

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 240

[Release No. 34-57172; IC-28124; File No. S7-16-07]

RIN 3235-AJ92

ELECTRONIC SHAREHOLDER FORUMS

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to the proxy rules under the Securities Exchange Act of 1934 to facilitate electronic shareholder forums. The amendments clarify that participation in an electronic shareholder forum that could potentially constitute a solicitation subject to the proxy rules is exempt from most of the proxy rules if all of the conditions to the exemption are satisfied. In addition, the amendments state that a shareholder, company, or third party acting on behalf of a shareholder or company 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. Therefore, the amendments remove legal ambiguity that might deter shareholders and companies from energetically pursuing this mode of communication.

EFFECTIVE DATE: [Insert date 30 days after Federal Register Publication].

FOR FURTHER INFORMATION CONTACT: Lillian Brown, Tamara Brightwell, or John Fieldsend at (202) 551-3700, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3010.

SUPPLEMENTARY INFORMATION: We are amending Rule 14a-2,¹ and adopting new Rule 14a-17,² under the Securities Exchange Act of 1934.³

I. BACKGROUND

On July 27, 2007, the Commission published for comment a release proposing, among other things, amendments to the proxy rules relating to electronic shareholder forums.⁴ We are adopting new Rule 14a-17⁵ and adding an exemption to Rule 14a-2 substantially as proposed in that release.

The purposes of new Rule 14a-17 and the Rule 14a-2 exemption are to facilitate experimentation, innovation, and greater use of the Internet to further shareholder communications. By facilitating such communications on the Internet among shareholders, and between shareholders and their companies, we hope to 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.

In a series of proxy roundtables that we sponsored in May 2007, several participants observed that recent technological developments hold promise in this

¹ 17 CFR 240.14a-2.

² 17 CFR 240.14a-17.

³ 15 U.S.C. 78a et al.

⁴ Release No. 34-56160 (July 27, 2007) [72 FR 43466] ("Proposing Release"). The instant release addresses only the electronic shareholder forum aspects of the Proposing Release. Comments received that addressed the comprehensive package of amendments to the proxy rules and related disclosure requirements are outside the scope of this adopting release.

⁵ New Rule 14a-17 was proposed as Rule 14a-18.

regard.⁶ Those participants noted that these technological developments could provide a more effective and efficient means of communication than any that are currently available to shareholders.⁷

For example, the participants suggested that an online forum that would be for the exclusive use of shareholders of the company could protect the shareholders' privacy through encrypted unique identifiers,⁸ while still permitting participants to know what voting percentage of the company was represented in discussions.⁹ Participants in such a forum could, in addition, discuss a variety of important subjects that today are considered, if at all, only periodically and indirectly through the proxy process.¹⁰ With the use of electronic shareholder forums, shareholder participation and communication could be extended throughout the year, rather than only during the period leading up to companies' annual shareholder meetings. Shareholders might also use such a forum as a

⁶ See Rich Daly, Broadridge Financial Solutions, Inc.; Amy Goodman, Gibson, Dunn & Crutcher LLP; Stanley Keller, Edwards Angell Palmer & Dodge LLP; Cary Klafter, Intel Corporation; and Paul Neuhauser, The University of Iowa College of Law, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 152 to 171. See also, Russell Read, CalPERS; Amy Goodman, Gibson, Dunn & Crutcher LLP; Nell Minow, The Corporate Library; Bill Mostyn, Bank of America Corporation; and Gary Brouse, Interfaith Center on Corporate Responsibility, Transcript of Roundtable on Proxy Voting Mechanics, May 24, 2007, at 54 to 81.

⁷ Id.

⁸ See, e.g., Stanley Keller, Edwards Angell Palmer & Dodge LLP, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 152; Rich Daly, Broadridge Financial Solutions, Inc., Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 157; and Nell Minow, The Corporate Library, Transcript of Roundtable on Proxy Voting Mechanics, May 24, 2007, at 67.

⁹ See, e.g., Rich Daly, Broadridge Financial Solutions, Inc., Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 157.

¹⁰ See, e.g., Rich Daly, Broadridge Financial Solutions, Inc., Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 156 and Stanley Keller, Edwards Angell Palmer & Dodge LLP, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 160.

polling mechanism to elicit the sentiments of the company's managers or other shareholders on various potential actions.¹¹

Technology now makes it feasible to establish such electronic shareholder forums to perform these functions. As one commenter indicated, technology is available to establish "secure, shareowner-to-shareowner communications, with access restricted to eligible shareowners, and using the Internet as a medium for efficient, ongoing interaction between shareowners and issuers."¹² These forums can be created so that operators and participants may exchange information electronically. Additionally, electronic shareholder forums can be designed to identify a participant's share ownership, as of a particular date, without disclosing that participant's name, address, or other identifying information.¹³ Therefore, we think that participants' privacy can be protected while simultaneously providing for accountability for anyone making false or misleading statements.

If companies choose to participate in, or sponsor, electronic forums, they might find them of use in better gauging shareholder interest with respect to a variety of topics. A company-sponsored forum also could be used to provide a means for management to communicate with shareholders by posting press releases, notifying shareholders of record dates, and expressing the views of the company's management and board of

¹¹ See, e.g., Stanley Keller, Edwards Angell Palmer & Dodge LLP and Rich Daly, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 170 to 171 and Nell Minow, The Corporate Library, Transcript of Roundtable on Proxy Voting Mechanics, May 24, 2007, at 54 to 56.

¹² Comment letter from Broadridge Financial Solutions, Inc.

