

SEC Amends Proxy Rules to Facilitate Electronic Shareholder Forums

On February 25, 2008, the Securities and Exchange Commission's amendments to the federal proxy rules facilitating electronic shareholder forums, or e-forums, took effect. The stated purpose of the amendments, which can be found [here](#), is to facilitate greater online interaction among shareholders and issuers and allow for innovation and experimentation. While the SEC chose not to make e-forums a substitute for the current means of presenting non-binding shareholder proposals pursuant to Rule 14a-8, that potential use of e-forums is a frequently noted possibility. Because e-forums are entirely optional, issuers and shareholders alike have broad discretion in determining whether and how they use a wide range of interactive electronic media, including chat rooms, blogs, electronic surveys and online polling.

The SEC added a new provision to Rule 14a-2 exempting certain statements in e-forums from the proxy rule filing requirements. The provision covers communications in e-forums by shareholders and by issuers that occur more than 60 days prior to the date announced by the issuer for its next annual or special shareholder meeting. Existing Rule 14a-2(b)(1) already exempts a solicitation by an outside shareholder if the shareholder does not seek proxy authority. That exemption, however, can be retroactively lost if the person subsequently seeks such authority. Under the new exemption, a person who makes exempt solicitations in an e-forum is eligible to seek proxy authority at a later date, including within the 60-day period immediately prior to the shareholder meeting.

In addition, Rule 14a-17 was added to clarify that a shareholder or issuer (or third party acting on either's behalf) that establishes, maintains, or operates an e-forum is not liable for statements made by another person participating in the forum. The person making the statements, however, remains liable for false or misleading statements under traditional liability theories.

The amended rules provide limited benefits for issuers. For shareholders, the amendments offer some legal certainty about online activity. Even shareholders, however, will need to evaluate the consequences of participating in particular e-forums. For example, shareholders who post communications in e-forums in reliance on the new rules and later solicit proxy authority may need to file the earlier postings as soliciting materials. In order to avoid such a result, the SEC suggests providing participants the opportunity to delete their postings as of the 60-day cut-off, or have the forum "go dark" during this period. Potential participants should determine whether these options are available in particular e-forums before making postings. Shareholders also should consider whether particular e-forum activity might result in the formation of a group for purposes of Regulation 13D or whether soliciting activities undermine eligibility to file on Schedule 13G.

If you would like to learn more about the staff report, please contact your usual legal advisor at Ropes & Gray LLP.

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