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What About e-Forums for Your Company

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What About E-Forums for Your Company



BY LOIS YUROW

On January 18, the SEC amended the proxy rules to encourage creation of electronic forums — “e-forums” — for shareholders to communicate among themselves and for shareholders and companies to interact with each other. The technology is available, and a good forum could enhance your investor relations program, but deciding to develop an e-forum is not as simple as the SEC would like it to be.

Important Background

For years, investors have used Internet chat rooms and message boards to discuss stocks. These forums generally are operated by passive third parties — Yahoo and AOL for example — not by the participants or issuers. In fact, most companies expressly refuse to acknowledge chat rooms and message boards because of lack of resources, the risk of selective disclosure, and concern that they would be deemed to support a forum over which they would have no control. Also, all participants risk having their contributions deemed “solicitations” requiring compliance with SEC proxy rules. The SEC set out to reduce these liability concerns.

The Proxy Amendments

The SEC under Chairman Christopher Cox encourages the use of technology to improve investors’ access to information, so it is no surprise that the Commission wants to help issuers and shareholders leverage the useful aspects of interactive forums. In particular, the SEC wants to promote year-round conversations among investors and public companies to supplement the flurry of single-issue discussions that now precedes an annual meeting.

To that end, the proxy amendments were designed “to facilitate experimentation, innovation, and greater use of the Internet to further shareholder communications.”

The amended rules *do not require* anyone to create or participate in an e-forum. Instead, as described in the sidebar, the amendments remove two obstacles that potentially inhibited companies and shareholders from doing so. Amended Rule 14a-2 provides that participation in an e-forum will not constitute a

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“solicitation subject to the proxy rules” if certain conditions are satisfied. Amended Rule 14a-17 provides that, like an ISP or other publisher, a shareholder or company that operates an e-forum (either directly or through a third party) “will not be liable under the federal securities laws for any statement or information provided by another person participating in the forum.” The amendments do not dampen the antifraud rules or rules governing the activities of control groups.

Should Your Company Create an e-Forum?

A company developing and maintaining an e-forum can secure many benefits. You can make your company’s forum attractive

WHAT DO THE AMENDMENTS ACCOMPLISH?

One of the recent proxy amendments protects e-forum participants from inadvertently triggering disclosure obligations. The other amendment confirms that the party operating an e-forum is not responsible for content posted by others. Neither amendment offers any protection from the antifraud rules.

Rule 14a-2(b)(6). The proxy rules require anyone engaged in a solicitation to comply with certain filing and disclosure requirements. As defined, the term “solicitation” is broad enough to capture many of the contributions someone might make in an e-forum, even if the annual meeting is months away and the participant has not decided to seek proxy authority.

To encourage robust discussion, Rule 14a-2(b)(6) provides that communication on an e-forum will not be deemed a solicitation if:

- The person making the communication is not seeking “the power to act as proxy” and;
- The communication occurred more than 60 days before the scheduled date of the next shareholders meeting, or earlier than two days after the meeting date is announced, whichever is later.

Notably, a participant (including the issuer) can rely on this exemption and later actively solicit proxies, but the soliciting party must then comply with all applicable disclosure and filing requirements. Under those circumstances, the participant’s previously exempt communications, if still available for viewing on the e-forum, might be deemed “soliciting material” that must be filed.

Rule 14a-17. This amendment states that a company, shareholder, or third party working for a company or shareholder that operates an e-forum will not be liable for another participant’s postings by virtue of having provided the communication outlet. The protection is available so long as “the forum is conducted in compliance with the federal securities laws, applicable state law and the company’s charter and bylaws.”

— Lois Yurow

by promising that management will actively participate in the company-sponsored forum (and no other). Management can use a sponsored forum to distribute and update information, explain the company’s position and respond to comments about contentious issues, and gauge support for proposed corporate initiatives.

Equally important, IROs can follow what matters to investors — maybe learning about possible proxy proposals or prevailing rumors early enough to address them effectively.

Finally, since an e-forum is an inexpensive way for individuals to broadcast their views, and a company-sponsored forum will have an aura of credibility, you are likely to hear from a wider range of investors than those that sponsor proxy proposals, attend annual meetings, or get invited to one-on-one sessions.