¹³ Id.

directors.¹⁴

Despite these potential benefits of electronic shareholder forums, shareholders and companies alike have been reluctant to establish, maintain, or operate them due, in part, to uncertainty over liability for statements and information provided by those participating in the forum. In addition, potential forum participants have expressed concern regarding whether views and statements expressed through the forum would be considered proxy solicitations. Therefore, we proposed a new exemption from the proxy rules (other than from the shareholder list provisions in Rule 14a-7 and the antifraud provisions in Rule 14a-9) for any solicitation in an electronic shareholder forum that satisfies the conditions of the exemption. We also proposed new Rule 14a-17 to provide liability protection for a shareholder, company, or third party acting on behalf of a shareholder or company that establishes, maintains or operates an electronic shareholder forum regarding statements or information provided by another party participating in the forum.

As we discuss further in Section III, we are adopting new Rule 14a-17 and the amendments to Rule 14a-2 substantially as proposed. We are taking these steps to remove both real and perceived impediments to continued private sector experimentation with, and use of the Internet for, communication among shareholders, and between shareholders and the companies in which they invest. We intend for the amendments to facilitate communication and thereby encourage the creation of, and participation in, electronic shareholder forums.

¹⁴ Of course, anyone posting information on an electronic shareholder forum should consider the requirements of Regulation FD. See 17 CFR 243.100 to 243.103.

II. COMMENTS ON THE PROPOSED AMENDMENTS TO FACILITATE ELECTRONIC SHAREHOLDER FORUMS

The majority of the public comment on the proposed amendments to facilitate electronic shareholder forums was favorable.¹⁵ A substantial percentage of commenters remarking on the amendments, however, opposed substituting electronic shareholder forums for the current means of presenting non-binding shareholder proposals in the company’s proxy statement pursuant to Rule 14a-8.¹⁶ Although we solicited comment on this question, we did not propose any revisions to Rule 14a-8 that would cause the electronic shareholder forum to be a substitute for the Rule 14a-8 process. In the rule amendments that we are adopting today, we are making the electronic shareholder forum option an additional, rather than substitute, means of communication that could enhance and expand opportunities for participation and interaction.

In our proposing release, we requested comment on five basic issues related to electronic shareholder forums. The first issue was whether the proposed amendments would have their intended effect of providing sufficient flexibility under the federal securities laws to establish forums that permit interaction among shareholders and between shareholders and the company. In this regard, we solicited comment on whether shareholders and companies desire such flexibility, and if they do, whether the amended rules would provide it. We also solicited comment on whether any additional measures

¹⁵ See, e.g., comment letters from The Allstate Corporation (“Allstate”); Business Roundtable (“BRT”); Capital Research and Management Company (“Capital Research”); GreenMachines.net (“GreenMachines”); and Investment Company Institute (“ICI”).

¹⁶ 17 CFR 240.14a-8.

are necessary to ensure that the federal securities laws do not hinder development of these forums. Finally, we asked whether the rules should provide more direction and guidance relating to the structure and purpose of the forums than we proposed.

The second issue on which we solicited comment concerned the potential liability under the federal securities laws associated with electronic shareholder forums. A primary purpose of the proposed amendments was to clarify that establishing, maintaining, or operating an electronic shareholder forum does not make one liable for statements or information provided by another person. We also asked commenters to identify any additional liability issues under the federal securities laws that we may not have addressed through the proposed amendments.

The third issue concerned the period of time during which electronic shareholder forums should be allowed to operate without being subject to most of the federal proxy rules. Under the proposed amendments, any solicitation in an electronic shareholder forum by or on behalf of a person that does not seek, directly or indirectly, the power to act as a proxy for a shareholder would be exempt from most of the proxy rules.

We proposed that such a person could avail himself or herself of the exemption provided that the solicitation was made more than 60 days before the date announced by the company for its next annual or special meeting, or not more than two days following the announcement of such a meeting if the announcement occurred fewer than 60 days before the meeting date. We solicited comment on whether an electronic shareholder forum could function effectively with this timing limitation. We also asked whether better alternatives exist to encourage free and open communication. Additionally, we solicited comment on whether we should require electronic shareholder forums to be

closed down within 60 days of a scheduled shareholder meeting, whether shareholders whose communications remain posted inside the 60-day period should be required to file them with us, and how to best monitor these forums.

Fourth, we solicited comment regarding the use of electronic shareholder forums as a substitute for advancing referenda that otherwise would be presented in the form of non-binding shareholder proposals for inclusion in a company's proxy materials.

Finally, we solicited comment on the ways that an electronic shareholder forum might be used in connection with bylaw proposals regarding procedures for nominating candidates to the board of directors. In particular, we solicited comment on whether shareholders should be able to use an electronic shareholder forum to solicit other shareholders to join with them in submitting a bylaw proposal.

The vast majority of commenters supported the new exemption for electronic shareholder forums that we proposed to add to Rule 14a-2 and proposed new Rule 14a-17.¹⁷ The commenters generally favored the continued development of electronic shareholder forums as a means of facilitating communication among shareholders and between shareholders and companies.¹⁸

Despite the generally favorable reaction, some commenters predicted that electronic shareholder forums might develop into the same types of shareholder chat

¹⁷ See, e.g., comment letters from Allstate; BRT; Capital Research; GreenMachines; and ICI.

¹⁸ See, e.g., comment letters from Calvert Group, Ltd. ("Calvert"); Senator Carl Levin ("Senator Levin"); and Stephen R. Van Withrop ("Van Winthrop").

