

SEC Votes to Adopt Rule Amendments Relating to Electronic Shareholder Forums and Shareholder Proposals on the Election of Directors

November 29, 2007

At an open meeting on November 28, 2007, the Securities and Exchange Commission (SEC) voted to adopt rule amendments relating to (1) electronic shareholder forums and (2) shareholder proposals on the election of directors. The amendments were first proposed in July 2007 in two companion releases. Notably, the SEC declined to act on another rule amendment that would enable shareholders to include in company proxy materials their proposals regarding the procedures for nominating candidates for the board of directors. The SEC indicated that it may act on that proposal in the future.

The proposed rule amendments will affect Regulation 14A under the Securities Exchange Act of 1934, as amended, which governs the solicitation of proxies.

Electronic Shareholder Forums

By a unanimous vote, the SEC approved rules that are designed to facilitate greater Internet communication among shareholders and companies. First, proposed Rule 14a-18(a) was adopted substantially as proposed. Rule 14a-18(a) will permit a company or a shareholder to operate an electronic shareholder forum without being subject to liability for any information or statements posted on that forum. The company or shareholder operating the forum will continue to be subject to compliance with the federal securities laws, including the antifraud rules.

Second, Rule 14a-2(b)(6) will exempt certain types of solicitations from the limitations set forth in Regulation 14A on the types of public activities a shareholder or company may engage in when discussing issues that may be voted on at a company's shareholder meeting. Specifically, any solicitation in an electronic shareholder forum by or on behalf of any person who does not seek the power to act as a proxy for a shareholder and does not furnish or request a form of revocation, abstention, consent, or authorization would be exempt. To be exempt, such solicitation must occur more than 60 days before an annual or special meeting or within two days of the announcement of the meeting. The SEC emphasized that Rule 14a-2(b)(6) was not intended to replace the ability of a person to engage in the current proxy solicitation process of Regulation 14A, but to be an addition to that process. To read the SEC press release, please visit <http://www.sec.gov/news/press/2007/2007-247.htm>.

Shareholder Proposals on the Election of Directors

By a vote of 3-1 (Commissioner Nazareth voted against), the SEC voted to approve amendments to Rule 14a-8(i)(8) to clarify its exclusion for shareholder proposals on the election of directors. Rule 14a-8(i)(8) provides that a company may exclude a shareholder proposal that "relates to an election for membership on the company's board of directors or analogous governing body." In interpreting Rule 14a-8(i)(8), the SEC staff had permitted companies to exclude shareholder proposals that would result in a contested election, including any change to the nominee procedures. The purpose of this position is to prevent Rule 14a-8 from being used to conduct election campaigns.

The SEC's clarification is a result of a recent Second Circuit decision in *American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.*, 462 F.3d 121 (2d Cir. 2006), which held that AIG could not rely on Rule 14a-8(i)(8) to exclude a shareholder proposal seeking to amend

a company's bylaws to establish a procedure whereby shareholder nominees for director would be included in AIG's proxy materials. The SEC has taken the position that Rule 14a-8(i)(8) should not be interpreted to permit such proposals.

Citing the uncertainty created by the AIG case, the SEC has amended the exclusion in Rule 14a-8(i)(8) 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 (emphasis added)." To read the SEC press release, please visit <http://www.sec.gov/news/press/2007/2007-246.htm>.

More information regarding these new rule amendments will be available on the SEC's website (<http://www.sec.gov/rules/final.shtml>) when the adopting rule releases become available.

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