cyberspace unchecked. For example, social action movements have challenged proponents of two gas industry initiatives, the Keystone Pipeline and hydraulic fracking, through the use of Internet social media tools. Their mission has been to shape public opinion and thereby influence policymakers and regulators.¹ These movements had a more limited part in the public conversation prior to the advent of the Internet: the existence of social media, however, has allowed them to insert themselves into the public conversation with no barriers to entry and virtually no accountability.

The scope of the challenge is only increased by the fact that social media has an instantaneous *global reach*. For example, a single employee or an unhappy customer of a multi-national corporation need only access Facebook, Twitter, or even a social action blog to instantly disseminate their negative message throughout the world.

The old forms of influencing corporate public conversation are no longer as effective (at least by themselves) at countering this new phenomenon. Indeed, in the past, companies might use print media, television, or radio to blunt the effects of a scandal. Imagine, though, how much damage can be done to the corporate brand between the time that a scandal emerges on social media and the time that an ad makes its way to television, radios, newspapers, or even the Internet. Nowadays, social media has created an expectation of a rapid response, creating new timing challenges for corporations seeking to respond to negative public sentiment, necessitating a heightened level of vigilance, preparedness, and technical capabilities, and “buy-in” from senior management.

Companies cannot afford to ignore conversations playing out on social media, as left unaddressed, they can “snowball,” and even result in litigation or regulatory action. This requires companies to *engage* social media directly. As David Neumann, Manager of Social Media & Mobile Services at Prime Visibility, notes: “The worst thing a company can do is completely ignore the situation or provide a canned response that doesn’t deal with the issue head on. . . . Address the situation immediately. Inform your social media followers and likes that you understand the issue and you’re taking steps to repair the situation. You are not going to please everyone, but, by keeping an active dialogue with your customers across social media, you can effectively turn a negative situation into a positive one.”²

But it is not enough for companies to merely familiarize themselves with and participate in the current forms of social media. In this fluid, fast-changing environment, new forms of social media are being created and further developed on a daily basis, each one more

¹ See Richard Levick, *Colorado Rejects Fracking: The Money’s Not Talking; Social Media Is*, FORBES, Nov. 7, 2013, available at <http://www.forbes.com/sites/richardlevick/2013/11/07/colorado-rejects-fracking-the-moneys-not-talking-social-media-is/> (last visited Jan. 6, 2014).

² See Debra Eckerling, *5 Tips for Handling a Business Crisis on Social Media*, SOCIALTIMES, June 28, 2013, available at http://socialtimes.com/5-tips-for-handling-a-business-crisis-on-social-media_b130946 (last visited Jan. 6, 2014); see also RICHARD TORRENZANO & MARK DAVIS, DIGITAL ASSASSINATION 226 (2011) (“Understand that attacks do not just go away—never, ever. If you ignore them, they get worse very quickly.”).

efficient, user-friendly, and potent than the last. This requires companies to maintain a watchful eye over the social media landscape and evolve their social media apparatus to keep up with any changes.

This article is intended to raise sensitivity to and awareness of the challenges of social media, and to offer some initial suggestions to prepare for this new corporate reality. As set forth below, we suggest a dual approach to company engagement with social media, consisting of (1) a defensive strategy whereby companies respond to negative comments on social media where necessary, and (2) an offensive strategy whereby companies proactively utilize social media to (a) anticipate challenges to brand and (b) promote a positive company image. Admittedly, this approach brings with it certain legal and logistical risks. For this reason, we recommend that general counsel play a close advisory role in the formulation and implementation of the company's social media strategy.

A Two-Pronged Approach: Reacting to and Leveraging Social Media

A. Reacting to Negative Messages on Social Media

Responding in real-time to negative messages about the company on social media can quickly neutralize or deflect bad publicity in a way that traditional media (due to their slower pace and smaller audience) cannot.³ “[W]hen used effectively, social media is a powerful, quick and inexpensive means of delivering a message. It enables a company to directly communicate information to a wide audience, with the potential for even broader distribution by third-party ‘word-of-mouth’ advocacy.”⁴ Defending against bad publicity on social media requires a measured and thoughtful approach, in which companies can neutralize their social media critics on their own turf.

