

# Corporate Governance Commentary

January 2008

## A Practitioner's Guide To Electronic Shareholder Forums

### Highlights

- The SEC recently adopted amendments to the proxy rules designed to encourage the use of electronic shareholder forums (which, for convenience, we will refer to as “e-forums”). The stated purpose of the amendments was to make communications among shareholders, and between shareholders and their companies, more effective and less expensive. The amendments do not prescribe any particular format, although Web sites that permit online exchanges of information, such as Q&A discussions and/or online polling, seem to be the type of format that the SEC envisioned.
- For a lot of companies, e-forums may not be of much value, given the relative ease with which companies can now communicate with their shareholders. One possible exception is companies receiving Rule 14a-8 proposals, or which are otherwise targeted by institutional shareholders, may benefit from using e-forums as a channel for communicating with investors and diffusing the situation. Another possible exception is that e-forums may have some investor relations value, particularly for companies that are under increased scrutiny from investors and public interest groups. For companies that decide to organize e-forums, the design will have to be carefully thought through if the e-forums are to be effective.
- Companies should be aware of two potential risks the amendments create. First, badly constructed e-forums may be hijacked by vocal individuals and turned into platforms for launching anti-management tirades. Perhaps even more troubling, e-forums will improve the ability of hedge funds and other activist investors to mobilize against companies.
- E-forums do not replace Rule 14a-8 precatory proposals. Shareholders will therefore have the best of both worlds and be able to direct their efforts through whichever of the two communications channels they think most effective.
- E-forums will not have any ISS implications, at least initially. That could change if, for example, ISS were to start viewing e-forums as a sign of good corporate governance and factoring them into its “CGQ” ratings, or were to start treating online polls conducted through e-forums similarly to Rule 14a-8 proposals for purposes of making withhold recommendations based on company failures to implement straw poll recommendations.

On January 18, 2008, the SEC published amendments to the federal proxy rules designed to facilitate the use of e-forums.<sup>(1)</sup> The amendments will become effective on February 25, 2008. According to the adopting release, the amendments are intended “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, [the SEC hopes] to tap the potential of technology to better vindicate shareholders’ state law rights . . . in ways that are potentially more effective and less expensive for shareholders and companies.”<sup>(2)</sup> The following is a summary of the amendments and an analysis of their implications, organized in a question and answer format.

**Question:** What is an “electronic shareholder forum”?

**Answer:** The amendments do not define the term “electronic shareholder forum” nor prescribe any particular format. A number of variations come to mind:

- An online “town hall” used as a vehicle for shareholders to raise questions and concerns about the company and obtain responses from management. The focus of a “town hall” style e-forum would be facilitation of broad information exchanges about the company, for the benefit of both the company and its shareholders. It could be unrestricted as to topic, like an online chat room, or more focused around one or several specific topics specified by the sponsor of the e-forum.
- A variation would be to structure the e-forum as a sort of extended symposium relating to a specific topic, such as executive compensation. The goal would be to promote an in-depth understanding of the topic, in contrast to a “town hall” format, which would deal with a number (possibly unlimited) of topics and where the focus would be more on airing opinions than finding or explaining a solution.<sup>(3)</sup>
- Another possibility would be for the e-forum to serve as an online polling platform. This could be used in addition to consideration of non-binding proposals under Rule 14a-8 at the annual meeting of shareholders, so that proposals could be presented and considered by shareholders at any time of the year.

The foregoing uses of an e-forum could be varied or combined. As noted above, the amendments are intended to encourage experimentation with the design of e-forums in order to optimize their utility.

