



## **DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING**

### **A Message Board Primer: Practical and Legal Issues for Companies to Consider**

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#### **1. Understanding Message Boards**

##### **What is a "message board"?**

A message board is a place on a web site where a visitor can type a message (known as a "post"). Upon accessing a board, visitors will see a list of message titles sorted by the time and date posted as well as the author's name—in most cases, an alias. Clicking on the title brings up the message for review.

Visitors can easily navigate around a board — ranging from message replies to keyword searches for a particular topic or author.

Once posted, a message can be viewed by any visitor to the message board. These visitors may reply to the message by posting another message — in this way, message boards enable exchanges of information, ideas or opinions.

Message boards also are known as on-line bulletin boards, newsgroups, bulletin board systems or BBSs. Note that "chat rooms" are different than message boards.

##### **Where can message boards be found?**

On web sites that cater to investors. Message boards are attractive to investors as a way to anonymously share opinions and insights about the stock market generally as well as individual stocks.

A company that operates a web site that hosts message boards is known as a sponsor.

##### **How much does it cost to post messages or visit a board?**

In almost all cases, messages can be posted for free — although normally a visitor must first register to become a "member" of the web site. Registration for membership is free - but requires that the visitor provide personal data.

Most sponsors permit visitors to freely view messages without registering as a member or any other conditions — but a few sponsors do require registration even for viewing.

Source: E\*Trade requires member registration to view messages and visitors must pay to subscribe to AOL's Internet service to access their boards.

##### **How can someone become a "member" of a message board community?**

By registering on the sponsor's web site, which typically is free. Normally, the sole requirements are providing truthful information on an on-line questionnaire.

Membership can be terminated by a sponsor for any reason, but most likely would only happen if a member violates the sponsor's policies, including its "terms and conditions."

##### **What are the most popular message board communities?**

The most popular sponsors host hundreds of boards. On most of these sites, separate boards are dedicated to discussions about particular companies and their stock. The most active boards have thousands of messages posted about some companies.

The following sponsors have the most popular boards for investors:

- Yahoo Finance! — nearly 8000 individual company message boards

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[messages.yahoo.com/yahoo/Business\\_\\_Finance/index.html](http://messages.yahoo.com/yahoo/Business__Finance/index.html)

- Motley Fool — thousands of individual company message boards

[boards.fool.com/](http://boards.fool.com/)

- AOL — subscription-based, but 22 million people subscribe
- Microsoft Investor — hosts chat rooms but not message boards

[moneycentral.msn.com/investor/home.asp](http://moneycentral.msn.com/investor/home.asp)

- Silicon Investors — broken out by industries and topics

[www.siliconinvestor.com/stocktalk/](http://www.siliconinvestor.com/stocktalk/) and [www.techstockinvestor.com/](http://www.techstockinvestor.com/)

- E\*Trade — [www.etrade.com/cgi-bin/gx.cgi/Applogic+Community](http://www.etrade.com/cgi-bin/gx.cgi/Applogic+Community)

Note that most of these sponsors do not host boards dedicated to companies whose stock is traded over-the-counter or are penny stocks (i.e.-stock price is below \$5) — primarily due to a higher propensity for fraud and manipulation on these types of boards.

Source: Raging Bull (also known as "Raging B.S.") is one of the few sponsors that host boards for companies whose stock is traded over-the-counter or is a penny stock. Several other sponsors, such as Motley Fool, used to sponsor these types of boards — but discontinued the practice.

### **How are messages posted?**

Quite easily. Most sponsors require visitors to register with them (which is free) before they can post. Then, a member just needs to type a message and submit.

Note that most sponsor do not require visitors to register to view messages (known as "lurking").

### **What are the differences between "message boards" and "chat rooms"?**

A "chat room" is a place on a web site where visitors can exchange messages in real time and then the messages automatically are deleted.

On a "message board," visitors leave messages to be viewed and replied to at a later time.

## **B. How Messages Can Harm a Company**

### **What is happening on message boards?**

Since anyone can post any type of message (subject to a sponsor's discretion to remove a message), most messages are conversational and do not contain useful information. Although there is a lot of meaningless banter on boards, some kernels of knowledge do exist.