In reacting to negative messages on social media, however, it is important for companies to realize, as multiple experts have pointed out, that they cannot “talk at” people or merely “get the message” out. This is because social media, unlike radio, television, or newspapers, is inherently a conversation, not a form of one-way communication. As Prof. Rosabeth Moss Kanter of Harvard Business School has noted: “The biggest mistake companies make with social media is similar to the same mistake they've been making since the dawn of the digital age: They think of it as one-way communication. They think they can use these tools to talk AT people rather than chat WITH them, and fail to value the input coming from the other side of what becomes a pseudo-conversation.”⁵ Jay Hooley, President & CEO of State Street Corp., has likewise

³ See Practice Note, *Social Media Risks and Rewards*, PRACTICAL LAW, available at <http://us.practicallaw.com/cs/Satellite/us/resource/8-501-1933> (last visited Jan. 6, 2014) (“Companies can use social media to quickly respond to rumors or other negative publicity.”); Robert Jordan, *How to Avoid the Big 5 Social Media Mistakes Corporations Make*, FORBES, Sept. 28, 2012, available at <http://www.forbes.com/sites/robertjordan/2012/09/28/how-to-avoid-the-big-5-social-media-mistakes-corporations-make/> (last visited Jan. 6, 2014) (“Companies are too slow to respond [on social media]. We are bombarded with email, meetings, and corporate hierarchy, and speedy response can easily go out the window. But social media wants immediacy – that’s the oxygen.”).

⁴ See Holly Gregory, *Social Media: What Boards Need to Know*, PRACTICAL LAW THE JOURNAL, May 2012, at 29.

⁵ See The Experts, *The Biggest Mistake Companies Make With Social Media*, WALL ST. J., Oct. 23, 2013, available at

explained: “Social media is inherently interactive and too many companies use it to post nothing but information about their own company. The right thing to do on social media is share thoughts, opinions and resources that encourage conversation. Good social media strategists ask questions and think about education more than promotion when developing content.”⁶ Companies must realize that their use of social media is not equivalent to *controlling* discussions on social media, but rather *joining* them.

Moreover, companies should not underestimate the importance of a quick response to social media smearing, even if the response consists of nothing more than a statement that the company is investigating and will work to obtain a fuller answer. “With an eight-hour digital day, a response forty-eight hours later is five digital days late. Aim to respond within a two- to four-hour window. Your initial response can always be enriched and sharpened as you move along. Remember: In today’s digital world, if you are silent or even just late, you are guilty.”⁷

A few examples will illustrate how joining the conversation on social media and responding to negative messages in a timely fashion can help blunt incipient threats to corporate brand, and how, conversely, ignoring the conversation can exacerbate media headaches. In April 2009, after two Domino’s Pizza employees posted a video on YouTube in which they adulterated the chain’s food, the CEO of Domino’s Pizza responded by posting his own video, apologizing for what consumers saw and assuring them that such things were neither condoned nor practiced at the company.⁸ Social media crisis-management commentators applauded Domino’s relatively quick use of social media (which included reaching out to bloggers), noting that it was likely instrumental in staving off a broader brand crisis.⁹

United Airlines experienced the opposite result that same year when it failed to quickly respond to a negative YouTube video posted by a disgruntled customer. In 2009, Canadian musician Dave Carroll created a song “United Breaks Guitars” after his guitar was broken during a trip on the airline. “The song became an immediate YouTube and iTunes hit when it was released. The creator of this viral song said that his fruitless negotiations with the airline for compensation lasted nine months. Therefore, he posted a video to voice his frustration—which now has more than 13 million views. This story is

<http://online.wsj.com/news/articles/SB10001424052702303448104579151672079647020> (last visited Jan. 6, 2014).

⁶ *Id.*

⁷ TORRENZANO & DAVIS, *supra* note 2, at 226.

⁸ See *Social Media Risks and Rewards*, *supra* note 3.

