

Compensation to Newsletter Writers Must Be Disclosed

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by Kenneth G. Sam

On April 10, 2017, the SEC's Division of Enforcement brought enforcement actions against 27 individuals and entities behind various alleged stock promotion schemes. These actions arose when public companies, through promoters or communications firms, hired newsletter writers to generate publicity for their securities without publicly disclosing that the writers were being paid.

While it is not illegal to hire newsletter writers, Section 17(b) of the Securities Act of 1933 (Securities Act) requires that newsletter writers fully disclose both the amount and the nature of the compensation received, including the dollar amount of a cash payment, the number of shares issued, or any other compensation. Additionally, newsletter writers and persons who adopt, approve or authorize the content of a publication may be liable for untrue statements of material facts or omissions for misleading investors.

The Internet provides a ready means for fraudulent promotion of securities through social media, newsletters, chat rooms, emails, online blogs, press releases, and other media. The SEC's Division of Enforcement is focusing attention on companies using stock promotion schemes that lead investors to believe that they were reading independent, unbiased analyses in newsletters, social media, stock forums, or other media when writers are secretly compensated for promoting a company's securities. The SEC can bring charges against companies and promoters for these types of violations under various provisions of the Securities Act and Securities Exchange Act of 1934 (Exchange Act), including:

Securities Act Section 17(a)/ Exchange Act Section 10(b) and Rule 10b-5: For, directly or indirectly, using interstate commerce to offer or sale any securities by:

- employing any device, scheme or artifice to defraud; or
- obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

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- engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 17(b) of the Securities Act: For, directly or indirectly, using interstate commerce to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

Exchange Act Section 20(b): For aiding and abetting violations of Section 17(a) and Section 17(b) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act.

In addition, violations of securities laws may result in criminal prosecution. Allegations of securities law violations or association with firms that are charged with securities law violations may cause liability and embarrassment to a company and its officers, directors and employees. These violations may result in penalties, fines, imprisonment, or sanctions, including barring persons from serving as an officer or director of a public company or participating in certain securities offerings.

Companies may be ultimately responsible for the investor relations work performed by investor relations, communication, social media, marketing, and other firms. Companies can take steps to avoid securities law violations by:

- Completing due diligence and selecting only reputable investor relations, communication, social media, marketing, and other firms to engage in investor relations activities.
- Limiting the use of paid newsletter writers and making sure that any compensation paid is properly disclosed.
- Adopting public communications policies that require authorization of company communications prior to dissemination.
- Carefully reviewing all materials for accuracy to ensure that the disclosure does not contain untrue statements of a material fact or omissions.
- Making sure that all content is consistent with the company's public disclosures filed with regulatory agencies.
- Including forward looking statement and other disclaimers in all materials that are promotional in nature.
- Involving legal counsel, auditors and other professionals in the review of investor relations materials.