Messages are posted by many types of persons, including investors, stockholders and employees.

### **What is a "cybersmear"?**

A common description for messages that contain false and disparaging information about someone or something. Cybersmeas can significantly impact a company's stock price.

Source: For an excellent article on cybersmeas and public companies, see Blake Bell, "Dealing with False Internet Rumors: A Corporate Primer," [wallstreetlawyer.com](http://wallstreetlawyer.com) (December 1998).

### **Why would someone want to post a cybersmear?**

Probably for the same reasons why anyone would circulate a rumor off-line, including:

- Manipulate a stock price
- Provide misinformation about a competitor
- Complain about services or products
- Revenge for termination or working conditions

### **What are examples of how cybersmeas can impact a stock price?**

### What are examples of how cybersmears can impact a stock price?

Thousands of cybersmears are posted each year, many of which are relatively harmless but some of which impact a company's stock price.

A good example occurred in the mid-90s - Motley Fool concocted a fake company and claimed its stock was listed on a fictional exchange and then posted 50 messages about the company — and a number of investors tried to trade the company's stock. Motley Fool conducted a similar ploy for Aprils Fool 2000 and had similar results.

Another example involves Imaginon Inc. - a small-cap company whose stock rose from 41cents to \$15.25 (a 3700% increase!) during a 3 month period in late 1998 due to message board rumors about a reverse acquisition.

Source: For an article about Imaginon's miraculous rise and the messages that caused it, see "Stemming the Tide of Touts on Stock Message Boards," New York Times on the Web (February 21, 1999).

### C. What Can Companies Do about Harmful Messages

#### What are companies doing about cybersmears?

Depends on the company - and the facts and circumstances. Some companies take action, even legal action. Some companies do nothing.

Many companies do not even aware that a cybersmear against them has been made — mainly due to the difficult task of monitoring the Internet (which includes the Web, intranets and e-mail). Even if a company becomes aware of a cybersmear - most don't know what to do since they are relatively novel, until after their first one.

#### What types of legal actions can be brought against cybersmears?

There are numerous types, many of which are state law actions, including:

- Fraud
- Defamation or libel
  
- Trade secrets
- Harassment
- Spamming
- Invasion of privacy
- Obscenity
- Stock manipulation
- Breach of fiduciary duty
- Breach of contract
- Respondeat superior for employee's misconduct
- Copyright or trademark infringement

### D. Sponsors Involvement and Liability for Harmful Messages

#### Will a sponsor prevent the posting of a message that violates a law?

No - sponsors do not pre-screen or approve message content.

All sponsors have policies that prohibit certain types of conduct on their boards as well as disclaim any requirement to screen messages before they are posted - but in these policies, sponsors universally reserve the right to monitor their boards and remove messages at their discretion.

Some sponsors randomly review messages after they have been posted — but they may curtail this practice in light of recent cases that found sponsors immune from liability if they didn't have knowledge of the problematic message's content.

#### How can a company contact a sponsor to remove a message?

Most sponsors provide e-mail addresses on their web sites — but no other contact information, such as a contact name or phone number.

As of March 2000, the following sponsors provided the listed contact information on their web sites:

- Yahoo - complaint form at [add.yahoo.com/fast/help/abuse/cgi\\_abuse](http://add.yahoo.com/fast/help/abuse/cgi_abuse)
- Motley Fool - [FoolBoards@fool.com](mailto:FoolBoards@fool.com)
- Silicon Investors - [comments@investorguide.com](mailto:comments@investorguide.com)
- E\*Trade - no contact information for complaints
- AOL - online complaint form

- AOL - on-line complaint form
- Raging Bull - Rusty Szurek at rusty@ragingbull.com or by phone at (978) 684-3760 and an on-line complaint form at [www.ragingbull.com/cgi-bin/bpreport?board=LMT&uusername=shadow172&number=345](http://www.ragingbull.com/cgi-bin/bpreport?board=LMT&uusername=shadow172&number=345)

Source: Raging Bull also has an "Ignore" function to allow visitors to self-censor any messages posted by a particular member. The drop down box for "Select a Violation" only offers 4 types of violations, none of which pertain to corporate complaints.