**Question:** How do the amendments facilitate e-forums?

**Answer:** The amendments remove possible legal impediments to communication among shareholders, and between shareholders and their companies, in two principal ways:

- First, the amendments address the concern that organizers of e-forums might be liable for content posted by third parties. A new Rule 14a-17(b) provides that no “shareholder, registrant, or third party acting on behalf of a shareholder or registrant, by reason of establishing, maintaining, or operating an electronic shareholder forum, will be liable under the federal securities laws for any statement or information provided by another person to the electronic shareholder forum.”<sup>(4)</sup>
- Second, the amendments address the concern that postings on e-forums might be deemed to constitute solicitations in violation of the proxy rules.
  - The definition of “solicitation” under Rule 14a-1 of the proxy rules includes “the furnishing of . . . a communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.” The SEC has recognized that this definition is very broad and could potentially turn almost any shareholder statement of views concerning a publicly traded corporation into a regulated proxy solicitation.<sup>(5)</sup> Unless an exemption were to apply, the shareholder would be required to prepare and file a proxy statement in compliance with the proxy rules and to distribute the proxy statement to those deemed solicited.<sup>(6)</sup>
  - One of the exemptions frequently relied on by shareholders, Rule 14a-2(b)(1), exempts solicitations by or on behalf of any person (other than the issuer) who does not directly or indirectly seek proxy authority. The exemption is not available to anyone who seeks proxy authority in the future and so cannot be used to “test the waters.” In addition, Rule 14a-6(g) provides that anyone relying on the Rule 14a-2(b)(1) exemption who beneficially owns, at the commencement of the solicitation, securities of the class which is the subject of the solicitation, with a market value over a specified amount, must file certain types of written solicitation material with the SEC.

- Under the e-forum amendments, new Rule 14a-2(b)(6) provides an exemption under the proxy rules for solicitations in an e-forum by or on behalf of any person who does not directly or indirectly seek proxy authority.
  - Unlike Rule 14a-2(b)(1), the exemption is also available for management.
  - Moreover, utilizing the new exemption does not foreclose a party from seeking proxy authority at a future time when the exemption is no longer being relied on, and so can be used to “test the waters.” It also does not require that any solicitation material be filed with the SEC.
  - The exemption is only available for solicitations made more than 60 days prior to the date announced for the next shareholders meeting or, if the announcement is less than 60 days prior to the meeting date, not more than two days following the date of the announcement.<sup>(7)</sup>
  - The exemption does not foreclose reliance on any other exemption during the 60-day blackout period. For example, participants in an e-forum who do not intend to solicit proxy authority would be free to rely on the exemption under Rule 14a-2(b)(1) for e-forum postings during the blackout period.
  - Finally, Rule 14a-2(b)(6) does not provide an exemption from the antifraud rules, or from other provisions of federal securities laws, such as Regulation 13D-G, Regulation FD and other applicable federal or state laws, or from any restrictions under a company’s charter or bylaws.<sup>(8)</sup>

**Question:** How will e-forums benefit companies?

**Answer:** Given advances in technology, communication has never been easier than it is today. Managements and boards of directors engage in communications with shareholders in a variety of formats, including in-person meetings, calls and written communications (including e-mail), investor conference calls and webcasts, investor seminars, press releases, SEC filings and through the company’s Web site. Most of these communications are not treated as “solicitations,” unless made in connection with an annual or special meeting (when, given the 60-day blackout, the e-forum exemption would also generally not be available). For example, an investor presentation about the status of the company’s business would generally not be thought of as constituting a solicitation. Accordingly, many companies will not have the need or desire for more effective and efficient communications with their shareholders.

There will be some companies, however, for which e-forums may be useful. For example:

- Companies that receive a Rule 14a-8 proposal, or that are the subject of institutional shareholder criticism focused on a particular topic, may want to consider using a “symposium” type of e-forum as a channel for communicating with investors and defusing the situation.
  - An example of such an e-forum is the Verizon e-forum set up in June 2007 as a result of investor dissatisfaction over the high levels of executive pay and the factors used to determine pay, at a time when the company was underperforming its peers. The stated purpose of the forum was to “provide its participants with the effective access to information and exchange of views needed to understand the relationship of executive compensation incentives to the company’s achievement of long term enterprise objectives, as a foundation for considering investor decisions about both capital commitment and voting.”<sup>(9)</sup>
  - A document posted on the forum homepage describes the process as follows: “The Forum program will start with an informal “workshop,” inviting Verizon management, shareholders, securities analysts and other professionals to develop consensus recommendations of (a) what investors should be considering in their decisions and (b) what information can reasonably be made available for required research and analysis. Based on the directions established by the workshop, the Forum will present relevant information publicly to all participants and provide opportunities for open

exchanges of views at one or more steps. A final report of the program's conclusions will include any comments offered by Verizon management."

