

Responding to a Politician's Social Media Attack

"Trump Slams Nordstrom for Dropping Ivanka's Brand"

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President Trump has repeatedly used his Twitter account to single out companies for criticism of their business practices, raising the question for a broad range of public companies of how to prepare for and potentially respond to such criticism. Of course, rhetorical attempts by politicians to influence the conduct of private enterprise – commonly referred to as “jawboning” – are an old political tactic.¹ The nature and frequency of jawboning in the current environment makes this a serious issue for boards and management at a wide variety of public companies, in a way that it has not been in the recent past.

Crisis plans maintained by public companies for other circumstances may provide useful guidance for how to respond to a politician's social media attack (an “SMA”). However, every type of crisis raises unique concerns and considerations. Many companies should carefully consider the appropriate response to an SMA in advance.

This note is intended to aid public companies for a discussion at the board level concerning SMAs. It covers three main areas that public companies should specially consider: (i) governance, (ii) executive compensation and employment-related issues and (iii) communications, and provides senior legal advisors with an outline of relevant considerations. While the principal considerations relevant to responding to an SMA will not typically be legal concerns, corporate governance considerations constitute threshold legal issues and employment-related and communications considerations implicate important legal issues.²

¹ “During the Democratic administrations of Presidents Kennedy and Johnson, officials tried to deal with the mounting inflationary pressures by direct government influence or jawboning. Wage-price guideposts were established, and the power of the presidency was used to push businesses and labor into going along with these guideposts. The term attracted some derision and is often associated with the Biblical story, in Judges 15:15, of Samson slaying a thousand of his enemies using the jawbone of an ass. . . . The term jawboning has also been used to refer to Herbert Hoover's efforts to convince employers to keep wages high as prices fell during the Great Depression. . . . During the 2000 U.S. Presidential Election, George W. Bush criticized outgoing president Bill Clinton for not attempting to lower oil prices by “jawboning OPEC” to increase supply. The Canadian-American economist J. K. Galbraith stated that “jawboning” was first used to describe the activities of the U.S. Office of Price Administration and Civilian Supply, formed in April 1941.” <https://en.wikipedia.org/wiki/Jawboning>

² The question of whether there are legal limits to, or whether there may be legal claims arising from, SMAs is beyond the scope of this note. There may be legal and other costs that arise from an SMA or a company's response to an SMA, including a potential reaction from equity markets.



I. Governance Considerations

- Monitoring. Many large companies have processes in place to carefully monitor social media for relevant information. Companies that do not have a retail customer base constituency or a brand presence may nevertheless monitor social media for discussions concerning stock trading, employee issues or other important aspects of their businesses. Companies that have not yet felt a need to adopt such processes should reconsider the question in light of the evolution of social media, including but not limited to the risk of SMAs. Given the speed at which social media can “go viral,” a company’s monitoring system should be designed to pick up relevant information in real time. Care should of course be taken in dealing with any such information, including consideration of applicable securities and employment laws and data privacy concerns.
- Board and Management Alignment. It is important for management and the board to be aligned in their thinking about responding to SMAs. As a threshold matter, management should provide the board with background and recommend a general discussion concerning strategy, tactics and preparation. Management and the board should evaluate areas of potential vulnerability, paying particular attention to the issues that seem to most draw the attention of political leaders. A response plan should be developed to address the risk of an SMA at least with respect to those identified vulnerabilities, and a response team should be organized, leveraging the company’s existing crisis management team.
- Threshold for Board Involvement. In order to maximize the chances for alignment, management should consider in advance which social media postings should be formally brought to the board’s attention.
 - Many companies may determine that an SMA from the President or another very senior public official is presumptively material, and therefore should receive at least some attention from the board before a decision is made about a response. An SMA from a lower-level official may not warrant that status.
 - For other companies, the decision to formally confer with the board will depend on an assessment of materiality. The standard to be applied will in most circumstances not depend on the materiality of the subject of the SMA from a financial perspective. Instead, reputational considerations will in many cases dominate, while in other cases employee-related, government contracting or regulatory affairs considerations may dominate. In all of those situations, it will ordinarily be difficult to establish clear standards in advance.
 - Companies should consider how savvy board members may be in monitoring social media. The board members who are more plugged in to developments on social media may expect management to address such developments with the board.
 - Given that it is too early to tell how jawboning may continue to evolve and the difficulty of establishing clear advance standards for formal board consultation, it may be prudent for many public companies to plan for at least a basic level of consultation between management and the board in the event of an SMA.
- Method of Consultation with the Board. If an SMA should be formally brought to the attention of the board in some way, what method of consultation is appropriate?
 - As in other crisis situations, decisions concerning the appropriate response to an SMA are likely to require quick action. Therefore, any consultation with board members will need to happen promptly. Formal board meetings are unlikely to be practical.
 - To maximize responsiveness, a standing committee of two or three board members who might be consulted, as a group or individually, may be appropriate.

