

## SEC Opens The Door To Electronic Shareholder Forums

March 2008

On Jan. 18, 2008, the Securities and Exchange Commission (the "SEC") adopted new rules that are designed to facilitate the exchange of information in electronic forums for communication among shareholders. The new rules offer significant liability shields for those involved in the establishment or operation of electronic shareholder forums, as well as those who participate in such forums.

In announcing the new rules, the SEC acknowledged that both shareholders and companies have expressed great interest in opening such forums, but have been reluctant to do so because of uncertainties about potential liability for statements provided by those participating in the forums.

The SEC stated that it hopes that the new rules will "tap the potential of technology to better vindicate shareholders' state law rights, including their right to elect directors, in ways that are potentially both more effective and less expensive for shareholders and companies."

The rules facilitating cheaper and faster communications among shareholders are expected to unleash more shareholder participation in corporate governance in a number of ways. "Electronic shareholder forums could generate attention for sound proposals that could increase the value of share ownership, and they could filter out proposals not supported by other shareholders," said the SEC. "They could also help disparate shareholders to form stronger coalitions and coordinate their voices; [and] these forums can also better educate or otherwise inform shareholders [about] the issues that will likely come up through proxy solicitations... prior to an annual meeting," the SEC concluded.

Sponsorship of and participation in electronic forums remains purely voluntary under the rules. The SEC specifically rejected public proposals that would have substituted mandatory electronic shareholder forums for the current means of presenting non-binding shareholder proposals in the company's proxy statements under Rule 14a-8 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Thus, individuals who choose not to establish, maintain or participate in electronic forums will not be affected by the new rules.

The new rule, Exchange Act Rule 14a-17 for the protection of those who establish, operate or maintain electronic forums, and Rule 14a-2(b)(6) exempting participants in electronic forums from certain liabilities for proxy solicitation, became effective on Feb. 25, 2008. For more detailed information about the rules, see SEC Release No. 34-57172 available at:

<http://www.sec.gov/rules/final/2008/34-57172.pdf>.

### PARTICIPATING IN ELECTRONIC FORUMS

Current regulations bring within the ambit of the proxy solicitation rules any communication that is considered "part of a continuous plan ending in a solicitation and which prepare(s) the way for its success."

But now Rule 14a-2(b)(6) creates an exemption from most proxy solicitation rules - including Rules 14a-3 through 14a-6 (except Rule 14a-6(g)), Rule 14a-8, and Rules 14a-10 through 14a-15 - for communication in an electronic shareholder forum that meets specified conditions.

A communication that might otherwise be construed as a solicitation in an electronic shareholder forum will be exempt from the rules cited above so long as it occurs more than 60 days prior to the date announced by the company for any relevant annual or special meeting of shareholders. If the company announces such a meeting less than 60 days before the meeting date, a communication may still be exempted if it does not occur more than two days after the announcement. The 60 day time period corresponds with the maximum amount of time prior to a scheduled meeting that the company may fix the record date for determining the shareholders entitled to notice of, or to vote at, a meeting under the Delaware Code. The SEC believes that imposing the 60 day requirement will limit the potential for abuse, and that the 60 day cutoff period will provide sufficient time for shareholders to consider the information disclosed to them about a planned shareholder meeting.

In either case, though, the solicitation cannot seek, directly or indirectly, the power to act as a proxy for a shareholder. Such a solicitation must still follow the traditional proxy solicitation rules.

Of course, communications cannot be totally exempted from solicitation rules if they are part of an ongoing plan that triggers regulatory enforcement for other reasons. For instance, communications in a shareholder forum for the purpose of acquiring or disposing of equity securities might result in the formation of a shareholder group subject to the provisions of Regulation 13D. Such soliciting activities might trigger specific offer and sale disclosure requirements and impact the eligibility to file a Schedule 13G.

Also, once an exempt solicitation is made, the individual making the solicitation cannot later request proxy authority as part of an ongoing plan. Therefore, people relying on Rule 14a-2(b)(6) who later solicit proxy authority will need to comply with other applicable SEC rules.

This means that shareholders who post communications on electronic forums in reliance on Rule 14a-2(b)(6) and who later solicit the power to act as a proxy will need to determine whether earlier electronic postings must be filed as soliciting materials. The SEC has suggested that electronic forum participants who are concerned about this prospect might consider deleting their electronic postings prior to the 60-day cutoff if given the opportunity to do so. Anyone hosting the forum might also consider having it "go dark" during the relevant regulatory periods prior to any meeting.

It is not necessary to file any notification of reliance on the new rule with the SEC in order to take advantage of its protections.

## ESTABLISHING OR OPERATING ELECTRONIC FORUMS

Rule 14a-17 clarifies that a shareholder, a company, or a third party that establishes, maintains or operates an electronic shareholder forum is not liable for statements made by another person participating in the forum.

Any person providing information to or making statements in an electronic shareholder forum, however, will remain liable for the content of any communication that violates federal securities laws protecting investors engaged in the purchase or sale of securities.

The SEC declared that the main purpose of the new hosting rule is to protect those who facilitate electronic forums from liability in much the same way that the federal communications laws protect an interactive computer service.

## SPECIFIC BENEFITS OF ELECTRONIC FORUMS

There are numerous potential benefits to the use of electronic shareholder forums, and the SEC cited several specifically as follows:

1. Electronic shareholder forums may reduce the costs of communication and coordination among shareholders and also may reduce companies' costs in replying to shareholder groups if they choose to do so electronically.
2. A shareholder seeking to submit a non-binding proposal or conduct a proxy contest may be encouraged or discouraged from doing so in accordance with better information that he or she will have acquired, at little or no cost, about the preference of other shareholders.
3. If a proposal is enthusiastically supported by a significant number of shares, the company might take notice of that and voluntarily adopt it; again, saving the shareholders considerable expense and benefiting the company overall.
4. Shareholders may be encouraged to run successful proxy contests to pursue changes, or management may benefit from a closer alignment between management and the interests of shareholders.
5. Shareholders and management will also likely have more information to use in evaluating various initiatives submitted for their consideration by other shareholders or by management.

The SEC noted that the only immediate and direct costs of such forums are voluntarily undertaken. Those costs include expenses associated with monitoring, processing and considering the information posted on such forums.

### *Explanatory Notes:*

*This update is intended to call your attention to a number of rule changes of possible interest and relevance to you, but it is not intended to constitute a legal opinion or definitive summary of all changes that could be material to you.*

**Burns & Levinson's Securities Law Group** represents public and private companies, underwriters and investment banks, venture capital and investment funds, real estate investment funds, hedge funds, investment advisors, broker-dealers, stockholder groups and individuals in public and private securities offerings and transactions, SEC, NASD and stock exchange compliance, corporate governance, fund formation and offerings, SEC enforcement and securities litigation.

### THE SECURITIES LAW GROUP

**Josef Volman - Co-Chair**  
617.345.3895 | [jvolman@burnslev.com](mailto:jvolman@burnslev.com)

**Andrew Merken - Co-Chair**  
617.345.3740 | [amerken@burnslev.com](mailto:amerken@burnslev.com)

If you have any questions regarding this Burns & Levinson Securities Law Update, please contact one of the individuals named above.

If you would like to be added to or removed from the mailing list for Burns & Levinson Securities Law Updates or other Burns & Levinson publications, please call 617.345.3000 or send your name and email address to [clientservices@burnslev.com](mailto:clientservices@burnslev.com).