Still, despite the SEC’s best intentions, a company that creates an e-forum assumes some risk. Consider these potential problems and challenges for the IRO:

If we build it, will they come? Some observers wonder whether shareholders really want more interaction with public companies. Will an e-forum attract individuals who own a small number of shares, or own their shares in street name for privacy reasons? Conversely, will institutional investors have the desire and resources to participate in all the e-forums available to them, or will they stay away, depriving your forum of an important voice? As one law firm warned, companies hoping that an e-forum will give them some insight “should . . . realistically assess the expected amount and quality of shareholder input to be gained when shareholders are under no obligation to participate.”

Will everyone behave? The promise of easy communication with a wide audience can be enticing for someone intent on committing fraud, or for someone with a complaint. Will a vocal minority monopolize the forum to advance a particular agenda? Will activists use the forum to promote future shareholder proposals or proxy challenges? If the conversation on your e-forum degenerates, serious investors will stop coming and your company’s reputation could suffer.

How much will it cost? Creating an e-forum will cost money. In addition to start-up expenses, you need to budget for publicity to reach all of your shareholders, staffing, and ongoing technical maintenance. As discussed below, you probably also will want procedures to validate participants and conduct straw polls.

Will it backfire? If you have an opinionated shareholder base, your e-forum could begin to look like a constant battle over shareholder proposals, putting the company on defense and

drawing resources away from running the business. And will the governance rating organizations — like ISS or Glass Lewis — monitor e-forums and consider the company's participation as part of their overall assessment? Going a step further, will the investment community decide that creating or participating in an e-forum is a mark of good governance, and penalize companies that opt out?

Decisions, Decisions

If management decides that your company should set up an e-forum, there are many variables to consider.

Who will moderate? Does your company already have seasoned people who can moderate? These individuals will need time to read and respond to shareholder comments, access to information and managers to ensure that their postings are accurate, ongoing legal guidance to prevent ill-advised disclosure, and the fortitude to manage the conversation firmly but fairly. Even if you have the staff, would shareholders prefer to forego some institutional knowledge in exchange for a neutral moderator?



Lois Yurow

What is the best format? Do you want a “town hall,” where shareholders can raise any issue and management will respond? Or is it better to restrict the discussion to a defined set of topics? Although it's true that if you restrict discussion you risk complaints of censorship, you also improve the odds of having a reasoned discussion. In addition, it will be easier to monitor and more efficient to respond to a forum with a restricted scope. Should you promise to monitor the forum and post responses daily, or commit to a less ambitious schedule? Will your e-forum enable participants, including the company, to poll shareholders to gauge support for particular ideas? This ability could reduce fruitless shareholder proposals or alert the company to popular ideas, but it also could galvanize support for proposals that might otherwise languish in the proxy statement.

Who can participate? Will your e-forum be open to anyone with an interest (including analysts and the press), or will you restrict participation to shareholders? How will you reach beneficial owners to invite them to participate, and what will that effort cost? If you want participants to be shareholders, how will you verify their status each time they log in, and what will that technology cost?

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Can participants be anonymous?

There are many ways that participants in an e-forum can be identified to each other. You may require a full name and statement of ownership to promote accountability. Alternatively, you may decide that anonymity will foster a more candid discussion, despite the counter-vailing risk that anonymous participants have more opportunity to speak carelessly or even fraudulently. Perhaps you want to permit participants to withhold their names but announce their voting power.


Will you operate year-round? Under the amendments, communications in an e-forum will not constitute “proxy solicitations” if they occur more than 60 days before the next shareholders meeting. You can protect participants from inadvertently losing this exemption

by disabling the forum when the 60-day period begins, but that approach cuts off all discussion when shareholders are likely to be most interested. Alternatively, participants (including the company) can be given the means to delete their own postings (now potentially “soliciting material”) if they later begin a solicitation.

Conclusion

The SEC’s amendments open the door to many possibilities, but raise as many questions. If your company is pondering an e-forum, you first must decide how much control you are willing to exercise and whether your shareholders will accept the constraints. If you do not want to impose content restrictions (including the right to edit or remove postings) and limit participation to shareholders, an interactive forum may not be your best

option. Without that control, your forum easily can become indistinguishable from a Yahoo chat room.

That isn’t to say you shouldn’t do anything. If you provide a convenient on-line method for shareholders to submit comments to management, and regularly update your Web site with information on issues that spark shareholder interest, you will achieve two important goals of an e-forum and demonstrate your company’s responsiveness. To paraphrase Chairman Cox, shareholders will publicize their opinions, whether you like it or not. Maybe somebody ought to pay attention. 

Lois Yurow practiced corporate and securities law for several years and now helps public companies satisfy the SEC’s plain English disclosure requirements. E-mail her at lois@securitieseditor.com.

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