### **Can a sponsor remove a message if a company can demonstrate a reason?**

Most sponsor policies allow them to remove a message for any reason — even if the author complies with the policy's terms and conditions. Note that most sponsors reserve the right to change their policies at any time without notice to members.

### **Will a sponsor remove a message if a company can demonstrate a legitimate reason to have it removed?**

Most sponsors do not remove messages without some type of legal action initiated by a company.

If a company can provide a legitimate reason, the sponsor arguably will have a basis to demonstrate a good faith belief that disclosure to the company was acceptable — either in the absence of a subpoena or to comply with the legal process.

Source: An example of a sponsor taking action voluntarily is Yahoo Finance's three step process to block spam from its message boards as noted in "Yahoo Curbs Message Board Spam," [c/netnews.com](http://c/netnews.com) (July 27, 1999).

### **What are the terms and conditions in sponsor policies?**

Although each sponsor's terms and conditions vary, typical terms and conditions include:

- members cannot share their memberships with others (i.e. share user names and passwords)
- members can maintain only one membership with a sponsor at a time
- members must be at least 18 years old

### **What type of conduct is prohibited in sponsor policies?**

Although each sponsor's policy prohibits different conduct, they typically prohibit:

- Breaking the law
- Breaking the securities law
- Advertising
- Threats
- Sexually explicit material
- Impersonations
- Viruses
- Offer to buy or sell stock

If a sponsor believes that an author has violated its policies, it has the discretion to remove the message and terminate the membership of the author.

### **Where are sponsor policies found?**

On their web sites — typically called "Terms of Use." For example, the following sponsors post their policies at the following URLs:

- Yahoo - [docs.yahoo.com/info/terms/](http://docs.yahoo.com/info/terms/)
- Motley Fool - [www.fool.com/Help/FoolsRules.htm](http://www.fool.com/Help/FoolsRules.htm)
- Silicon Investors - [www.siliconinvestor.com/misc/tou.html](http://www.siliconinvestor.com/misc/tou.html)
- Tech Stocks - [xinvestorville.futurequest.net/termsofuse.htm](http://xinvestorville.futurequest.net/termsofuse.htm)
- Microsoft Investor - [www.msn.com/help/legal/terms.htm](http://www.msn.com/help/legal/terms.htm)
- AOL — on the subscription based site
- Raging Bull - [www.ragingbull.com/member/TermsOfUse.html](http://www.ragingbull.com/member/TermsOfUse.html)

### **Can sponsor be held liable for the messages posted on their boards?**

Probably not — particularly if the sponsor does not have knowledge of the message's content.

Probably not — particularly if the sponsor does not have knowledge of the message's content.

Congress has enacted a law to protect sponsors — and this law has been upheld in the courts so far. However - based on these cases, it's possible that the law may not apply to sponsors that are aware of the fraudulent or defamatory nature of a message.

In addition, all sponsor policies disclaim liability for the content of any of the messages on their boards.

Source: Under Section 230(c) of the Communications Decency Act of 1996 (known as the "Good Samaritan" provision), sponsors are immune from liability for messages posted on their sites by third parties. Cases that have upheld the Good Samaritan provision include Prodigy Communications Corp. v. Lunny (New York Court of Appeals, 99 N.Y. Int. 0165, Dec. 2, 1999) (sponsor held not liable for defamatory messages on its site without its knowledge or participation) and Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), cert. denied (AOL held not liable for allegedly acting unreasonably slow to delete alleged defamatory messages).

### **Can a sponsor sue an author for messages it posted on the sponsor's web site?**

Many sponsor policies purport to have authors who violate their policies indemnify the sponsor for any liability for their infractions - but there have been no reported cases of a sponsor suing an author.

