HUNTON& WILLIAMS

Client Alert

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SEC Issues New Guidance on the Use of Social Media

On April 21, 2014, the Securities and Exchange Commission's Division of Corporation Finance published new Compliance and Disclosure Interpretations (C&DIs) concerning the use of social media in certain securities offerings, business combinations and proxy contests. The C&DIs permit the use of an active hyperlink to satisfy the cautionary legend requirements in social media communications when the social media platform limits the text or number of characters that may be included (e.g. Twitter).

The C&DIs also clarify that postings or messages re-transmitted by unrelated third parties generally will not be attributable to the issuer. Therefore, the issuer will not be required to ensure that such third party's re-transmission complies with the guidance.

The requirements regarding cautionary legends contemplated by these C&DIs apply to both issuers and other soliciting parties in proxy fights or tender offers. Therefore, while the new guidance will allow issuers to communicate with their shareholders and potential investors via social media, it may also prove useful to activists in proxy fights and tender offers.

Hyperlink to SEC Legend

Issuers and other applicable parties are currently required to include specific cautionary legends in the following written communications:

- registered securities offerings made prior to the registration statement becoming effective in reliance on Rule 134 of the Securities Act of 1933;
- permissible post-filing free writing prospectus communications made pursuant to Rule 433 of the Securities Act;
- -solicitations made prior to the delivery of proxy statements under Rule 14a-12 of the Securities Exchange Act of 1934;
- communications related to an offer made in connection with a business combination transaction pursuant to the exemption in Rule 165 of the Securities Act; and
- pre-commencement communications in tender offers under Rules 13e-4(c), 14d-2(b) and 14d-9(a) of the Exchange Act.

Until now, these SEC legending requirements have restricted issuers' and other parties' abilities to communicate using Twitter or other similar technologies with character limitations because the required legends generally exceed the text limitations. Recognizing "the growing interest in using technologies such as social media to communicate with security holders and potential investors," the staff confirmed in C&DIs 110.01, 164.02 and 232.15 that it will permit the use of an active hyperlink to satisfy the cautionary legend requirements above in social media communications as long as each of the following requirements are met:

- 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.

These C&DIs do not apply to social media platforms that do not restrict the number of characters used. Therefore, communications on platforms such as Facebook or LinkedIn must still include the full legend in the body of the message.

"Re-Tweets"

C&DIs 110.02 and 232.16 provide guidance regarding an issuer's responsibility to ensure compliance with applicable SEC rules when third parties re-transmit, re-post or "re-tweet" communications made by the issuer. If a third party re-transmits, re-posts or "re-tweets" an issuer's communication, the re-transmission will not be attributable to the issuer and the issuer will not be required to ensure compliance with Rule 134 or 433 so long as "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."

Conclusion

The staff's guidance concerning the use of social media is a welcome development in light of rapidly changing technologies and communication mediums. While social media is often associated with technology companies, it has gained significant traction across all industries. The staff's new guidance, therefore, will allow issuers to communicate more easily with their shareholders and potential investors. It will also likely prove to be a useful tool for activists in proxy fights and tender offers.

In light of these new rules, companies should be aware of the following:

- This is a developing area.
    - The SEC can be expected to review how companies "prominently convey" the required hyperlink containing additional information. For now, there is no "market practice" in what is deemed sufficient to put investors on notice.
    - In a series of tweets, it is not clear whether it is sufficient to include the hyperlink in only the first tweet or if it must be included in every tweet.
    - The guidance was clearly issued with platforms such as Twitter, Facebook and LinkedIn in mind. Evolving social media technology and future platforms, however, may not fit neatly within the staff's guidance.
- Management and boards should consider ways to establish an active investor-centric social media profile.
    - A new or scarcely followed Twitter handle may be of little use to a company in a time of need. Conversely, an active, well-followed Twitter handle may serve as a useful tool for a company in the face of a proxy fight or tender offer. In particular, such a Twitter account could provide an efficient and inexpensive method of disseminating the company's message to investors to seek their support.
- Companies should make sure their investor and public relations teams are well versed on the SEC rules and guidance regarding social media, including when SEC legends are required.
    - Many companies use social media to promote their products or brand without including information that is material and that relates to financial or operating performance or

prospects. Thus, a company's shift in social media policy to include communications subject to the rules governing securities offerings, tender offers and proxy contests, discussed above, will require training for company personnel who oversee social media communications.
    - Companies should consider adopting social media policies or revisiting existing policies.
- Companies should also remain mindful of Regulation FD in their use of social media.
    - As the staff has previously indicated,[1] companies should consider whether:
        - the website is a recognized channel of distribution;
        - the posting of information on the website disseminates the information in a manner that makes it generally available to the securities marketplace; and
        - there has been a reasonable waiting period for investors and the market to react to the posted information.

Contacts

Steven M. Haas
shaas@hunton.com

W. Lake Taylor, Jr.
tlake@hunton.com

Scott H. Kimpel
skimpel@hunton.com

Lawton B. Way
lway@hunton.com

[1] These newly adopted C&DIs do not change the staff's existing guidance regarding social media. As noted by the staff in April 2013, companies may use social media to report material information without violating Regulation FD, as long as certain conditions are met. See http://www.hunton.com/files/upload/use_of_social_media_4.8.13.pdf.