⁹ *Id.*; see also Emily Bryson York, *What Domino’s Did Right—and Wrong—in Squelching Hubbub over YouTube Video*, ADVERTISING AGE, Apr. 20, 2009, available at <http://adage.com/article/news/crisis-pr-assessing-domino-s-reaction-youtube-hubub/136086/> (last accessed Jan. 6, 2014) (quoting social-media expert and blogger Brian Solis: “This is a moment in time for all crisis communications. . . . Domino’s is always going to be aligned with the Motrin, Tylenol and Walmart cases as [marketers] look at how to better create crisis communications and how to create social-media programs. I think they did it pretty well.”).

a classic example of how unpredictable customers can be, and how quickly companies need to act.”¹⁰

Nevertheless, while a quick response is usually warranted, there may be times when it will be more appropriate for a company *not* to respond to negative messages on social media (e.g., when the message has not received much publicity, and responding to it would only serve to publicize it further). These circumstances must be evaluated on a case-by-case basis, often with the assistance of experts in this field.¹¹

B. Use of social media to protect brand

While many companies already use social media for marketing and promotional purposes, the proactive use of social media is also critical to *anticipate* threats to corporate brand. “By monitoring social media platforms, a company has access to a rich stream of data that can be used strategically. . . . In a world full of information and noise, social media can provide an efficient method to follow viewpoints about the company. Increasingly sophisticated means are being developed to help find and filter this information in useful ways.”¹² Indeed, according to recent research by the Stanford Graduate School of Business, there is evidence that monitoring social media can alert the board to reputational risks, giving it a sense of just how well protected are the company’s brands and corporate reputation.¹³ Harnessing the power of social media is therefore necessary to give companies adequate situational awareness, which in turn, is essential for corporate risk avoidance and brand protection.

Just how much social media monitoring a company should undertake will depend on many variables, including the size of the company, the prominence of its brand, the nature of the business, and the competitive environment. Digital Marketing and Social Media Strategist Brad Hines recommends that, “[a]t a minimum, all companies should in the wake of a PR problem set up a Google Alert (Google.com/alerts), use Skweal, and monitor Yelp, Twitter, Facebook, and G+ for what people are saying.”¹⁴ As discussed *infra* Part IV, we believe that this is the bare minimum that companies should undertake in the field of monitoring: oftentimes, given the size, strength, and reputational value of a company, it may be necessary to hire an outside vendor or consultant to monitor the Internet and the various forms of social media using specialized software.¹⁵

¹⁰ See Schalk Viljoen, *Top 5 Ways To Prepare For Social Media Scandals*, FORBES, Dec. 6, 2013, available at <http://www.forbes.com/sites/sap/2013/12/06/top-5-ways-to-prepare-for-social-media-scandals/> (last visited Jan. 6, 2014).

¹¹ See *Social Media Risks and Rewards*, *supra* note 3 (“Companies should not ignore misleading statements being made about the company or its products. *The appropriate response, however, will depend on the type and severity of the conduct at issue . . .*”) (emphasis added).

¹² Gregory, *supra* note 4, at 29.

¹³ *Id.* (citing *Monitoring Risks Before They Go Viral: Is it Time for the Board to Embrace Social Media?*, available at gsb.standord.edu).

¹⁴ See Eckerling, *supra* note 2.

¹⁵ See also *Social Media Risks and Rewards*, *supra* note 3 (“The company should monitor social media sites, services and applications (and websites generally) for potentially damaging comments about the company or its products or services and infringement of the company’s intellectual property. *The company should consider*

Some experts also recommend that companies recruit their mid- to lower-level employees as “brand ambassadors” to promote the company’s good name, products, and/or services on the various social media websites.¹⁶ As discussed below, however, this approach suffers from certain risks, both from a practical perspective (*i.e.*, if run-of-the-mill employees are given speaking authority for a company, what controls are there to ensure that they stay on message?), as well as from a legal perspective (both under employment and securities laws, as discussed *infra*). The better practice, as highlighted below, is to centralize and confine “social media speaking authority” to select employees or representatives of the company, which will ensure both consistency and legal compliance across all social media communications.¹⁷

The Legal Challenges Posed by Corporate Engagement in Social Media

Engagement by companies on social media is not without legal risks, especially because there are significant gaps in the law regarding the treatment of corporate social media communications. While a myriad of legal risks are activated by company engagement with social media, we summarize here four main categories of risk.

A. Social Media Posts as Corporate Speech

The key thing to remember is that social media posts are a form of corporate speech. Accordingly, the same liability risks that attach to other forms of corporate speech—such as advertisements or press releases—may apply to social media communications as well. Thus, companies should be aware that their social media communications might one day be used against them to support claims of libel, defamation, or false advertising, as well as other state law commercial speech claims.¹⁸ Likewise, information that is widely available and easily accessible on social media might be deemed to put companies on constructive notice of product defects or legal violations, or at the very least render these risks “foreseeable” to companies.¹⁹ (This latter concern is especially acute where a company has a social media monitoring system in place.) And, of course,

whether to engage a third-party monitoring vendor or use company employees to undertake this activity.” (emphasis added).