## **E. Deciding Whether to Unmask an Author**

### **What risks does a company face if it unmask an author?**

If the author probably is an employee, a company should evaluate the potential impact on employee morale: will it be perceived as using "Gestapo" tactics?

Companies also should be prepared for negative media coverage - since privacy and free speech on the Internet are timely and sensitive topics. On-line privacy advocates have aligned themselves with John and Jane Does - and they know how to leverage the power of the media.

Source: The Electronic Privacy Information Center is quite active in helping John and Jane Does preserve their anonymity in these related lawsuits.

### **What risks does a company face if it files a lawsuit to unmask an author?**

Litigation costs — and a higher likelihood that the media cover the matter and that third-parties, such as on-line privacy advocates, will get involved.

Source: Yahoo Clubs! hosts a John Does Club (that had 98 members in spring 2000) where messages regarding related lawsuits are posted and on-line chats and conferences regarding unmasking authors are promoted, see [clubs.yahoo.com/clubs/johndoes](http://clubs.yahoo.com/clubs/johndoes).

### **Which companies have filed lawsuits to unmask an author?**

Reportedly, dozens of companies have filed these lawsuits.

For example, in early 1999, Raytheon filed a highly publicized John Doe breach-of-contract suit and sought the identity of 21 anonymous authors whom company officials believed to be employees.

After learning that some of the authors did indeed work for the company, Raytheon dropped the suit and opted instead to handle the matter internally — and eventually 3 employees left the company. One year later - the Raytheon 21 still communicate on the Web and it is believed that the publicity of the lawsuit still impacts employee morale at Raytheon .

Source: See "Raytheon Employees Resign in Wake of Lawsuit Protesting Internet Postings," Wall Street Journal (April 5, 1999).

## **F. How Can a Company Unmask an Anonymous Author**

### **How can companies determine the identity of an anonymous author?**

Obtaining information from a sponsor can be difficult.

It likely will be difficult to find someone at the sponsor to contact. Most sponsors provide only e-mail address contacts on their web site - not contact names or phone numbers. Since time likely will be "of the essence" for companies seeking to remove a message, e-mail contact information is not particularly useful — particularly since it can take several hours or even days (if at all) for a sponsor to respond to an e-mail.

In addition, most sponsors are hesitant to divulge any information - unless a company first obtains a subpoena. Sponsors normally don't voluntarily reveal whatever information they have about an author or a message - because they take great pains to limit their liability for the content of the messages posted on their boards - and they fear that an author will allege a breach of privacy if they turn over this information.

### **Can a company convince a sponsor to voluntarily reveal an author's identity?**

Although unlikely, a company may be able to convince a sponsor to voluntarily remove a message if it can demonstrate a legitimate reason for removal. The more legitimate the reason, such an obvious violation of a law, the more likely that a sponsor will voluntarily remove a message.

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Under their policies, sponsors have complete discretion to remove messages—without providing a rationale or even if the author complies with the sponsor's terms and conditions. Despite having complete discretion, most sponsors require that companies obtain a subpoena before they will cooperate with efforts to unmask an author or delete a message — sponsors are sensitive to the fact that authors don't like to have their messages removed and may publicly complain or sue if a message is removed.

Source: Yahoo voluntarily removed controversial messages regarding Lockheed Martin Corp. and its largest customer, without either party requesting that the sponsor remove the messages. See "Yahoo Censors Internet Postings," Boston Globe (November 3, 1999).

### **What alternatives does a company have to contacting a sponsor to unmask an author?**

Cybersleuth - or hire an investigative firm to do it for the company.

A company may be able to track an author using publicly available clues. These clues can be derived from the nature of the message itself or electronic traces left behind — without resorting to hacking.

Once a company unmasks an author, it can deal directly with the author and may be able to avoid having to file a subpoena - which significantly reduces the risk of media attention.

Source: Investigation firms are springing up to help companies unmask authors, including the Internet Crimes Group ([www.internetcrimesgroup.com](http://www.internetcrimesgroup.com)) which was founded by an ex-member of the FBI. Depending on the complexity of a search, Internet Crimes Group charges between \$2.5k-\$5k to track an author and typically can turn around a request in several weeks.

