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A legal update from Dechert's Corporate and Securities Group

## SEC Amends Rules to Facilitate Use of Electronic Shareholder Forums

The Securities and Exchange Commission (the "SEC") has amended the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to facilitate the use of electronic shareholder forums. These amendments revise the proxy rules under Section 14 of the Exchange Act (1) to provide that a company or shareholder that establishes or maintains an electronic shareholder forum will be subject to liability under federal securities laws only for statements it makes and not those made by others in the forum and (2) to clarify that statements posted to an electronic shareholder forum generally will be exempt from regulation under the proxy rules. Rather than prescribe any specific approach to the conduct of an online shareholder forum, however, the SEC has designed the amendments to remove impediments to continued private sector experimentation with the use of the Internet and to improve and encourage communication among shareholders and between shareholders and the company. The new rules will be effective February 25, 2008.

### Amendments to Facilitate the Use of Electronic Shareholder Forums

Newly adopted Rule 14a-17 is intended to facilitate the use of an electronic shareholder forum by both a company and its shareholders. This provision applies only so long as the forum is conducted in compliance with the federal securities laws, applicable state law, and the company's organizational documents. The amendment also makes clear that a company or shareholder that merely establishes, maintains, or operates the electronic shareholder forum

will not be liable under the federal securities laws for any statement or information provided by another person participating in or on the forum.<sup>1</sup>

Notwithstanding this amendment, persons providing information or statements to the electronic shareholder forum remain liable for the content of their communications under traditional liability theories in the federal securities laws relating to false or misleading information, such as Sections 10(b) and 20(e) of the Exchange Act and Rule 10b-5 under the Exchange Act. Federal and state law will continue to apply to those providing information or statements to an electronic forum, including the prohibitions in the federal securities laws against primary or secondary participation in fraud, deception, or manipulation.

The proxy rules govern the "solicitation of proxies," the attempt to influence the voting of proxies, regardless of whether the person is seeking authorization to act as a proxy. Solicitation has been construed to include any communication that is part of a continuous plan ending in a solicitation. Accordingly, shareholders and companies have historically been reluctant to discuss in electronic forums any issues that could be the subject of proposals at annual or special meetings, including non-binding proposals, out of concern that their statements may be deemed a "solicitation" under the proxy rules.

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<sup>1</sup> Rule 14a-17(b).

The amended proxy rules exempt from such rules

- any solicitation in an electronic shareholder forum by or on behalf of any person who does not seek, directly or indirectly, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form or revocation, abstention, consent or authorization,<sup>2</sup>
- so long as the contribution occurs more than 60 days before the date announced by an issuer for an annual or special meeting of shareholders, which corresponds to the maximum Delaware law shareholder meeting notice requirement.

If an issuer announces a meeting less than 60 days before the meeting date, the solicitation may not occur more than two days following such announcement.

The amended proxy rules also allow a person who participates in an electronic shareholder forum and makes solicitations in reliance on the proposed exemption to later solicit proxies without threatening the exemption's validity, so long as any such solicitation complies with the proxy rules, including required disclosures and distribution.<sup>3</sup>

Communications within an electronic shareholder forum that constitute a solicitation and that occur less than 60 days before an annual or special meeting, or more than two days after the announcement of a meeting, are unaffected by the amendment and must comply with the SEC's existing proxy rules. Accordingly, the party making such a solicitation must file such information with the SEC on an appropriate form and provide certain specified information to the company's shareholders in accordance with the proxy rules.

The SEC notes in its release adopting the amendments that a company or shareholder who takes advantage of an electronic shareholder forum and continues to solicit proxies within the 60-day period or after announcement of the meeting assumes special

<sup>2</sup> Rule 14a-2(b)(6).

<sup>3</sup> Rule 14a-2(b)(6).

risks. Under the amendments, such a person is assumed to be aware that if statements made prior to the 60-day period are stored and remain available on the forum, then such statements would be subject to the proxy rules and must be included with the soliciting material filed and distributed in accordance with the proxy rules. The SEC notes in its release that one way to address this concern would be for such person's materials be removed from the forum at such time or that the forum go dark entirely during the 60-day period prior to the meeting to avoid such stored materials being considered soliciting material and becoming subject to the proxy rules.

## Impact of Amendments

The amendments are intended to encourage the free flow of information, ideas, and opinions among shareholders and other interested parties. These opportunities for exchanging information are often impaired under the existing proxy rules by the prospect of potential liability under the federal securities laws as a result of the timing or content of such communications. From a company's standpoint, a shareholder forum can offer more frequent information about the interests and concerns of investors than the company could otherwise provide and would allow shareholders to provide advice to management. The flexibility provided by the SEC means that a forum can take many different forms, and the party establishing the forum may determine, for example, whether to invite the public or limit the forum to shareholders of the issuer, whether to allow participants to remain anonymous or require identification and whether to require or permit shareholders to include their holdings of the company's securities.

A shareholder considering whether to submit a non-binding proposal to a company may find a shareholder forum to be particularly useful following these amendments. Shareholders may discuss proposals in a forum and get feedback from other shareholders and, if invited, the company may be able to assess the level of shareholder interest before the shareholder decides to submit the proposal. In addition, a shareholder may be able to tailor the proposal to the interests of other shareholders and the company based on these discussions. In some circumstances a company may be able to address concerns raised by its shareholders directly, obviating a shareholder's need to

make a proposal that would take substantial time and incur greater expense.

## Applicability of other SEC Rules

It should be noted that other SEC rules and regulations are as applicable to discussions in electronic shareholder forums as they are outside such forums.

For example, discussions in a forum relating to the acquiring, holding, voting, or disposition of a company's equity securities may result in formation of a group that requires the filing of a Schedule 13D or that triggers filing and short-swing profit disgorgement rules under Section 16. Similarly, discussions either inside or outside of such forums relating to control of the company may affect the eligibility of a shareholder to use Schedule 13G.

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## Practice group contacts

For more information please, contact one of the Dechert lawyers listed or the Dechert attorney with whom you regularly work. Visit us at [www.dechert.com/corporateandsecurities](http://www.dechert.com/corporateandsecurities).

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