¹⁶ See, e.g., Eckerling, *supra* note 2 (“Aggregate brand-safe, shareable content in a single location so your employees know exactly what they can and can’t share on social during a business crisis,” says Russ Fradin, CEO and co-founder, Dynamic Signal. ‘Also, encourage employees to share your brand message with their social communities to generate authentic, positive PR. Empower employees to be brand ambassadors and respond to negative criticism on social with brand-approved messages.’”) (emphasis added).

¹⁷ In instituting these internal controls on “social media speaking authority,” however, it will be important for companies to ensure compliance with employment law restrictions on the extent to which employers can limit employees’ use of social media. See *infra* Part III.B.

¹⁸ See *Company Use of Social Media: Best Practices Checklist*, PRACTICAL LAW, available at <http://us.practicallaw.com/7-501-1472> (last visited Jan. 6, 2014) [hereinafter, *Best Practices Checklist*].

¹⁹ Cf. *Schneider v. City of Grand Junction Police Dep’t*, Civil Action No. 10–cv–01719–MSK–KLM, 2012 WL 683516, at *10 (D. Colo. Mar. 2, 2012) (unsuccessful attempt by civil rights plaintiff to argue that municipality’s “failure to check any internet or social media reviews of [police officer who assaulted plaintiff (such as Facebook or Linked In)]” established causal connection between municipality’s actions and plaintiff’s injuries).

a poorly-worded social media post might be used as an admission or evidence of mental state in a future litigation against the company, or may be contrasted with what a company is saying internally. At bottom, companies must always bear in mind that their social media activity is part and parcel of the corporate record, and carries with it the same legal and regulatory risks.

B. Employment Law Risks

As noted above, a key precaution to ensure that an appropriate and consistent message emerges from the company is to limit “social media speaking authority” to select company employees or representatives. Even this limitation carries some risk, however. Section 7 of the National Labor Relations Act grants covered private-sector employees, including non-unionized employees, “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2012). However, “blanket prohibitions on an employee’s ability to identify as an employee or otherwise prohibit any use of the employer’s name or logo without approval may . . . violate employees’ Section 7 rights.” And, broad non-disparagement policies may be in violation of the NLRA where they prohibit employees from making any disparaging or defamatory statements in the electronic media about the employer.²⁰ In setting employee guidelines on who can speak on behalf of the company in social media, therefore, companies must walk a fine line to ensure that an employee would not “reasonably construe” such guidelines as prohibiting Section 7 activities.²¹

C. Litigation Procedure Risks

Like any form of electronic documentation, social media postings may be discoverable. See, e.g., Fed. R. Civ. P. 34(a) (permitting discovery of any “electronically stored information . . . stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form”). Additionally, disclosure of information on social media sites might result in a waiver of attorney-client privilege and attorney work product protection under some circumstances. Companies must therefore pay careful attention to these risks and incorporate them into their document retention policies and litigation hold notices.²²

D. Securities Law Risks

1. *Regulation Fair Disclosure (“Reg FD”)*

Reg FD, adopted in 2000, states that an issuer may not disclose material nonpublic information to certain groups, either intentionally or unintentionally, without disclosing the same information to the entire marketplace. 17 C.F.R. § 243.100 (2013).²³ The application of Reg FD to social media communications was previously unclear. For example, in December 2012, Netflix’s CEO received a notice from the SEC Enforcement

²⁰ See Courtney Fain, *Emerging Issues Concerning Social Media and the Workplace*, WEIL EMPLOYER UPDATE, Mar.-Apr. 2012, at 5, 6.

²¹ See *id.* at 6.

²² See *Best Practices Checklist*, *supra* note 18.

