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Corporate & Securities Practice

SEC Adopts Staff Position on Shareholder Access; Encourages Electronic Shareholder Forums

In July 2007, the Securities and Exchange Commission issued two competing proposals for comment regarding shareholder access to issuer proxy statements with respect to the election of directors. One was a proposal to permit issuers to exclude from their proxy statements shareholder proposals that relate to a nomination or an election of directors. The alternative was a proposal to permit 5 percent shareholders to submit for inclusion in an issuer's proxy statement proposals relating to by-law amendments that would mandate procedures to allow shareholders to nominate board of director candidates. These proposals were the subject of extensive comment and political debate. On November 28, 2007, the Commission approved the first of these proposals, adopting an amendment to Rule 14a-8(i)(8) under the Securities Exchange Act of 1934 that codifies the existing staff interpretation of that rule. See <http://www.sec.gov/news/press/2007/2007-246.htm>.

Rule 14a-8 permits shareholders to submit proposals for inclusion in the issuer's proxy statement if they comply with certain procedural requirements and if the proposal does not fall within a basis for exclusion specified in the rule. One of the permissible exclusions currently available under Rule 14a-8 is any proposal that "relates to an election for membership on the company's board of directors or analogous governing body." The Commission codified the staff's interpretation of this ground for exclusion by amending the language to read as follows:

If the proposal relates to *a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election.*

The Commission's shareholder access action preserved the status quo. The Commission felt it was necessary to take action because a recent court case that did not uphold the staff's interpretation of the proxy rules raised a significant amount of uncertainty. In the view of Commission Chairman Christopher Cox, if the Commission had not adopted either of the shareholder access proposals "there would be no clear and authoritative interpretation of our rules. And there would be an easy end run around the Commission's required disclosures and our antifraud rules in proxy contests." See <http://www.sec.gov/news/speech/2007/spch112807cc.htm>.

This amendment will be effective 30 days after it is published in the Federal Register. Accordingly, there will not be a change to the shareholder access rules for elections of directors this proxy season.

The Commission's decision is not the end of the debate on shareholder access to issuer proxy statements in the context of election of directors. Commissioner Cox stated that he expects that the Commission will "move forward and re-open this discussion in 2008 to consider how to strengthen the proxy rules to better vindicate the fundamental state law rights of shareholders to elect directors."

On November 28, 2007, the Commission also adopted amendments to the proxy rules to facilitate the use of electronic shareholder forums. Under the current rules, participation in an electronic shareholder forum potentially could be viewed as a solicitation subject to the proxy rules.

The amendments provide participants in electronic shareholder forums with an exemption from most of the proxy rules for communications occurring more than 60 days prior to the meeting date announced by the company if the communicating party does not solicit proxy authority while relying on the exemption. After the date that the exemption is no longer available, participants in electronic shareholder forums may solicit proxies if their solicitation is conducted in accordance with the Commission's proxy rules. If a company announces a meeting of shareholders less than 60 days before the meeting date, the solicitation could not occur more than two days following the company's announcement. See <http://www.sec.gov/news/press/2007/2007-247.htm>. Commissioner Cox characterized this rule amendment as "in essence, the federal securities regulation equivalent of that landmark piece of Internet legislation."

These amendments also provide that a shareholder, company, or third party that establishes, maintains, or operates an electronic shareholder forum will not be liable under the federal securities laws for any statement or information provided by another person participating in the forum.

The electronic shareholder forum amendments will also take effect 30 days after they are published in the Federal Register.

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