

November 28, 2007

The SEC Says “No” to Shareholder Access (For Now) and “Yes” to Shareholder Forums

At today’s open meeting, the SEC, in a 3 to 1 split, voted to codify in a revised Rule 14a-8(i)(8) its interpretation that companies may exclude from their proxy materials any shareholder proposal that would result in an immediate election contest or set up a process for future election contests by requiring the inclusion of shareholder nominees in company proxy materials. Notwithstanding intense opposition from shareholder groups and prominent government leaders, including members of Congress and Commissioner Nazareth herself, the SEC took this action to give companies certainty as to how to act with respect to such proposals in the 2008 proxy season and to ensure that persons conducting election contests would be subject to the SEC’s existing rules relating to solicitations in opposition (which currently generally apply only to contests where there are two competing proxy solicitations, not to one proxy solicitation with competing board slates). In his meeting remarks, Chairman Cox expressed disappointment at having to adopt this interim rule, but hopes to take up the issue next year.

Revised Rule 14a-8(i)(8) is meant to be narrowly construed, and many shareholder proposals that may fall under the broader “director election” rubric will continue to be includable in company proxy materials. Only those shareholder proposals that would result in an immediate election contest (*e.g.*, by making or opposing a director nomination for a particular meeting) or would set up a process for shareholders to conduct future election contests by requiring companies to include shareholder nominees in company proxy materials are excludable. Examples of excludable proposals include those that could have the effect of:

- disqualifying board nominees who are standing for election;
- removing a director from office before his or her term expired;
- questioning the competence or business judgment of one or more directors; or
- requiring companies to include shareholder nominees in the company’s proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to board-supported nominees.

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Fukoku Seimei Building 2nd Floor
2-2, Uchisawaicho 2-chome
Chiyoda-ku, Tokyo 100-001, Japan
(81-3) 3597-8101

1615 L Street, NW
Washington, DC 20036-5694
(202) 223-7300

Unit 3601, Fortune Plaza Office Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
(86-10) 5828-6300

Alder Castle, 10 Noble Street
London EC2V 7JU England
(44-20) 7367 1600

12th Fl., Hong Kong Club Building
3A Chater Road, Central
Hong Kong
(852) 2536-9933

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Non-excludable proposals include those that relate to:

- director qualifications or board structure (as long as the proposal will not remove current directors or disqualify current nominees);
- voting procedures (such as majority or cumulative voting);
- nominating procedures; or
- reimbursement of shareholder expenses in contested elections.

The SEC also voted to approve rules that would promote shareholder communications via online forums by exempting from federal proxy rules any solicitation made in a forum by or on behalf of any person who is not seeking directly or indirectly any proxies and does not furnish or otherwise request any form of revocation, abstention, consent or authorization, so long as the solicitation is made more than 60 days before the next shareholder meeting or, if the company announces the date of the next shareholder meeting less than 60 days before the meeting date, not more than two days after such announcement. Companies, shareholders and third parties or persons acting on their behalf may establish, maintain or operate a shareholder forum to facilitate interaction among shareholders and between the company and its shareholders as they deem appropriate, so long as the forum complies with the federal securities and other applicable federal and state law and the company's charter and bylaws. No forum organizer would be liable, solely as a result of their establishing such a forum, under the federal securities laws for any statement or information provided by another forum participant. Forum participants would be liable for their own statements under existing theories of liability, such those arising under Sections 10(b) and 20(e) of the Exchange Act.

The new rules are expected to be effective 30 days after their publication in the Federal Register.

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The foregoing is based on oral discussions at the SEC's open meeting and the SEC's press releases on these developments. The specific language of the new rules will not be known until the relevant releases are published, at which time we expect promptly to provide a more detailed description and analysis thereof. This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning the issues addressed in this memorandum may be directed to Paul D. Ginsberg (212-373-3131), Raphael M. Russo (212-373-3309) or Frances F. Mi (212-373-3185).