

CAHILL GORDON & REINDEL LLP
EIGHTY PINE STREET
NEW YORK, NEW YORK 10005-1702
TELEPHONE: (212) 701-3000
FACSIMILE: (212) 269-5420

February 5, 2008

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice as to any particular set of facts, nor does this memorandum represent any undertaking to keep recipients advised as to all relevant legal developments.

SEC Final Rules on Electronic Shareholder Forums

On January 18, 2008, the Securities and Exchange Commission (the “Commission”) issued a final release concerning the adoption of amendments to the proxy rules to facilitate the use of electronic shareholder forums as a means for shareholders to communicate with each other and with the companies in which they invest.¹ The new rules will go into effect on February 25, 2008. The Commission believes that shareholders and companies have been reluctant to establish such forums because of concerns regarding liability over illegal solicitations and over statements made in such forums. The amendments address these concerns by: (1) exempting from the proxy rules certain solicitations made in electronic shareholder forums and (2) providing liability protection for third-party statements made in shareholder forums. The Commission hopes that electronic shareholder forums will encourage shareholder participation and communication throughout the year and not just immediately before a meeting. The Commission chose not to impose any kind of template as to how shareholder forums should be organized, instead leaving it to shareholders and companies to decide.

The Commission noted that the amendments are meant to make electronic shareholder forums an added means for shareholders to communicate and do not in any way substitute for a shareholder’s right to submit a non-binding proposal for inclusion in the company’s proxy material under Rule 14a-8.²

I. Proxy Rule Exemption

Any solicitation of proxies in connection with securities registered pursuant to Section 12 of the Securities Exchange Act of 1934³ is subject to the filing and disclosure requirements of the proxy rules. The Commission has broad authority to control the way in which proxies are solicited so that it promotes “fair corporate suffrage.”⁴ The definition of “solicitation” includes both a request that a share-

¹ See SEC Release No. 34-57172; IC-28124; File No. S7-16-07, *Electronic Shareholder Forums* (Jan. 18, 2008), available at <http://www.sec.gov/rules/final/2008/34-57172.pdf>.

² Rule 14a-8.

³ 15 U.S.C. §1781.

⁴ 17 H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934) at 14.

holder execute a proxy and the “furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.”⁵ The proxy rules, therefore, apply to anyone attempting to influence the voting of proxies regardless of whether or not that person is seeking to act as proxy.

A. New Rule 14a-2(b)(6)

Any communication that, under the totality of the relevant circumstances, is considered “part of a continuous plan ending in a solicitation and which prepare(s) the way for its success”⁶ must comply with the Commission’s proxy rules. New Rule 14a-2(b)(6) exempts from most of the proxy rules⁷ solicitations made in an electronic shareholder forum established, maintained or operated by a company, shareholder, or a third party acting on their behalf. Such solicitations must not have been made either by or on behalf of a person who: (1) seeks the power to act as proxy for a shareholder or (2) furnishes or otherwise requests a form of revocation, abstention, consent or authorization.

B. Limitations of Exemption

A solicitation made on an electronic shareholder forum will be exempt from the proxy rules as long as it is made more than 60 days before the date announced by the company for its annual or special meeting of shareholders. If the company announces the meeting less than 60 days before the meeting date then the solicitation may not occur more than two days after the announcement. Any solicitation that remains on the forum following this period must either comply with the proxy rules or fall within one of the rule’s other exemptions. The Commission believes that the 60-day limitation will decrease the potential for abuse. The Commission stressed that although it would like to promote open discussion between shareholders, the actual solicitation of proxy authority for an upcoming meeting must still be conducted in compliance with the proxy rules.

C. Post-Exemption Period Proxy Solicitation

A person who makes a communication in an electronic shareholder forum in reliance on the exemption provided by Rule 14a-2(b)(6) can later request proxy authority after the date the exemption is no longer available, as long as the shareholder complies with the proxy rules. A shareholder doing so, however, will have to determine whether the previous comments made on the forum need to be filed as soliciting materials or whether such comments fall under another exemption to the proxy rules. The Commission suggests that the shareholder forum may deal with this issue by giving contributors the opportunity to delete postings during the 60-day period or by preventing access to the forum during that time.

⁵ Rule 14a-1(1)(iii).

⁶ SEC Release No. 34-29315 (June 17, 1991).

⁷ A person relying on Rule 14a-2(b)(6) will be exempt from: (1) Rules 14a-3 through 14a-6 (other than Rule 14a-6(g)); (2) Rule 14a-8; and (3) Rules 14a-10 through 14a-15.

II. Liability Exemption for Forum Operators

New Rule 14a-17 provides that a shareholder, company or third party acting on behalf of a shareholder or company that establishes, maintains or operates an electronic shareholder forum is not liable for statements made by another person participating in the forum provided that the forum is conducted in compliance with the federal securities laws, applicable state laws and the company's charter and by-laws. The person making the statement or providing the information, however, remains liable under both traditional liability theories of the federal securities laws and under applicable state laws. The Commission specifically expanded liability protection to include individuals and entities other than companies and shareholders, such as Internet service providers and shareholder and corporate associations.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Jon Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at (212) 701-3323 or jschuster@cahill.com; or David Shamshovich at (212) 701-3819 or dshamshovich@cahill.com.