

Voluntary Investor Communication Processes

Dave Tate, CPA, Esq.

<http://davidtate.us>

tateatty@yahoo.com

AREAS OF DISCUSSION :

Step 1. Initial Considerations

Step 2. Prepared v. Interactive Communications

Step 3. Historic/Current v. Forward-Looking Communications

Step 4. Correcting, Clarifying, Updating Communications

Step 5. Special Circumstances

The following 5-step summary is an aid for voluntary investor communications, described non-securities filing communications by a company, typically such as press and news releases, analyst conferences, investor presentations, corporate internet home pages and technical advertisements. Stock exchange rules have required prompt disclosure of material corporate developments. However, those rules have not necessarily been enforced by the exchanges, and failure to comply with the exchange rules has not caused legal liability. Historically, there has been no legal requirement to continually disclose material developments--duty to disclose, or to fully disclose, material developments has not been required except in mandated securities filing documents, in circumstances where a company voluntarily discloses information about a particular development, and in circumstances of insider trading. Depending upon SEC guidance, Sarbanes-Oxley §409

Voluntary Investor Communication Processes

David W. Tate, CPA, Esq.; <http://davidtate.us> ; Page 1 of 10

could make some or all of these communications mandatory on an ongoing basis. Section 409 provides that each issuer reporting under Section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations as the Commission determines by rule is necessary or useful for the protection of investors and in the public interest. Regulation FD (fair disclosure), requiring full, not selective, public disclosure also is relevant to this topic in the circumstances in which Regulation FD applies.

This is a constantly changing topic. Companies and their shareholders receive significant benefit and value from regular investor communications. Unfortunately these communications also can expose a company to liability risk. The good news is that investor communication processes guidelines enhance the accuracy of investor communications, and significantly help the company avoid or reduce liability by evidencing diligent intent, business judgment, and actions, and by helping to negate a plaintiff's ability to establish scienter, that is, either intentional wrongdoing, or a standard that is difficult to define, falling somewhere between intentional misconduct and recklessness.

Limitations. These materials are an overview of a complicated and detailed topic area. Additional discussion also would include significant case study examples, and citations to and analysis of authorities. The fact situation of each potential communication circumstance must be independently evaluated. Investor communication issues require significant subjective analysis and judgment. Not all specific potential communication issues can be addressed when drafting these materials; and not all issues discussed will apply in each communication situation. The existing rules and decisions relating to investor communications do not present bright line guidance or mandates; thus, in many circumstances these materials are general in nature so as not to imply or create specific mandates. These materials do not provide legal, accounting, investor communication or other professional advice or guidance, and do not constitute solicitation for or engagement of services. These materials do not apply to any particular person, entity, or circumstance. These materials are a summary of significantly greater information, and are not an exhaustive reference resource. These materials are subject to modification at any time by the author without notice. Please contact the author to inquire about subsequent modifications. You should seek appropriate legal or other professional advice with respect to your specific corporate investor communication process or situation. In other words, these materials are intended to be helpful, and to encourage appropriate and thoughtful disclosure, but you should not and cannot rely upon them as guidance in your specific situation because they do not pertain to your particular circumstance, and I specifically disclaim liability for the information contained in these materials. These materials were last updated in April 2006.

STEP 1, INITIAL CONSIDERATIONS

A. Consider the People Involved in the Process; and Authorized to Speak.

Use an interactive team process that includes people who most often participate in communications and the communication process, such as the CEO, CFO, senior marketing, senior management, and investor relations officers, and additional people who participate from time to time as required by the nature of the information being reported. Officially authorize a very limited number of people to communicate on behalf of the corporation, and enforce those limitations. Speak to your legal counsel about this issue.

B. Consider the Accuracy and Sufficiency of Factual Information.

Statements made must be accurate and contain sufficient factual information about the issues to not be misleading to the average investor, even if that requires that disappointing information be communicated.

Investor communications can offer an opportunity to communicate disappointing news in a light that is most appropriate. Material negative news will most likely become known at some time anyway.

Determining when to communicate, what information to communicate, what communication means or method to use, and the wording of the communication can require significant judgment--there is some guidance available. Generally, approach the matter by communicating the information that the average, non-technically inclined investor, who lacks extensive knowledge about the company or the circumstances at issue, would want to know about the topic being communicated so as to be knowledgeable about the important aspects of the matter. See later discussions about when to communicate and what means or method to use--topics that can relate to selective communication issues.

Use plain English.

C. Consider Materiality.

The Courts and Sarbanes-Oxley §409 (subject to SEC guidance) hold that only material information needs to be communicated. Courts hold that material information is the quantitative and qualitative information (both positive and negative in nature), that the average investor would consider important to the issue or topic being communicated. In many situations evaluation of "materiality" is subjective. Clearly this is a difficult issue. Guidance about materiality in select situations can be obtained from SEC pronouncements (SEC Staff Accounting Bulletin No. 99), court decisions, and knowledgeable background in this topic area.

