



California Corporate & Securities Law

Rule 134 And Suitability Disclosure

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Recently, I came across the following Compliance and Disclosure Interpretation (C&DI) issued by the Division of Corporation Finance at the Securities and Exchange Commission:

510.04 Although suitability requirements are not permitted under a literal reading of Rule 134, Rule 134(a)(16) does permit the inclusion of “any statement or legend required by any state law or administrative authority.” In light of the position by the California Department of Corporations that advertisements for direct participation programs (limited partnerships) must include suitability requirements, issuers may use suitability requirements in Rule 134 advertisements distributed in California when they are included to comply with the Department’s position. [Jan. 26, 2009]

Rule 134 provides that a communication limited to the matters specified in the rule will not constitute either a statutory prospectus under the Securities Act of 1933 or a “free writing prospectus” as defined in Rule 405.

In referring to the Department of Corporation’s position, the Division of Corporation Finance does not provide a citation to a specific rule. However, they may be alluding to Rule 260.140.01(d) which requires prospectus used in connection with an offering on which suitability standards are imposed under the terms and conditions of qualification include a description of those standards. The rule refers to Rules 260.140.112.1 and 260.140.123.2. Those rules establish the Commissioner’s standards for real estate and oil and gas programs, respectively. Rule 260.140.01 is not an advertising rule (those rules are found at Rules 260.300 – 260.402). Note, too, that the term “prospectus” is not a statutory term under the Corporate Securities Law of 1968 (unlike the Securities Act of 1933).

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>