II. Board Consultation

In most cases, management will have gathered data, prepared reports, analysis and other information and considered and discussed the business decision that is the subject of an SMA. Prior to discussing any response to an SMA with the board, management should prepare a summary of such preparatory materials for the board. The summary should at a minimum address the following issues:

- Understand the corporate decision. Why was the corporate decision that is under attack made in the first place? What benefits were expected to be achieved?
- Evaluate the criticism. Is there merit to the SMA? Assess whether there is a basis for the criticism.
 - What is the likelihood that the decision will lead to the result that is the focus of the criticism?
- Explore the alternatives (if any). What alternative paths are available to achieving the expected benefits and that could mute the criticism?
 - In considering alternatives, consider whether any alternative could involve seeking a quid pro quo from the federal government (or a state or local government), and how realistic it would be to pursue such an alternative.
- Consider the costs and benefits of **not** adjusting in response to the SMA. Assuming an alternative path is not viable, what are the costs of pursuing the corporate decision notwithstanding political criticism? Costs may include direct economic costs, including for example the potential loss of government or corporate business or tax benefits, possible litigation (including shareholder derivative suits), the potential impact on other regulatory matters facing the company, and domestic and foreign public relations, marketing, investor relations and similar costs. Indirect costs, such as effects on employee morale, may have a less quantifiable but nevertheless substantial impact on the business and therefore should also factor into the calculation. The principal benefits

will presumably be those anticipated by the initial corporate decision. For some businesses, there may also be reputational benefits of not responding in an accommodating way to an SMA.

- Consider the costs and benefits of adjusting in response to an SMA. Assuming an alternative path is not viable, what are the costs of complying with the politician's demand? Are there benefits to saying yes? As with "saying no," management should consider the direct economic costs to the company in the form of a loss of the benefits that were expected from the company's initial decision. There may be a loss of other corporate business as a consequence of compliance with the politician's demand, as well as domestic and foreign public relations costs and negative effects on morale. Management should weigh these costs against the benefits, if any, of compliance, such as a potential increase in business from government and corporate sources, tax benefits and potential positive effects on domestic and foreign public relations and employee morale.
- Consider Management and Board Conflicts of Interest. There are two obvious ways in which management may be presented with personal conflicts of interest³ in connection with the decision about responding to an SMA:
 - Senior executives of public companies regularly participate in government-sponsored blue ribbon panels, business councils and other similar arrangements. The Trump administration in particular has quickly highlighted the President's eagerness to hear from business leaders through such arrangements and less formal approaches. Senior executives may view the opportunity to participate in those types of arrangements as personally valuable, for reputational and potentially financial or other reasons. While

³ Personal conflicts are inherent in many situations, and not every personal conflict rises to the level of a legal issue. We do not suggest that the conflicts of interest described above would give rise to a legal conflict under fiduciary principles of general corporate law or other legal or regulatory areas.

those situations may potentially give rise to conflicts of interest particularly in the context of an SMA, it seems likely that few boards will determine that participation in such activities should be prohibited on that basis. Rather, prudent steps tailored to the particular situation may be taken to ensure that the conflicts of interest are appropriately managed from the company's perspective.

- The response to an SMA could have financial consequences, including notably short-term (or even longer-term) consequences on a company's stock price. Management compensation may be impacted by those consequences. For many equity-based compensation arrangements, short-term movements in stock price can, in particular circumstances, have a material impact on the compensation paid to executives. For example, senior executives may be particularly sensitive to short-term movements in stock price around the time that significant stock option awards are scheduled to expire. In the event that an SMA coincides with those circumstances, the board may need to be particularly attuned to the conflict of interest.
 - The same conflicts of interest that affect executives may affect board members, in which case it may be suggested that conflicted members recuse themselves from relevant discussions.
- Decide on a time frame for the response. What is the time frame for a measured response? Companies may consider instituting a policy of stating “no comments to rumors or innuendos” as a quick initial response to give management and the board time to carefully consider the actual response.