D. Consider Buried Facts.

Related information of similar importance should be presented, displayed and communicated in a manner that is of similar noticeability.

E. Consider Possible Contingencies and Uncertainties.

Evaluate possible contingencies or uncertainties that may exist, and consider whether the communication should be worded to include information about possible contingencies or uncertainties to avoid being misleading.

F. Legal Counsel.

Consider whether any issues should be discussed or evaluated through legal counsel for confidentiality or expertise.

G. Documentation.

Consider whether to document the investor communication process activities and analysis performed. Consult legal counsel and corporate procedures. This is a very important consideration. Documentation can be useful to demonstrate appropriate business judgment, and to help negate evidence of possible wrongful intent (scienter). Documentation also might be discoverable by plaintiff counsel.

STEP 2, PREPARED V. INTERACTIVE COMMUNICATIONS

A. Prepared/Non Interactive Communications.

Prepared/non interactive communications are communications where the corporation prepares a written or oral statement that will be communicated, and where there will be no opportunity for listeners to ask questions.

B. Interactive Communications.

Interactive communications are oral or written communications where there may or will be the possibility for listeners to ask questions. Interactive communications create unique difficulties because it may not be possible for the speaker to fully prepare for each question that may be asked, and the responses provided by the speaker might not be ideally worded.

To the extent possible, be prepared for the issues to be discussed.

Answer only those questions that can be answered.

Don't guess.

Be willing to investigate an issue and provide a subsequent responsive communication, keeping in mind possible selective communication issues (see discussion below).

C. Documentation of Communication.

Generally, obtain a copy of the communication, if possible. Also obtain copies of known reports, such as analyst or news reports, that result from the communication. Consult with legal counsel and consider procedures for retention or disposal of materials when appropriate.

Consider taking summary notes during an interactive communication, to reference issues or questions that could not be answered, or that might need subsequent correcting, clarifying or updating. Consult with legal counsel.

D. Consider Possible Selective Communication Issues.

A selective communication occurs when material information is disclosed to only certain people, and not to the broad investing public.

Selective communications are unlawful, and should be avoided.

You should be knowledgeable about Regulation FD (fair disclosure). In a recent action, the SEC held that even a vague, implied or suggestive selective communication can violate Regulation FD.

All selective communications must be promptly (that day if possible, but no later than the next day) broadly disseminated to the investing public. However, even that corrective action might not negate damages that have already occurred.

At this time, generally, neither a corporate home page, nor a recorded phone message is considered an acceptable means for achieving broad public dissemination of information.

E. Post Communication Review.

For interactive communications, conduct a prompt (that day if possible) post communication evaluation of the accuracy of the statements made, and whether there is a need to correct or clarify any of the statements.

It may be difficult to identify all of the people who attended the original communication, and even more difficult to determine how to provide each of those people with the subsequent communication. Keep the selective disclosure possibility in mind. Consult legal counsel on this issue.

STEP 3, HISTORIC/CURRENT V. FORWARD-LOOKING STATEMENTS

A. Historic/Current Statements.

Communications of historic/current fact information, are communications of known events or facts, etc., that have already occurred.

Communicate accurate, material, factual information, not conclusions.

B. Forward-Looking Statements.

Forward-looking communications are communications about events, occurrences, assumptions or results may transpire in the future.

Forward-looking statements should be made in good faith--based upon reasonable assumptions and criteria.

For purpose of the Private Securities Litigation Reform Act ("PSLRA"), a forward-looking statement is generally described as a statement (1) containing a projection of

revenues, income/loss, earnings/loss per share, capital expenditures, dividends, capital structure, or other financial items; (2) of the plans and objectives of management for future operations; (3) of future economic performance; and (4) of the assumptions relating to any of these statements.

C. Consider Combined Historic and Forward-Looking Statement Problems.

Communications often contain both historic/current and forward-looking statements in one sentence. In recent cases courts have had to diagram communications to identify whether components are historic/current, or forward-looking, or both, with serious consequences. Additionally, courts have held that with respect to a statement containing both historic and forward-looking aspects, a sufficient pleading alleging that the historic component is misleading also can taint the forward-looking component as knowingly misleading, thus negating the cautionary and safe harbor language (see discussion below pertaining to the safe harbor and cautionary language).

Try to avoid the combined historic/current and forward-looking statement problem. Keep the language and sentence structure uncomplicated, and use plain English wording that a non-technically oriented investor would understand.