### **What type of information does a sponsor have about an anonymous author?**

A sponsor may or may not have relevant information about an anonymous author - since an author may have registered with the sponsor using fictional contact information.

But the sponsor may have an e-mail address (which can indicate which Internet service provider the author uses) or the unique Internet Protocol address associated with the author's Internet service provider account. With this information, it may be possible to locate the computer from which an author submitted its message to the board.

### **Do sponsors cooperate with subpoena requests?**

To varying degrees. Sponsors play a pivotal role in unmasking an anonymous author - if a sponsor chooses to fight a subpoena, a company may choose to not uncover the identity of the author due to the potential for media publicity that accompanies filing a lawsuit to get a subpoena.

### **Will a sponsor contact an anonymous author before removing its message?**

Sometimes. Most sponsors' publicly posted policies don't require it — but some sponsors have indicated that it is their policy to do so anyways.

In deciding whether to inform an author of a request or a subpoena to remove its message, sponsors may consider various factors - such as the nature of the complaint as well as the type of relationship it has with the author as well as whether it has some type of valid contact information.

Note that even if a sponsor attempts to contact an author, it may take some time to decide whether to do so — and this process may take so long that it's too late for an author to assert its legal rights to attempt to quash a subpoena.

Occasionally, even if a sponsor is unable to notify an author — it still may negotiate with the company to narrow the scope of the subpoena. But in most cases, a sponsor will provide the information it has, since sponsors typically are not in a position to evaluate the merits of the numerous subpoenas they receive.

Source: Yahoo Finance! receives the lion's share of subpoenas, see "Yahoo Suits Could Chill Speech," TechWeb (March 12, 1999).

## **G. Filing Lawsuits to Unmask Authors**

### **Where should a company file a John or Jane Doe lawsuit?**

In the county in the state where the sponsor's headquarters is located — since personal jurisdiction can be difficult to obtain based solely on where a message resides on a server.

In addition, some jurisdictions have anti-SLAPP statutes that may be the basis for an author to preserve its anonymity - if it can show that the lawsuit likely is frivolous. These statutes are meant to prevent litigation designed to stifle public debate — and often apply to John Doe suits.

Source: SLAPP stands for "strategic lawsuits against public participation." The California Anti-SLAPP Project has a list of jurisdictions with anti-SLAPP laws at [www.sirius.com/~casp/welcome.html](http://www.sirius.com/~casp/welcome.html).

### **Have companies successfully unmasked authors of messages?**

Dozens of companies have filed lawsuits against John and Jane Does to find out who posted a message and to seek redress.

Source: See "Firms Sue to Unmask Online Attackers," The Business Journal of San Jose (August 10, 1998).

## **H. How to Handle Employees Who Post Messages About Their Employer**

### **Should a company care if its employees participate on message boards?**

Employees may come across messages that can help them perform better in their jobs. Unfortunately, companies can wind up liable for messages that employees post - even though companies do not sponsor the boards, review their employee's messages before posting, or control their employees outside the workplace.

In particular, employees that post messages that relate to their jobs or employers can raise a myriad of securities law issues - such as control person liability, aiding and abetting, misleading disclosure or selective disclosure as well as other types of liability.

### **How can a company regulate how employees use message boards?**

With Internet use policies or through other corporate policies.

In the wake of published reports of problems caused by employee posts, growing numbers of companies have established or amended their Internet use policies to address message board use. Although these policies can help educate employees about the dangers of posting messages, questions remain regarding the enforceability of certain provisions in these policies.

### **Can a company enforce a policy that restricts employees from posting messages?**

Companies should be sensitive to not violating the First Amendment to the U.S. Constitution - on their own free time, employees arguably can engage in any lawful activity that they desire, including communicating on message boards.

Since freedom of speech considerations may be difficult to overcome - policies should be flexible to withstand court scrutiny. In addition, companies need to consider the rapidly changing state of privacy law.

Source: An example of employees fighting back in these lawsuits is provided in "Ex-Varian Employees Cry SLAPP," The Business Journal of San Jose (November 1, 1999).

