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Securities and Exchange Commission Releases Two Interpretations Relating to Social Media and Online Electronic Platforms in Securities Offerings

On April 21st the SEC's Division of Corporate Finance released two compliance and disclosure interpretations that are of importance to businesses seeking to conduct securities offerings using online electronic platforms.

In Question 110.02 the SEC addressed the issue of circumstances where an issuer distributes an electronic communication in compliance with Rule 134 (on when a communication is not considered a prospectus) and Rule 433 (on free writing prospectuses) using a social media site which allows recipients to retransmit the received communication. In such a case, must the issuer ensure compliance with Rule 134 and 433 by the third party retransmitting the communication?

The SEC's answer is that if the third party is neither an offering participant nor acting on behalf of the issuer or an offering participant and the issuer's has no involvement in the retransmission other than preparation of the original communication then the retransmission would not be attributable to the issuer.

In Question 110.01 the SEC addressed a circumstance in which an electronic communication is posted on a platform which limits the number of characters or amount of text that can be displayed and this limitation prevents the display, or full display, of required disclosure statements under Rule 134. In such a circumstance is a hyperlink to the full disclosure statement allowed?

The SEC's answer is that a hyperlink would satisfy the Rule requirements in three limited circumstances:

- Where the communication is distributed through a platform with technological limitations on the number of characters or amount of text;
- Including the required statements in their entirety would cause the communication to exceed the limit on number of characters or amount of text;
- 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 SEC's interpretation is explicit that use of a hyperlink is not appropriate in cases where the communication platform does not have the capacity to display the required statements along with the other information.

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