D. Statutory Safe Harbor (PSLRA), Cautionary Language and “Safe” Words.

Speak to legal counsel about these issues. For all forward-looking statements use both the safe harbor protections and cautionary language. Use of the safe harbor protections is a must; however, there is still little case law available to assist with the practical use of those protections.

Cautionary language and safe harbor protections will not protect historic communications, or forward-looking statements that are known to be incorrect, and you should assume that they will not protect recklessly made forward-looking statements, or statements that are not made in good faith and based upon reasonable assumptions.

PSLRA Statutory Safe Harbor: For forward-looking written statements (remember to evaluate whether components are historic/current, forward-looking, or both), identify the statement as forward-looking, and accompany the statement with meaningful (not boilerplate) cautionary statements in the same document, identifying important, specific, and relevant factors that could cause actual results to differ materially from those projected in the forward-looking statement. For forward-looking oral statements, the Act states that you should identify the statement as forward-looking, state that results may materially differ from the projections in the statement, and identify a readily available written document that contains meaningful (not boilerplate) cautionary statements identifying important/critical, specific, and relevant factors that could cause actual results to differ materially from those projected in the forward-looking statement. The Act defines readily available written documents as SEC filed documents, annual reports, and widely disseminated public materials. However, see In re Apple Computer, Inc. Securities Litigation, U.S.D.C., N.D. Cal. (decided Dec. 11, 2002), Fed. Sec. L. Reports para. 92,407, April 30, 2003, in part holding (1) safe harbor and bespeaks cautionary

statements contained in Form 10-K and 10-Q documents only apply to those specific documents, and are not effective as such for statements made outside of those documents, such as at a conference call or an investor conference presentation, at which specific safe harbor and cautionary statements must be made; and (2) a cautionary or safe harbor statement must contain specific and precise information--the following wording is not sufficient: "Please note that some of the information you'll hear during this call consists of forward-looking statements and that actual trends could differ materially from our forecast. For more information, please refer to Apple's SEC filings." Thus, when making an oral forward-looking statement, consider making oral cautionary disclosures, and refer to an appropriate written statement containing cautionary disclosures. You should discuss these issues with legal counsel.

The PSLRA safe harbor protections do not apply to statements in 1) Generally Accepted Accounting Principles financial statements; 2) IPOs; or 3) tender offers. The PSLRA safe harbor in part codifies aspects of the cautionary rule. The PSLRA may protect the forward-looking statement if it is accompanied by the cautionary language, or if the statement is immaterial, or if the plaintiff cannot prove that the forward-looking statement, even if unaccompanied by cautionary language, was made with the knowledge (i.e., requisite degree of scienter, wrongful intent, recklessness, or negligence) of the person making the statement that the statement was false or misleading. As with cautionary language discussed below, remember that the PSLRA safe harbor protections are defensive in nature, and should not be relied upon to replace diligent intent to properly disclose.

Cautionary Language: Pursuant to judicial decisions, cautionary language also can protect the corporation from misleading forward-looking investor communications. Cautionary language informs the recipient about specific important relevant factors and uncertainties that might cause the future event, occurrence or result not to transpire or arise, or that could cause the actual results to differ materially from those projected in the forward-looking statement. The cautionary language must be of hard facts critical to appreciating the magnitude of the risks described. Boilerplate cautionary language is not sufficient--the cautionary language must be specific to the subject of the forward-looking communication. Basically, a misstatement or omission might be considered immaterial if the cautionary language is sufficient to render reliance on the false or omitted statement unreasonable; however, cautionary language is a potential defense and should not be relied upon to replace diligent intent to properly disclose.

A few comments about "safe" words. Courts have held that in some circumstances certain words of communication are puffery or are sufficiently vague such that a reasonable investor cannot legally rely upon those words when making investment decisions. Use of legally inconsequential or "safe" words is not a substitute for making appropriate and timely communications. It is beyond the scope of these materials to discuss this topic in detail.

STEP 4, CORRECTING, CLARIFYING, UPDATING COMMUNICATIONS

Evaluate the possible need to correct or update prior communications.

Correcting, clarifying and updating incorrect or unclear information can very significantly reduce liability exposure—for the purpose of damage calculations, the courts look to determine when the correcting information was publicly disseminated.

You should consult legal counsel about many of these topics.

Publicly disseminate correcting or clarifying information for a material statement that was materially incorrect or vague/unclear when made.

Historically, generally, a correcting communication also should be made for an originally correct material statement of historic/current fact that later becomes materially incorrect because of a change in circumstances. Depending upon SEC guidance, Sarbanes-Oxley §409 could clarify confusion in this area by requiring a communication, i.e., a correcting communication, in the circumstance of a material development, which would appear to include the circumstance of a material correction.

