



SUZANNE M. DUGAN
SPECIAL COUNSEL
202.408.4600
sdugan@cohenmilstein.com
[V-CARD](#)

FIDUCIARY FOCUS

“*The use of social media presents risks and, as is the case with any type of risk, these risks should be identified, assessed, managed and mitigated.*”

SOCIAL MEDIA

These days, you don't have to look beyond the daily headlines to find ethical and fiduciary issues involving social media. Nowhere is this more evident than on Twitter, where a wide variety of users post and share hundreds of millions of messages a day. Today's scandals on social media are not limited to social gaffes but may include ethical breaches and even cross into the realm of civil or criminal liability.

For example, in August, a tweet by Tesla CEO Elon Musk that he had secured funding to potentially take Tesla private at \$420 per share led to lawsuits against Musk claiming that he drove up the value of Tesla shares and materially misled investors. These lawsuits were followed in September by the Securities and Exchange Commission charging Musk with securities fraud and seeking to prohibit him from serving as an officer or director of a public company, and also charging Tesla with failure to have appropriate controls and procedures in place relating to Musk's tweets. Two days later, Musk and Tesla settled with the SEC; in addition to \$40 million in penalties, Musk agreed to step down as Chairman of the board for three years, and Tesla agreed to appoint independent directors to its board and implement additional controls and procedures to oversee Musk's communications.

Lessons Learned

First, it is important to note that social media, when used correctly, can help public pension plans meet their fiduciary and ethical obligations. For example, when part of a comprehensive communication strategy, social media can be used as an effective means to communicate with members of the retirement system, resulting in greater transparency on the part of the system and greater understanding by members. In fact, at least one court has held that a public pension board of trustees has a fiduciary duty to provide clear and accurate information to prospective retirees under the common law duties of loyalty and care.

In addition to assisting trustees in meeting their fiduciary duty of communicating understandable information, social media may also be a valuable tool for pension systems looking to build relationships with members and encourage active engagement on the part of employees, thus helping to create a strong ethical culture throughout the organization.

Despite these benefits, social media used incorrectly can lead to the kind of scandals that not only harm the culture of an organization and lead to reputational damage, but can also result in a breach of fiduciary duty and unethical or even illegal behavior.

Key Take-Away

The use of social media presents risks and, as is the case with any type of risk, these risks should be identified, assessed, managed and mitigated. Begin your risk assessment process with a broad examination of ways in which social media could potentially be misused, whether inadvertently or deliberately. Engaging in a comprehensive brainstorming session often is a useful first exercise in identifying risks and assessing those risks. For example, does an individual trustee use social media in a way that could lead to the impression that he or she is speaking on behalf of the entire board? Is there a risk that trustees' communications with each other could implicate a jurisdiction's open meetings law, or are subject to the applicable freedom of information law? Does the content of those communications pose a legal, reputational or other risk? Are trustees trained to exercise the utmost caution to ensure that they do not reveal confidential information in their communications, such as discussing upcoming investment information in advance of public announcements or revealing personal information regarding a member that was obtained in a benefits hearing—risks that can lead to civil or criminal liability?

“*Today's scandals on social media are not limited to social gaffes but may include ethical breaches and even cross into the realm of civil or criminal liability.*”

After identifying and assessing the risks, the next step is to draft policies and procedures to manage and mitigate those risks. Remember that, as is often stated, fiduciaries are judged by their adherence to a process. Finally, as with any process, those policies and procedures should be revisited regularly to ensure that they are adequately meeting the risks presented, particularly in a rapidly-evolving field such as social media. ■

Suzanne Dugan heads Cohen Milstein's Ethics & Fiduciary Counseling practice, which assists pension systems in creating and updating policies and procedures designed to address these and other fiduciary issues.