III. Executive Performance and Compensation and Other Employment Issues

- CEO Pay and Performance. Few if any SMAs so far have focused in a personal way on the compensation of corporate CEOs relative to performance. However, those kinds of attacks seem likely to arrive. They present additional considerations for companies because of their potential impact on the ability of the CEO to effectively lead the organization and because of the sensitivity of pay decisions.
 - The potential impact of an SMA focused personally on CEO performance and pay issues can in some cases be inferred, at least in part, from public criticism that has for many years been leveled by shareholder groups and others who have focused attention on income inequality issues. However, an attack by the President or another prominent politician would likely raise additional issues because the attack might have greater credibility and impact on some internal and external constituencies than an attack from governance and pay critics and others similarly situated. In addition, public awareness of an SMA from a prominent politician is likely to be much greater than public awareness of criticism from those other sources.
 - From a governance perspective, developing a response to any such SMA will almost certainly require attention from the board. For this proxy season, particular attention should be given to evaluating pay and performance and the attendant proxy disclosure in light of SMA concerns. Management and the board should also be mindful of these concerns in preparing potential responses to questions or criticisms regarding pay and performance.
 - Any such SMA may also complicate board decisions about employment and compensation actions, because of the risk of a perception that

the board action was a response, either accommodating or not, to the SMA's criticism.

- SMA's Raising Employment Law Issues. An SMA criticizing a company's hiring practices or specifically singling out a certain population of employees could raise employment discrimination, gender pay equity and other similar concerns. For businesses that depend particularly heavily on human capital, advance consideration focused specifically on how to respond to any such SMA may be prudent.

IV. Communications

- Advance Preparation is Critical. Companies should put in place a set of communications guidelines prior to becoming the subject of an SMA. For companies that already have a social media policy in place, they should review the existing policy to ensure that it takes into account the unique considerations involved in responding to an SMA.
- Disclosure Controls and Procedures Governing Social Media. Companies should also have in place the proper disclosure controls and procedures to govern any response to an political attack via social media. In light of guidance that the SEC has released in recent years on the application of the fair disclosure and anti-fraud provisions of the federal securities laws to social media, companies with an active social media presence should already have in place procedures to vet the company's own posts, as well as posts by executives in their individual capacity. Given the risks of tripping a disclosure rule or adding unnecessary fuel to a potentially public fight with a politician, responses in the form of personal social media postings by individual executives should generally be avoided or, at the least, carefully vetted through the appropriate channels at the company.
- Proactive Communication. In addition to putting in place a set of robust communications guidelines, many companies may wish to consider whether to take a proactive approach. A number of companies have found already that publicizing a business decision or activity, even one that is already widely expected by the markets, could minimize the risk of an SMA and avoid putting the company on the defensive. For companies that prefer a more measured approach, disclosure through regular '34 Act reports and investor calls can be effective ways of explaining company decisions. Companies may also find it useful to prepare a set of standby responses to quickly employ when called upon. As an SMA can affect several different constituencies at once, it will be important for companies to think about who their allies are, and how they should engage them. By identifying their allies, understanding investor concerns (especially if a shareholder vote is needed further down the road) and using a range of shareholder engagement tools wisely, companies can build shareholder support and strengthen their position against an SMA.
- No Response? In some circumstances, the best response to an SMA will be no response at all. That approach will probably be premised on a conclusion that the initial criticism is unlikely to have much impact, and the risk of extending the conversation exceeds the potential benefits of a defense of the criticized conduct.
- Public or Private Response? Once a company finds itself on the receiving end of an SMA and decides to respond, the company will need to decide whether the response should be public or private. A public response may in certain contexts be more effective, but could also start a public conversation that could quickly lead to worsening reputational effects. The extent to which it is desirable for the response to be made public will depend on some of the factors previously mentioned, including the particulars of the corporate decision that is the subject of the SMA and whether or not the company is modifying its decision in light of the SMA.
 - The decision of whether to respond publicly or privately may implicate important legal considerations. For example, a decision to

respond publicly could raise concerns about the premature disclosure of previously non-public information. A private response could raise selective disclosure issues, and if carried out in consultation with others in the company's industry may implicate antitrust considerations.

- Public Relations Advisors. As with crisis management generally, public relations advisors can play an important role in shaping the messaging around a big corporate decision, and if necessary, devising and implementing a successful response to an SMA. Hiring the public relations advisor through an outside law firm increases the likelihood that attorney client privilege will apply to discussions with the public relations advisor.

V. Conclusion

The potential impacts of SMAs may diminish as time goes by. In the meantime, the uncertainties and risks are significant enough for management and boards at many companies to consider the issues carefully, as a matter of prudent preparation.

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