

Corporate Finance Alert

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SEC Eases Social Media Restrictions

Last week, the staff of the U.S. Securities and Exchange Commission's (SEC) Division of Corporation Finance issued guidance intended to facilitate the use of social media in connection with capital markets transactions, business combination transactions, tender offers and proxy contests. The guidance is intended to make it easier to satisfy the legend requirements applicable to certain transaction-related electronic communications.

Background

The federal securities laws generally restrict the type of information that may be disseminated to investors or security holders outside of a registration, proxy or tender offer statement, on the theory that an informed investment or voting decision should be confined to the four corners of disclosure documents filed with the SEC. Over time, however, SEC rules have been adopted that permit issuers and third parties to disseminate written (including electronic) transaction-related communications outside of these documents so long as certain conditions are satisfied. A condition that often applies is the requirement to include a prominent statement or legend in the written communication that refers readers to the disclosure document filed or to be filed with the SEC.

The legending requirements applicable to transaction-related communications, which predate the rise of social media, effectively have prevented issuers and third parties from using social media channels with character or text limitations, as the required legends typically exceed the character or text limitations.

New Staff Guidance

The new guidance, issued in the form of several "compliance and disclosure interpretations" (see Appendix A), attempts to address the shortcoming in the rules by providing that the staff will not object to the use of an active hyperlink to satisfy the legend requirements in the following circumstances:

- The electronic communication is distributed through a platform that has a limitation on the number of characters or amount of text that may be included in the communication;
- Including the required statements in their entirety, together with the other information in the communication, would cause the communication to exceed such limitations; and
- The communication contains an active hyperlink to the required statements and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

The guidance does not address how an issuer or third party would "prominently convey" that important or required information is provided through the hyperlink, but we expect

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that hyperlinks embedded in simple, concise language (e.g., “Important Information” or “Additional Information”) quickly will become standard market practice.

Where an electronic communication is capable of including the required legend, along with the other information an issuer seeks to convey, without exceeding the limit on number of characters or amount of text, the guidance makes clear that the use of a hyperlink to the legend would be inappropriate.

The new guidance also addresses the retransmission of electronic communications on social media platforms. Retransmissions can occur when, for example, a user “retweets” a communication on Twitter or “shares” a post on Facebook. The guidance provides that an issuer that disseminates an electronic communication in compliance with the rules would not need to ensure further compliance by a third party that retransmits the communication if (i) the third party is neither an offering participant nor acting on behalf of the issuer or an offering participant; and (ii) the issuer has no involvement in the third party’s retransmission beyond having initially prepared and distributed the communication in compliance with the rules.¹

Next Steps

The SEC guidance is a welcome change for issuers wanting to use social media as a way of communicating with investors and security holders. Combined with previous SEC guidance that confirms that social media can satisfy the conditions of Regulation FD under certain circumstances, and a relaxation of the general solicitation and general advertising limitations, the federal securities laws are becoming more aligned with modern communication practices.

Issuers intending to use social media to communicate with investors and security holders should, however, proceed with care. Among other things, issuers should be mindful that electronic communications on social media made in connection with capital markets transactions, business combination transactions, tender offers and proxy contests generally must be filed with the SEC on the date of first use and those communications remain subject to the anti-fraud provisions of the federal securities laws.

Issuers also should recognize that the flexibility afforded under the new guidance extends to third parties. It is therefore easier for those parties to advance proxy contests, tender offers and other campaigns against an issuer using social media platforms that previously were unavailable because of character or text limitations. Thus, issuers may want to consider increasing their use of these same platforms to more effectively communicate their views to investors and security holders and also should monitor closely social media platforms for what others are saying. We expect issuers and third parties to take advantage of the SEC guidance as social media continues to become an important component of communication strategies.

¹ Although the retransmission guidance addresses only electronic communications made in compliance with Rule 134, which provides a safe harbor from the definition of “prospectus” for certain limited written communications made after the filing of a registration statement, and Rule 433, which (along with Rule 164) permits the use of free writing prospectuses after the filing of a registration statement to facilitate written offers outside of the statutory prospectus, we believe the guidance should apply equally to transaction-related communications made in connection with business combinations, tender offer and proxy contests.

Appendix A

Securities Act Rules C&DIs

Question 110.01

Question: A communication made in reliance on Rule 134 must contain the statement required by Rule 134(b)(1) and information required by Rule 134(b)(2), unless the conditions of Rule 134(c) are met. In addition, if the communication solicits from the recipient an offer to buy the security or requests the recipient to indicate whether he or she might be interested in the security, it must include the statement required by Rule 134(d).