- The forum was organized by a financial institute with the support of the Association of BellTel Retirees Inc., a 110,000-member organization consisting of retired employees of Verizon and its predecessor companies. It was steered by an Advisory Panel, consisting of members of institutions with sufficient ownership interest in Verizon to justify more active support, and which provided financial support to the forum. <sup>(10)</sup> Management was invited to participate in the forum. <sup>(11)</sup>
- Some companies that are under particular scrutiny from investors and public interest groups may believe there is an investor relations benefit to establishing e-forums.
  - For example, companies in the energy sector, which are subject to constant scrutiny regarding environmental matters, could position themselves as being more attentive to environmental concerns and more socially responsible by hosting e-forums.
  - Royal Dutch Shell plc ("Shell") first began operating such an e-forum, called "Tell Shell Forum" in 1998, and currently operates one called "Shell Dialogues." The Shell Dialogues home page describes the e-forum as being designed to "enable Shell, its stakeholders and the general public to explore the key issues facing energy suppliers and consumers today – and tomorrow." Shell posts various reports, articles and videos on its Web site, and invites the e-forum participants to post questions, some or all of which Shell representatives then answer during a webcast Q&A session. According to the forum's Web site, the reports, articles and videos are compiled by various "media partners" who have editorial control over the content.
  - Dell Inc. recently launched an e-forum, called "Dell Shares," which it describes as "a forum for the Dell investing community and for Dell IR to address topics on Dell's business performance and strategy." <sup>(12)</sup> Dell investor relations personnel initiate topics by posting information in the e-forum, for example about acquisitions or retail initiatives. E-forum participants can post comments and questions, which the investor relations personnel have the ability to respond to.

**Question:** What sorts of risk will the amendments create for companies?

**Answer:** The amendments are likely to create at least two types of risk.

- First, a poorly designed company e-forum may turn into little more than a soap box for interested parties to launch tirades against management.
  - A loosely structured e-forum (for example, one that resembles the bulletin boards in Yahoo! and Motley Fool) would be very easy for third parties to hijack. Not only could this generate bad publicity for the company, but participation by other shareholders may dry up. <sup>(13)</sup>
  - A good example of that is the early experience of Shell. Tell Shell Forum was a purportedly uncensored e-forum. By 2005, when Shell was the subject of a lot of negative news relating to matters such as a reserves fraud and cost overruns, anti-Shell postings became so pervasive that Shell representatives started censoring some of them and then ceased responding to postings altogether. Participation by all but a few parties ceased, and the e-forum was eventually shut down. Having learned from its mistakes, Shell appears to have designed Shell Dialogues so that Shell retains much tighter control over the content.
  - Dell Shares also seems to have been designed so that Dell retains significant control over content. Not only do Dell investor relations personnel select the discussion topics, but the terms and conditions make clear that Dell reserves the right to edit, reject or remove forum participants' postings.
- Another, perhaps more significant, risk for companies is that the e-forum amendments will provide corporate governance activists, hedge funds and similar activist investors with a

better platform from which to mobilize against companies:

