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Social Media and Proxy Contests

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As the use of social media continues to grow, social media is likely to play an increasingly more prominent role in proxy contests. In this context, the recent Compliance and Disclosure Interpretations issued by the SEC's Division of Corporation Finance provide helpful clarifications on how social media outlets can be used in proxy contests in compliance with SEC regulations.

SOCIAL MEDIA'S IMPACT ON PROXY CONTESTS

Activist investors have used social media and have at times been able to "move the market" through social media statements in support of or against a public company. Carl Icahn first used Twitter to express his concerns against Dell Inc.'s buyout in 2013, referencing his interest in Dell in his first Twitter posting. Icahn also made extensive use of social media in the recent eBay, Inc. proxy contest, in which Icahn pressured eBay to add two of Icahn's nominees to eBay's board of directors and to spin off eBay's PayPal division. Icahn made multiple statements related to the eBay proxy contest through his personal Twitter account, including a link to an article about eBay's corporate governance problems, links to letters on Icahn's website supporting his position and criticizing eBay, and short jabs at eBay that could stand alone within the 140 character limitation of a Twitter post.¹ Similarly, members of eBay's board also used Twitter to announce their positions against Icahn in the proxy contest.²

In the general effort to inform and persuade shareholders during a proxy contest, social media can be a powerful tool, and it can grab the attention of a larger audience. As Carl Icahn's example suggests, social media can be used to make statements with a length and tone tailored to a specific social media platform, and to share links to information and analysis that provide more depth and greater disclosure to an interested reader.

SEC GUIDANCE ON SOCIAL MEDIA USE IN PROXY CONTESTS

In April 2014, the SEC's Division of Corporation Finance issued new Compliance and Disclosure Interpretations to provide guidance on applying the SEC's rules regarding communications made under the Securities Act of 1933 (the "Securities Act") when statements are made utilizing social media channels. Under the Compliance and Disclosure Interpretations, the SEC addressed two concerns related to the use of social media in proxy contests: (1) the use of a hyperlink to information required by certain rules when a character- or text-limited social media platform like Twitter is used for communication or disclosure and (2) a third party's re-transmission of a communication made by the company. Although the SEC has provided guidance on re-transmission of electronic communications made under Rule 134 and Rule 433 of the Securities Act, which apply to communications made

¹ Carl Icahn, Twitter, https://twitter.com/Carl_C_Icahn.

² In April 2014, Icahn and eBay reached an agreement that put one of Icahn's nominees on the eBay board.

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in connection with prospectuses, and did not specifically extend the guidance to Rule 14a-12 and proxy solicitations, we believe that the same principles under the Compliance and Disclosure Interpretations would apply to any re-transmissions of electronic communications made in connection with proxy contests under Rule 14a-12.

Rule 14a-12 under the Securities Exchange Act of 1934 requires that certain information, such as plain language disclosing a proxy contest participant's direct or indirect interests and a prominent legend advising investors to read the proxy statement, must be included in proxy contest solicitations and other regulated statements and communications to shareholders. Recognizing the growing use of social media, the SEC's Compliance and Disclosure Interpretations clarify that a hyperlink may be used to satisfy the legend requirements of Rule 14a-12 in limited circumstances when the digital communication is being made on an electronic platform that limits the length of one posting so the posting cannot fit both the statement and the required legend or other information together³, such as Twitter's limitation of 140 characters per post. Such required information must be linked through an active hyperlink that "prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink."⁴

The Compliance and Disclosure Interpretations also address the impact of a third party's re-transmission of statements or communications made by an issuer on social media platforms. The Compliance and Disclosure Interpretations clarify that an issuer that makes a regulated statement or communication on social media bears no responsibility for subsequent re-transmission of the issuer's statement by a third party as long as they are unconnected,⁵ meaning as long as the third party is not acting on behalf of the issuer and the issuer has no involvement in the third party's re-transmission of the issuer's statement.

Social media statements are given no less scrutiny than statements in other media. In thinking about how to utilize social media in a proxy contest, companies and investors should understand the SEC's requirements for statements and communications made through such platforms. For instance, the party issuing a statement through social media will still need to file solicitation materials with the SEC on the same day they are first used or disseminated. This does not change when the solicitation is contained in social media communication such as a Twitter post or hyperlinked information.

As for the new SEC guidance permitting the use of hyperlinked information, a question remains as to what presentations of a hyperlink will be deemed to qualify as prominently conveying that important or required information is provided through the hyperlink.

It can be expected that as the use of social media in proxy contests becomes increasingly more widespread and participants push the limits of social media communications, the SEC will offer additional guidance and clarification through additional Compliance and Disclosure Interpretations and published reports.

³ Compliance and Disclosure Interpretations 110.01, 164.02, and 232.15.

⁴ *Id.*

⁵ Compliance and Disclosure Interpretations 110.02 and 232.16.