²³ See generally Christopher Garcia & Melanie Conroy, *Applying Securities Laws To Social Media Communications*, WEIL REG FD ALERT, Dec. 2012, at 1.

staff for potential violations of Reg FD related to an announcement that the CEO made by Facebook about the company's recent successes. The SEC's concern was that the Facebook post was not directed to the entire marketplace, and therefore constituted a selective disclosure prohibited by Reg FD.²⁴ Conversely, there was significant uncertainty as to whether social media posts could *satisfy* the requirements of Reg FD—that is, whether social media effects the same “broad, non-exclusionary distribution of the information to the public” as a Form 8-K, 17 C.F.R. § 243.101(e), and therefore qualifies as an adequate method of disclosure to the entire marketplace.²⁵

On April 2, 2013, the SEC shed light on these questions when it issued a report clarifying that “companies can use social media outlets like Facebook and Twitter to announce key information in compliance with [Reg FD] so long as investors have been alerted about which social media will be used to disseminate such information.”²⁶ The SEC further confirmed, though, that “company communications made through social media channels could constitute selective disclosures and, therefore, require careful Regulation FD analysis.”²⁷

Given the SEC's guidance, it is critical that, if companies do intend to announce key information via social media, that they timely notify their investors of their plans to do so. Moreover, given that the SEC has confirmed that corporate social media posts may be subject to Reg FD's strictures, companies should strive to ensure that *every single comment they make on social media* goes through the same levels of internal legal review as a press release or any other statement that would require disclosure on a Form 8-K. A good rule of thumb is to treat a social media post in the exact same fashion as a company treats a press release.

2. Securities laws limiting the substance of communications

Several securities laws and regulations affect not only how companies disclose information, but the content of the information that they do disclose. These laws and regulations must be followed strictly when composing and disseminating corporate communications via social media.

'34 Act § 10(b) / Rule 10b-5: Section 10(b) of the Securities Exchange Act of 1934, 28 U.S.C. § 78j(b), and the SEC's Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, prohibit companies from making materially false or misleading statements or omissions. As with press releases and other statements to the public, companies must ensure that all statements they make on social media comply with this standard.

Regulation G: Under Reg G, an SEC regulation adopted pursuant to the Sarbanes-Oxley Act of 2002, a company can generally only disclose non-GAAP (generally accepted accounting principles) financial information if it provides comparable GAAP financial measures and a reconciliation of the information. See 17 C.F.R. §§ 244.100-

²⁴ *Id.* at 2.

²⁵ See *id.* at 3.

²⁶ Press Release, Securities and Exchange Commission, SEC Says Social Media OK for Company Announcements if Investors Are Alerted (Apr. 2, 2013), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513574> (last visited Jan. 14, 2014).

²⁷ *Id.*

244.102. To the extent that a company discloses financial information via social media, it should comply with this standard by pointing to the reconciliation to GAAP.

PSLRA: The Private Securities Litigation Reform Act of 1995 prohibits a company from issuing forward-looking statements unless they are identified as such and are accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statements. See 15 U.S.C. § 78u-5. While admittedly clunky and “legalese,” we recommend that companies include the PSLRA safe-harbor cautionary language in all social media posts that contain forward-looking statements.

The Way Forward

We have seen that company engagement with social media—both on a monitoring and response level—is necessary in order to ensure adequate brand protection in this digital age. However, we have also seen that such engagement is not without risk, both practically and legally. Given these risks, it is apparent that the general counsel’s office has a legitimate and important role to play in coordinating, or having constructive ongoing input into, the company’s use and monitoring of social media.

There are several good reasons for this. First, it is arguably the job of the general counsel to help the company protect the corporate brand by advising the company as to the proper way to minimize legal risk. Given that corporate forays into social media are so fraught with the legal risks detailed above—legal risks that general counsel are already familiar with in the context of traditional corporate communications—general counsel are well positioned to assist corporations to use social media effectively, so that they do not create new legal problems in the process of attempting to protect corporate brand.

Second, from an institutional standpoint, the general counsel’s office is centrally situated within the company. Indeed, general counsel regularly interface with the board, senior management, business group leaders, and external communications departments (such as investor relations, marketing, public relations, *etc.*) on legal compliance and other matters. These are the very same decision makers and departments that will likely be responsible for crafting and executing the company’s social media strategies and policies. The general counsel’s pre-existing relationships with these disparate company elements can facilitate the success of the company’s social media initiatives by keeping all “players” on the same page, thereby ensuring that the final message promulgated by the company to the public will be consistent and unified across all social media.

Third, as it turns out, a supermajority of in-house counsel themselves use one or more forms of social media. A 2012 survey of in-house counsel found that 67 percent of in-house counsel report having used LinkedIn either during the past 24 hours or the past week; 74 percent of in-house counsel use social media in “listen-only mode” (*i.e.*, they read, but do not contribute to the online conversation); and 55 percent of in-house counsel read blogs written by attorneys.²⁸ As a practical matter, therefore, in-house counsel by and large have a good sense of the social media landscape and can appropriately educate board members and other corporate decision makers regarding how best to navigate the legal risks and best practices of this new media.