- Hedge funds and other activist investors already know how to use the Internet as an effective campaign tool, and have created Web sites to display advocacy materials supporting their causes.<sup>(14)</sup> While the currently available proxy rule exemption under Rule 14a-2(b)(1) cannot be used to test the waters, the e-forum exemption under Rule 14a-2(b)(6) can. By using e-forums, activists will therefore be able to test the waters with a solicitation campaign in an e-forum, while preserving the ability to later switch tactics and seek proxy authority.<sup>(15)</sup>
- Activists will also be able to use e-forums to conduct straw polls on a year-round, 24/7 basis. This will effectively create an alternative to the Rule 14a-8 regime, which management only has to deal with once a year.
- Activist-run e-forums used in connection with event-driven campaigns are less likely to be burdened by the legitimacy concerns described below than standing management-run e-forums. Such activist-run e-forums are likely to be more focused on swaying investor sentiment as opposed to, for example, achieving legitimate straw poll results.
- It is possible that the e-forum amendments' exemption from liability for content posted by third parties, as well as the inapplicability of any filing obligation under Rule 14a-6(g), may also incentivize activists to use e-forums.
- In the proposing release for the e-forum amendments, the SEC solicited comments on whether shareholders should be able to use e-forums to solicit other shareholders to form a 5 percent group in order to qualify under the then-proposed shareholder access rule. Use of e-forums in this way would provide a further benefit to activists when they want to assemble a larger percentage of shares than they hold directly in order to call special meetings or take other corporate action requiring greater share ownership than the activists command directly.<sup>(16)</sup>
- Finally, some observers believe that the main consequence of the adoption of the e-forum rules will be to give activist investors of all stripes a new and important highly visible no-risk platform patina of legitimacy to their cause.

**Question:** What other challenges will e-forums designed for use by management and investors present?

**Answer:** If such e-forums are to be functionally useful, they will face a number of challenges:

- In order to attract meaningful participation by management and investors, e-forums will need legitimacy. Institutional investors are likely to be skeptical of e-forums that are designed and operated by companies, and vice versa. This suggests that to be widely supported, an e-forum would have to be perceived by investors and management as unbiased. For certain activities, such as online polls, the site would need to provide assurances as to the bona fides of the participants, including their actual ownership of company stock. Financial institutions, or technology service providers in the financial community, might be good site sponsors. For example, the Verizon forum mentioned above was organized by a third party financial service provider experienced in establishing such forums, with the support of the Association of BellTel Retirees.
- In the case of e-forums organized by institutional investors, a large institution perceived as not being overly activist might be a candidate. Perhaps large associations of institutional investors, such as the Council of Institutional Investors, would also have the necessary credibility if their site were structured to be unbiased and limited to bona fide investors.
- There are also technical problems that will have to be overcome in order to utilize e-forums for credible straw polls, such as a means to verify that voters are current shareholders and developing effective procedures for notice to shareholders inviting them to participate. This is something that companies and shareholders are unlikely to be able to do without external assistance. While there are service providers that have the expertise to do this, there will be associated timing and cost issues.

- A related issue for online polls is validity of the outcome. If participation is permitted on an anonymous basis, it may be particularly difficult to retain a good process and protect against fraud. Even if participation is not anonymous, the concern for validity will present technical verification issues, which service providers should be able to resolve, as well as trust issues, which goes back to the merit of having the e-forum overseen by an independent third party.
- Also, as indicated above, unless good procedural rules are put in place, there is a significant risk that e-forums will produce nothing more than a deluge of trivial e-mails. Rules will be needed that balance the competing considerations of making the e-forums sufficiently inclusive and uncensored to maintain legitimacy, but sufficiently focused and constructive to produce useful communications and mutual understanding.
- For companies, sponsorship or active participation in e-forums present resource and cost issues. A successful e-forum will require people to monitor the e-forum, and companies will have to consider the extent to which they are prepared to hire and train staff for that. The idea of being able to conduct online polls is particularly daunting. In order to obtain a meaningful result, shareholders will have to be informed, and a mechanism for doing so may prove costly and time consuming.
- Likewise, institutional investors with portfolios including a large number of companies will face similar or worse resource allocation and cost issues. They may not have the manpower or budget to monitor and participate in online polls and other e-forum activities involving more than a relative handful of companies. Given these considerations, e-forums may create an embarrassment of too many communication opportunities at too many companies for too few truly interested participants.

