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SEC Issues Guidance on Use of Social Media in Offerings and Proxy Fights

The SEC staff has released [new guidance](#) regarding the use of social media such as Twitter in securities offerings, business combinations and proxy contests (as a senior SEC official telegraphed at the Tulane Corporate Law Institute conference). Until now, SEC legending requirements have restricted an issuer's ability to communicate electronically using Twitter or similar technologies with built-in character limitations before having an effective registration statement for offerees, or definitive proxy statement for stockholders (as the legends generally exceed the character limits). Companies using Twitter and similar media with character limits can now satisfy these legend requirements by using an active hyperlink to the full legend and ensuring that the hyperlink itself clearly conveys that it leads to important information. Although the SEC guidance does not provide example language, hyperlinks styled as "Important Information" or "SEC Legend" would seem to satisfy this standard. Social media platforms that do not have restrictive character limitations, such as Facebook and LinkedIn, must still include the full legend in the body of the message to offerees or stockholders.

The new guidance will enhance the ability of market participants to use character-limited social media like Twitter to disseminate information to investors, which is likely to be especially welcome in high-tech industries where such media are an increasingly vital communications platform. Dueling Tweets have featured prominently in recent activism campaigns and proxy fights involving high-tech companies, most notably eBay's defense against a proxy contest launched by Carl Icahn.

Proxy participants (including directors and officers) must remember that "solicitation" is broadly defined by the SEC and can reach every written communication designed to lead to the giving or withholding of a proxy, including individual Tweets and even, according to SEC staff interpretation, Retweets that forward third parties' views, which are treated as though the Retweeter had written the text of the original Tweet. Every solicitation made before the definitive proxy statement is sent to stockholders must include the required Exchange Act Rule 14a-12 legend (which can now be provided by hyperlink) and be filed with the SEC on the day of first use, and is also subject to Exchange Act Rule 14a-9 antifraud rules and Regulation FD. Companies must therefore coordinate closely with officers and directors to ensure compliance.

The SEC's new guidance on proxy solicitation enables not only issuers but also activist hedge funds and governance activists to use social media in their proxy fights and attacks against a company's board and management before filing and mailing a proxy statement. Companies and their boards will have to be prepared to defend against such attacks and might consider establishing a social media rapid-response team in order to improve their own social media profiles, leverage their networks of friendly followers, and ensure that all participants are coordinated with the company's messaging in the case of an attack.

Trevor S. Norwitz
Sabastian V. Niles
Eitan S. Hoenig
Matthew I. Danzig

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