²⁸ See Adrian Dayton, *Social Media Use by In-House Counsel at All-Time High*, NAT. L. J., Apr. 18, 2012, available at <http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202596547593&slreturn=20130709131856> (last visited Jan. 6, 2014).

The general counsel's office, however, cannot and should not bear full responsibility for curbing a company's social media reputational risk: besides being completely impractical, such an approach could potentially undermine assertions of attorney-client privilege between the general counsel's office and other company departments. Instead, companies should consider looking to the following resources, either within or without the company, to handle and execute the three main social media engagement tasks:

- A. Monitoring: As noted above, depending on the size and structure of the company (as well as the value of its brand), it may be appropriate for the company to hire an outside vendor or consultant to monitor discussions about the company on social media. Professional social media monitors are experts not only at surveying social media chatter for negative comments about a company, but also isolating the source of such negative messaging, which can be crucial in developing an appropriate response.

If it is not feasible to hire a professional monitor, then the company should select a group of employees to handle this task. Regardless of the method chosen, it is crucial for a company to implement an "early warning system" to monitor and catch incipient negative chatter on social media. This "early warning system" should be accompanied by an internal company protocol that ensures new incidents of negative social media messaging are immediately channeled to appropriate company decision makers. The benefits of early warning systems will not be limited to social media damage control alone, as they can also alert management to potential operational knowledge gaps within the company or processes or conduct in need of attention.

- B. "Speaking" Proactively on Social Media: Companies should designate specific employees as "responsible for managing the company's social media accounts and online presence."²⁹ These employees may consist of representatives from the investor relations, marketing, public relations, and/or public affairs departments. Regardless of their identity, they should be subject to supervision by the general counsel's office to ensure compliance with legal requirements, the company's social media policy, and consistency and coherence across different social media platforms and different audiences.

Some experts believe that it is most efficient for companies to hire third-party consultants to represent the company in social media. While we see the value of this approach—as it ensures a unified, coherent, and consistent message, vetted by the greatest experts in this field—we also recognize that it may be impractical for some companies. Each company should assess its own resources and needs.

- C. "Reacting" to Negative Messages on Social Media: In the event of a burgeoning scandal, the company's designated "social media speakers" (whether employees or outside consultants) will carry the company's message to social media. In most instances, the board, senior management, and general counsel will not need to (and probably should not) speak on behalf of the company on social media. Nevertheless, commentators do recommend the formation of an internal response team consisting of principal corporate decision makers to shape the content of statements made on social media. This response team should be composed of:

²⁹ See Gregory, *supra* note 4, at 31.

1. Senior management;
2. Legal;
3. Corporate communications/public relations;
4. Marketing; and
5. Human resources (in case employees are responsible for damaging activities).³⁰

This response team will ensure that all social media representatives of the company are presenting the correct message and doing so consistently across all platforms. Such an informed, calibrated approach will also help ensure that routine social media communications (such as ads or promotions) are modified or even eliminated during a crisis period so that a company does not appear insensitive while a scandal is brewing.³¹

Conclusion

In this digital age, companies cannot avoid meaningfully engaging with social media. Ignoring negative messages about a company on social media, or relying solely on traditional forms of corporate communication, can place the company's brand and reputation at risk, not to mention pose litigation and regulatory risk. Recognizing that such engagement creates certain opportunities and risks, senior management, with input from the general counsel, needs to be educated as to the sources of potential social media threats to the corporate brand and needs to make certain that the company commits the necessary resources to respond to such emerging risks. By doing so, companies have an opportunity to not only safeguard but strengthen their brands.

³⁰ See, e.g., *Social Media Risks and Rewards*, *supra* note 3.

³¹ See Eckerling, *supra* note 2 (quoting Brian Heffron, EVP and partner at Boston-based marketing agency, CTP: "During a crisis, marketers and social media managers should be sensitive about tone and content, even if the crisis is under the radar. . . . A serious problem is compounded when a brand appears tone deaf and uncaring. Brands should continue to use social channels to communicate important information and respond to customers, but immediately suspend any light-hearted content or promotional posts.").