### **How can a company determine if an employee posts a message?**

Even though most messages are anonymously posted, a message's content may indicate that the author is an employee—either by an explicit statement or by the type of information provided.

Only in rare cases can companies find profile information about an author on the message board. To verify that an author is an employee, a company probably needs to contact the sponsor to ask for whatever information about the author it may have.

Source: On AOL, it's possible to review an author's profile — but this information comes from the author and typically isn't truthful.

### **What if a company cannot be certain if an author is an employee?**

Without hard evidence, it's unlikely that a company can be absolutely certain that an author is an employee — in fact, even if the message contains information that indicates that author clearly is an employee, it may be someone who obtained information from an employee — maybe without the employee's knowledge (in other words, someone "spoofed" the employee's identity).

## **I. Potential Employer Obligations Arising from Employee Messages**

### **Can a company be liable for messages posted by an employee?**

Probably, under the right circumstances - this is a gray area so anything can happen. Arguably, someone could sue a company for an employee's acts under any of the following causes of action:

- Control person liability
- Aiding and abetting
- Selective disclosure
- Misleading disclosure
- Respondeat superior

### **What should a company do if an employee posts an inappropriate message?**

**What should a company do if an employee posts an inappropriate message?**

If the message is unlawful or violates corporate policy, a company should consider taking disciplinary action against the employee — as well as consider whether the employee's actions have triggered obligations that the company must fulfill.

**What if an employee posts material non-public information about its employer in a message?**

The employer may need to widely disseminate the information by issuing a press release — since it may be considered selective disclosure. To determine whether the employee's posting is attributable to the employer, the analysis focuses on whether the employee was acting within the scope of employment when it posted the message.

Under the SEC's proposed selective disclosure rules, an employee would be acting on behalf of the company if a message was posted within the scope of the employee's authority - if so, the company would have a Regulation FD violation if the disclosure was intentional — if unintentional, a company would have 24 hours to widely disseminate the inadvertent disclosure through a press release or Form 8-K filing.

Source: The SEC's proposed selective disclosure rulemaking is in Release 33-7787 (December 20, 1999) at [www.sec.gov/rules/proposed/34-42259.htm](http://www.sec.gov/rules/proposed/34-42259.htm).

**Why should employees not post messages with "selective disclosure" on a board?**

An employee can be liable for insider trading if it posts material non-public information on a board - and receives a personal benefit, perhaps even a benefit such as an enhanced reputation in the message board community.

If the message is indeed selective disclosure, Rule 10b-5 liability can result for both the employee and employer if the message is the basis for a trade.

**Does posting information on the Web make it "public"?**

No - making information more widely available on the Web is not sufficient for it to be considered adequately disseminated.

The NASD has clarified that companies' on-line posts can supplement - but not replace - placing information on the wire services to be considered adequate dissemination. If an employee posts material non-public information in a message, a company should issue a press release as soon as possible to reduce the likelihood and magnitude of potential liability.

Source: The NASD clarified its dissemination policy in the Internet context in 64 Fed. Reg. 5331 (Feb. 3, 1999). NYSE Manual section 202.06 "Procedure for Public Release of Information" states that information should be given to the wire services and the press for it to be considered widely disseminated.

**Does a company have a duty to correct misleading rumors that circulate on a message board?**

It depends — probably not if a rumor is not attributable to the company.

Caselaw has supported a company's ability to institute a "no comment" policy to respond to rumors — so long as the company consistently follows the policy and not selectively addressing rumors.

Before saying "no comment," a company should investigate the message to ensure that it's not attributable to the company.

Note that if a company's stock price moves significantly in the absence of any new news, the stock exchange on which the stock is listed may call and ask for an explanation.

Source: The seminal rumor case is State Teachers Retirement Board v. Fluor Corp., 654 F.2d 843 (2d Cir. 1981). The NYSE Manual states that companies should provide a frank and explicit announcement regarding a rumor if it appears that information has been leaked in NYSE Manual section 202.03 "Dealing with Rumors or Unusual Market Activity."

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