**Question:** Will the amendments impact the Rule 14a-8 precatory proposal process?

**Answer:** The amendments do not amend Rule 14a-8. E-forums will operate as an additional channel for shareholders to bring their agenda items to the attention of management and other shareholders, and will not impact their ability to bring precatory proposals under Rule 14a-8.

In the proposing release, the SEC solicited comments on whether it should adopt rules to enable companies to adopt an online polling model for non-binding shareholder proposals in lieu of Rule 14a-8.

- Such a rule might have been beneficial for some companies because it would have permitted them to omit precatory proposals from their proxy statements.
- From an institutional investor's perspective, however, while an online poll has some attraction, the Rule 14a-8 process has proved too effective a tool simply to give up. Investors can use the express or implicit threat of a Rule 14a-8 precatory proposal as a means of opening up a dialogue with management regarding their concerns. If they are unable to resolve their differences with management, the Rule 14a-8 process gives them a very public forum to air their grievances. The ground rules for submitting a Rule 14a-8 proposal are clearly laid out, and the SEC functions as an effective arbiter of disputes.
- The online polling process could provide a similar opportunity for investors to pressure management into discussing and resolving the investors' concerns, but it is completely new and untested. Moreover, the amendments do not specify any governing process or create any neutral arbiter of disputes, so there are reasons to believe that it may not be as effective.
- By making online polling a supplement to, as opposed to a replacement for, Rule 14a-8 precatory proposals, institutional investors now have the best of both worlds. If online polling proves to be ineffective, the Rule 14a-8 process can be expected to continue unaffected. If online polling proves as or more effective a method for institutional investors to achieve their agendas, however, e-forums could reduce the significance of Rule 14a-8.

**Question:** How will ISS (now part of RiskMetrics Group) and other proxy advisory firms deal

with e-forums?

**Answer:** The amendments are unlikely to impact the role of ISS and the other proxy advisory firms, at least initially. ISS and its competitors make recommendations to shareholders on how to vote in connection with shareholder meetings. E-forums will operate outside of the shareholder meeting context, and thus the proxy advisory firms under their current product offerings would not play a role in e-forum straw voting or other activity. ISS, however, could change its practices in the following ways:

- If straw polling gains traction among institutional investors, ISS and/or other proxy advisory firms could expand their services to include recommendations for straw poll votes on e-forums. If they did so, it would be logical to expect that their influence in the straw voting process would soon match their influence in formal shareholder voting, or even exceed it, because internal voting functions at institutional investors probably would be challenged by the increase in issues to be voted on.
- ISS could also view company e-forums as a sign of good corporate governance and factor it in to the “CGQ” ratings that it assigns companies. Company e-forums could therefore become one of the factors that may influence ISS’ voting recommendations.
- Finally, ISS and the other proxy advisory firms could view failure to adopt measures that receive requisite shareholder support in online polls as a basis for a “withhold” recommendation in director elections. For example, ISS’ current US Proxy Voting Guidelines provide for a “withhold” recommendation for the entire board if the board has failed to act on a shareholder proposal that received approval by a majority of outstanding shares the previous year, or if the board failed to act on a shareholder proposal that received approval of the majority of votes cast for the previous two consecutive years. ISS could create similar guidelines for failure to adopt policies approved by shareholders representing some percentage of outstanding or voting shares in online polls.

**Question:** What impact will e-forums have on the 2008 proxy season?

**Answer:** For most companies, there is unlikely to be any impact because e-forums work outside of the shareholder meeting context and the exemption under the amendments is unavailable during a 60-day blackout period prior to the annual meeting. Some companies that receive Rule 14a-8 proposals for their 2008 annual meeting, however, may want to consider whether creating an e-forum could be helpful in dealing with the shareholder proposal. In addition, companies that have to deal with activist investors may find that the activists resort to e-forums for organizational and advocacy reasons in the run-up to the 60-day blackout period.

