

securities lawflash

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SEC Issues Guidance on Use of Social Media

Staff will allow required cautionary legends to be provided via hyperlink.

On April 21, the Staff of the Securities and Exchange Commission's (SEC's) Division of Corporation Finance issued helpful guidance¹ regarding the use of social media for certain written communications that are otherwise subject to SEC regulation.

In connection with registered securities offerings, business combinations, proxy solicitations, and tender offers, various SEC rules allow written communications beyond the registration statement, proxy statement, or other more formal documents. In certain cases, the rules restrict the permitted content of these communications and/or impose filing requirements. In each case, the rules require the inclusion of a cautionary legend, and the Staff's social media guidance addresses this legend requirement. Restrictions on the information that can be included in the communications and the filing requirements are unaffected by the SEC's guidance.

Recognizing the growing interest in using social media to communicate with security holders and others and recognizing that some electronic communication platforms—most notably, Twitter—limit the number of characters or amount of text that can be included in communications, the Staff's guidance will allow companies to satisfy the legend requirement by using an active hyperlink.

Under the guidance, using a link is permitted if, and only if, the following requirements are met:

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

This guidance applies to each of the following types of permitted communications:

- **Rule 134 Announcements:** In connection with registered securities offerings, Rule 134 allows written communications that convey certain specified information regarding the offering without such communications constituting a prospectus. Rule 134 is most often used for press releases announcing the launch and/or pricing of a registered securities offering. Rule 134 also requires, in most cases, a statement of how a prospectus can be obtained, and the Staff's guidance applies to this required information in addition to the legend.
- **Free Writing Prospectuses:** Rule 433 permits companies in the midst of registered securities offerings to provide investors with written communications (referred to as "free writing prospectuses") to convey information in addition, or supplemental, to that contained in the prospectus.

1. View the guidance at <http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>. The Staff's guidance is contained in Compliance and Disclosure Interpretations 110.01, 110.02, 164.01, 164.02, 232.15 and 232.16.

- **Business Combination Communications:** Parties to a pending business combination in which securities will be issued under a registration statement may issue written communications regarding the business combination in addition to the registration statement in accordance with Rule 165.
- **Proxy Solicitations:** Rule 14a-12 allows written communications that constitute a solicitation of proxies prior to the furnishing of the proxy statement.
- **Pre-Commencement Communications in Tender Offers:** Rules 13e-4(c), 14d-2(b), and 14d-9(a) each allow written communications with respect to a tender offer prior to the formal commencement of the tender offer.

At the same time, the Staff issued guidance on the retransmission of communications properly made under Rule 134 or Rule 433 in connection with a registered securities offering. The Staff stated that, so long as the third party that retransmits the communication is neither an offering participant nor acting on behalf of the issuer of the securities or an offering participant and the issuer has no involvement in the third party's retransmission beyond having initially prepared and distributed the communication in compliance with either Rule 134 or Rule 433, the retransmission would not be attributable to the issuer.

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