Some electronic communication platforms, such as those made available through certain social media websites, limit the number of characters or amount of text that can be included in the communication, effectively precluding display of the required statements together with the other information. Under what circumstances would the use of a hyperlink to the required statements satisfy the Rule 134(b) or Rule 134(d) requirements?

Answer: Recognizing the growing interest in using technologies such as social media to communicate with security holders and potential investors, the staff will not object to the use of an active hyperlink to satisfy the requirements of Rule 134(b) or Rule 134(d) in the following limited circumstances:

- The electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication;
- Including the required statements in their entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and
- The communication contains an active hyperlink to the required statements and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

Where an electronic communication is capable of including the required statements, along with the other information, without exceeding the applicable limit on number of characters or amount of text, the use of a hyperlink to the required statements would be inappropriate. [April 21, 2014]

Question 110.02 (Same as Question 232.16)

Question: Some electronic communication platforms, such as those made available through certain social media websites, permit users to re-transmit a posting or message they receive from another party. When an issuer distributes an electronic communication in compliance with Rule 134 or Rule 433, must the issuer ensure compliance with Rule 134 or Rule 433 of a re-transmission of that communication by a third party that is not an offering participant?

Answer: If the third party is neither an offering participant nor acting on behalf of the issuer or an offering participant and the issuer has no involvement in the third party's re-transmission beyond having initially prepared and distributed the communication in compliance with either Rule 134 or Rule 433, the re-transmission would not be attributable to the issuer. As explained in Securities Act Release No. 33-8591 (July 19, 2005), "[W]hether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or other offering participant depends upon whether the issuer or other offering participant has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information." [April 21, 2014]

Question 164.02

Question: An electronic communication relying on the exemption in Rule 165 must contain the legend required by paragraph (c)(1) of that rule. Some electronic communication platforms, such as those made available through certain social media websites, limit the number of characters or amount of text that can be included in the communication, effectively precluding display of the legend together with the other information. Under what circumstances would the use of a hyperlink to the legend satisfy the Rule 165(c)(1) requirement?

Answer: Recognizing the growing interest in using technologies such as social media to communicate with security holders, the staff will not object to the use of an active hyperlink to satisfy the requirements of Rule 165(c)(1) in the following limited circumstances:

- The electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication;
- Including the legend in its entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and
- The communication contains an active hyperlink to the required legend and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

Where an electronic communication is capable of including the required legend, along with the other information, without exceeding the applicable limit on number of characters or amount of text, the use of a hyperlink to the required legend would be inappropriate. This position also applies to written communications that constitute solicitations made in reliance on Exchange Act Rule 14a-12 and pre-commencement written communications subject to Exchange Act Rules 13e-4(c), 14d-2(b) and 14d-9(a). [April 21, 2014]

Question 232.15

Question: With the exception of free writing prospectuses that comply with Rule 433(f)(1), a free writing prospectus distributed in reliance on Rule 433 must contain the legend required by Rule 433(c)(2)(i). Some electronic communication platforms, such as those made available through certain social media websites, limit the number of characters or amount of text that can be included in the communication, effectively precluding display of the required legend together with the other information. Under what circumstances would the use of a hyperlink to the required legend satisfy Rule 433(c)(2)(i)?

Answer: Recognizing the growing interest in using technologies such as social media to communicate with security holders and potential investors, the staff will not object to the use of an active hyperlink to satisfy the requirements of Rule 433(c)(2)(i) in the following limited circumstances:

- The electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text that may be included in the communication;
- Including the required legend in its entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text; and
- The communication contains an active hyperlink to the required legend and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.

Where an electronic communication is capable of including the required legend, along with the other information, without exceeding the applicable limit on number of characters or amount of text, the use of a hyperlink to the required legend would be inappropriate. [April 21, 2014]

Question 232.16 (Same as Question 110.2)

Question: Some electronic communication platforms, such as those made available through certain social media websites, permit users to re-transmit a posting or message they receive from another party. When an issuer distributes an electronic communication in compliance with Rule 134 or Rule 433, must the issuer ensure compliance with Rule 134 or Rule 433 of a re-transmission of that communication by a third party that is not an offering participant?

Answer: If the third party is neither an offering participant nor acting on behalf of the issuer or an offering participant and the issuer has no involvement in the third party's re-transmission beyond having initially prepared and distributed the communication in compliance with either Rule 134 or Rule 433, the re-transmission would not be attributable to the issuer. As explained in Securities Act Release No. 33-8591 (July 19, 2005), "[W]hether information prepared and distributed by third parties that are not offering participants is attributable to an issuer or other offering participant depends upon whether the issuer or other offering participant has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information." [April 21, 2014]

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