Historically, whether there has been a duty to update a material forward-looking statement that was correct at the time of communication, but that later would be considered materially incorrect because of a changed circumstance, has been a developing area. That answer has depended on the type of statement made, and could depend on whether the market is still reacting to the original forward-looking information. As used in these materials, the term "update" refers to discussions pertaining to forward-looking communications, not to communications of historic/current fact. Some corporations expressly state in their communications that they have no duty to update. That type of statement may be prudent; however, it has not been clear that type of statement will release the corporation from a duty to update. Cases have held that there can be a duty to update information that is still "alive," such as where the market is still reacting to the original communication made, or where the corporation stated or implied that the information communicated presented a continuing future situation or the possibility of information updates. Even if the corporation states that it has no duty to update, it may be prudent to update in appropriate circumstances. However, depending upon SEC guidance, Sarbanes-Oxley §409 could require an updating communication of a material development or change; thus, requiring an update in the circumstance of a material development if the market is still reacting to the original forward-looking information, and an original or new communication of material development if the market no longer is reacting to the original forward-looking information.

Although the courts have not universally agreed, depending on disclaimers and other circumstances, historically, generally there has been no requirement that a run-of-the-mill forward-looking statement, such as a business output forecast, be updated when the statement was correct when made, but later becomes materially incorrect due to changed circumstances; however, in that circumstance, generally, an updating statement may be required of a forward-looking statement pertaining to a significant corporate event, such as a merger or acquisition. Similar to the above discussion, depending on SEC guidance,

Sarbanes-Oxley §409 could in that circumstance require the communication of a new material development.

STEP 5, SPECIAL SITUATIONS

Special investor communication circumstances do arise, and require additional specific evaluation.

A. Third Party Inquiries/Statements and Rumors.

You need to review your company policy on responding to rumors, inquiries, reports or statements by third party sources such as analysts, shareholders and reporters.

Generally, if you respond, only do so by following your communication guidelines.

Be aware of possible selective communications issues.

A response might imply that you have reviewed or adopted the reporter's comment, which generally you would want to avoid.

Cases have even held that a "there are no corporate developments" response can be misleading if there have been developments.

The general initial response would be: "we don't respond to . . .," or "no comment," or "we don't confirm or deny," or "we don't respond to 'are you comfortable with' inquiries," or "we don't review . . .," or similar responses. A response that there are "no corporate developments" might be misleading if there have been corporate developments. A comment or response, or reference to a third party inquiry, report or statement, such as by an analyst or a news reporter, might be considered an affirmative statement by the corporation, may imply review, confirmation or adoption of a statement or report by the corporation, and may raise selective communication issues.

If the corporation decides to respond to third party inquiries, reports or statements, consider the response in light of your investor communication process guidelines. For example, respond as if the corporation is preparing for and making a factual news release. Do not imply adoption, review, or confirmation of a third party report or statement. Generally, respond, not to an overall report, rumor, estimate, conclusion, hypothetical, forecast or similar third party circumstance, but with facts representing the accurate circumstances, paying particular attention to prior investor communications that may have been made by the corporation.

B. Select Internet Home Page Issues.

Information and links on the corporate internet home page may cause information to remain "alive" for investors to act upon it. Appropriate identification, archiving, disclaimer and caution, and/or removal should be considered.

Forward-looking oral communications that are subsequently printed or made reference to on an internet home page might be considered written; thus, raising the possible need for

different appropriate safe harbor wording.

A link or reference on a corporate home page to a third party source, such as a news article, might be considered a direct or implied endorsement or adoption of that source. The SEC has provided guidance on this issue, indicating that a hyperlink may be permitted, but only with appropriate context, emphasis, structure and wording.

Communication of information on the corporate internet home page generally should not be considered broad investor market dissemination. In other words, web page disclosure alone might still raise selective disclosure issues.

Only authorized corporate statements, chats or discussions should be made, referenced or linked on the home page. In appropriate circumstances consider whether unauthorized statements or discussions, etc., if any, should be identified as such.

Consider adopting specific corporate policies and procedures relating to these issues, and do consult legal counsel.

C. Special Communication Situations that May Require Evaluation.

The following are some, but not all, of the more common investor communication situations that might be more complicated and may require greater consideration or evaluation:

Negotiations about significant potential or actual company events or transactions.

Sales, liquidations and divestitures.

Stock issuances, and communications around the time of stock issuances.

Mergers.

Acquisitions and purchases.

Consolidations.

Appraisals.

Insider trading.

Investigations.

Regulatory approvals.

Changes in sales or earnings trends.

Specific timing and means or method of communication.

Representations regarding quality or product, management, qualifications or integrity, or safety and compliance with laws and regulations.

* * * * *