## Conclusion

The e-forum amendments are best viewed as a well-intentioned change with some possible benefits, but probably just as many unintended negative consequences for companies. The rule proposals were considered at the same time as the two shareholder access rule proposals and were tucked away at the back of one of the two proposing releases. Among the comment letters submitted to the SEC, the shareholder access proposals received far more attention than the e-forum proposals, and the comment letter of one ABA committee urged the SEC to explore the e-forum proposals in more depth before adopting them. The proposed rules did not elicit much discussion on whether or how they would tip the balance of power between shareholders and corporations. It is easy to see how the goal of facilitating communications among shareholders, and between shareholders and corporations, did not seem controversial.

While e-forums may be useful, for example, in dealing with proponents of Rule 14a-8 proposals or for investor relations purposes, many companies may not see a pressing need to open up a new channel of communications with their shareholders. Monitoring and participating in an e-forum will require time and effort, and may prove costly. Moreover, a badly designed e-forum may be completely ineffectual or, even worse, backfire and become inundated with anti-management tirades. Unless e-forums start to be viewed as indicia of good corporate governance and companies feel pressured into creating them, we believe

most companies will conclude the potential costs of e-forums outweigh their potential benefits.

On the other hand, the amendments will make it easier for hedge funds and other activist investors to mobilize. Unlike the existing frequently-used exemption permitting communication among investors without violation of the proxy rules, the e-forum amendments will also permit activists to “test the waters” using e-forums, and then switch tactics and start soliciting proxy authority in a full blown campaign. Hedge funds and other activist investors may therefore be the biggest beneficiaries of the e-forum amendments.

#### ENDNOTES:

- (1) The adopting release is available at [www.sec.gov/rules/final/34-57172.pdf](http://www.sec.gov/rules/final/34-57172.pdf) (the “adopting release”). The proposing release is available at [www.sec.gov/rules/proposed/2007/34-56160.pdf](http://www.sec.gov/rules/proposed/2007/34-56160.pdf). The e-forum concept was also discussed at the SEC’s roundtable forums in May 2007. Transcripts can be found at [www.sec.gov/news/openmeetings.shtml](http://www.sec.gov/news/openmeetings.shtml).
  - (2) In his speech given at the Sunshine Act meeting at which the amendments were adopted, Chairman Cox indicated that the amendments were intended to address concerns raised by shareholders that the proxy process can be time-consuming and expensive. Many observers, however, do not agree that the cost burden of proxy contests is inappropriate, nor that the proxy rules impose unreasonable burdens on communications by and among shareholders. Given amendments adopted in 1992 and current developments in technology, shareholders have a significant ability to communicate in compliance with the proxy rules. Moreover, the 1992 amendments were adopted following a 3-year study by the SEC and two different rule proposals. In contrast, there does not appear to have been any comprehensive study undertaken in connection with the e-forum amendments. At the May roundtable forums, the panelists discussed whether e-forums could improve communication, in light of the current Rule 14a-8 precatory proposal process and the role of brokers and other intermediaries in the beneficial ownership system. The panels did not purport to address potential solutions to any study finding that communication needed improving. In fact, several of the panelists were of the view that there is more than sufficient communication that takes place today.
  - (3) The e-forum could also be used to set up conference calls and in-person meetings; although these would not benefit from the exemptions under the amendments.
  - (4) In the adopting release, the SEC made clear that this protection does not just apply for companies and shareholders, but also extends to “other types of forum sponsors or operators, such as Internet service providers and shareholder or corporate associations, acting at the request, and on the behalf, of a shareholder or company.”
  - (5) See the adopting release for the 1992 amendments, SEC Release No. 34-31326.
  - (6) While for many years such distribution would have required printing and mailing a proxy statement, the SEC recently adopted rules that permit electronic proxy distribution, except in connection with business combination transactions.
  - (7) The adopting release makes clear that communications that remain available in an e-forum during the 60-day blackout period must comply with the proxy rules if they constitute a solicitation, unless they fall within an existing exemption. The SEC suggested that in order to ensure compliance, e-forums could give participants the opportunity to delete their postings as of the 60-day cut-off date, or have the e-forum “go dark” during this period.
  - (8) For example, the adopting release states that it could conceivably be necessary for a participant to identify itself in an otherwise anonymous forum if failure to do so in the circumstances could result in a violation of the anti-fraud rule. An example of this is the conduct of John Mackey, the Chief Executive Officer of Whole Foods, who used a pseudonym on the Yahoo message boards for nearly eight years to promote Whole Foods and denigrate its competitors. The practice came to light during antitrust proceedings in connection with Whole Foods’ acquisition of one of its competitors, Wild Oats Markets Inc. The SEC commenced an investigation to determine whether Mr. Mackey had violated securities laws. Mr. Mackey’s postings were also used by the FTC in its case against the acquisition.
  - (9) The forum is located at <http://www.shareholderforum.com/vz>. The forum was formed just after a Rule 14a-8 “say-on-pay” proposal put forward by the Association of BellTel Retirees was narrowly approved at Verizon’s annual meeting in May 2007.
  - (10) The Advisory Panel members included representatives of the following entities: Amalgamated Bank/Longview Funds, Association of BellTel Retirees, Blue Harbour Group, Delaware Investments/Lincoln National, Federal Reserve Bank of Richmond, Forbes, Hermes Equity Ownership Services, Palmer Brennan, NYSSA, Pfizer, Putnam Mutual Funds, Reda & Associates, Reinhart Boerner Van Deuren, and International Roundtable on Executive Remuneration. The more significant role of the Advisory Panel members perhaps calls into question the role of other shareholders. From the company’s perspective, the greater the number of investors who sign off on an approach, presumably the less the likelihood that it will be challenged in the future. Also, dealing
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with a larger portion of the shareholder base creates better optics, from a corporate governance perspective.

- (11) It is unclear the extent to which management has participated in the Verizon forum. According to a representative of the financial entity that organized the forum and that has organized similar forums in the past, however, managements typically end up participating in these types of forums. The financial entity has also received several requests from companies to organize similar forums.
- (12) Based on their stated purposes and their formats, the Shell and Dell forums seem oriented towards achieving an investor relations goal, as opposed to providing an in-depth learning environment designed to facilitate resolution of specific investor concerns.
- (13) The risk of a hijacked company e-forum may be particularly acute during the pendency of a significant or controversial strategic transaction. Hedge funds and other activist investors could use such a strategy as part of a campaign in opposition to the transaction. As a result, and given that the e-forum amendments do not provide an exemption from federal securities rules such as Rule 10b-5 and Regulation FD, management may want to consider suspending a company e-forum during the pendency of such a transaction. Note that the e-forum may also have to be suspended during the 60-day blackout period, described above, if the transaction requires shareholder approval.
- (14) Three examples from 2007 are the website [www.healunitedhealth.com](http://www.healunitedhealth.com), launched by CalPERS and CalSTRS to generate support for a Rule 14a-8 shareholder access proposal at the annual meeting of UnitedHealth Group Incorporated, the website [www.badaquiladeal.com](http://www.badaquiladeal.com), launched by Pirate Capital to generate opposition to the sale of Aquila Inc. to Great Plains Energy Inc., and the website [www.enhancefriendlys.com](http://www.enhancefriendlys.com), launched by The Lion Fund, L.P. and others to get two nominees elected to the board of directors of Friendly Ice Cream Corp.
- (15) Moreover, in the adopting release, the SEC recognized (but decided not to address in the amendments) the concern that the 60-day blackout "may not be sufficient practical protection against the ability of a coordinated campaign to so color shareholder perceptions as to make the vote a likely, if not foregone, conclusion."
- (16) The idea of amending Regulation 13D-G to facilitate the formation of groups in e-forums was shelved in November 2007, when the SEC postponed further consideration of shareholder access rules. While shareholders who use e-forums to form 5% groups still need to comply with Regulation 13D-G, this regime has been largely ineffectual at controlling coordinated activity by hedge funds in the past.

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