JENNER&BLOCK

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# *E-Proxy Rules May Not Satisfy ERISA Electronic Disclosure Rules*

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Publicly traded companies are required to provide proxy materials to their stockholders under the securities laws. The same requirement applies when a person becomes a stockholder in a publicly traded company by virtue of his or her participation in a company-sponsored defined contribution plan. Complications can arise in meeting securities law and ERISA disclosure obligations, especially when dealing with defined contribution plans that include publicly traded company stock funds. This advisory addresses this scenario.

**ERISA Section 404(c) and E-Proxy Background**

Because many defined contribution plans permit participants to direct their investments, plan sponsors typically try to ensure that their liability for any investment losses is minimized by complying with ERISA § 404(c). ERISA § 404(c) permits plan sponsors to transfer to participants the responsibility and liability for selecting investment options if the participant actually directs the investment of his or her account and the plan satisfies the requirements of the 404(c) regulations. Section 404(c) requires that the plan offer "a broad range of investment alternatives," that participants direct the investment of their accounts, and that specific information and disclosures be provided to participants. If company stock is offered, an additional list of requirements must be satisfied. Participants must be given the information provided to general stockholders, and the voting, tendering and similar rights must be passed through to participants.

Beginning January 1, 2009, public companies and others who file proxy statements must comply with electronic proxy delivery rules (the "E-proxy rules") implemented by the Securities Exchange Commission (the "SEC"). The E-proxy rules allow companies to choose among several delivery options: the "notice and access option," the "full set delivery option," or a hybrid of the two options.

Under the notice and access option, issuers post proxy materials on an internet website and send a notice to stockholders that the materials are available online. The notice must identify the website, provide specific information about the upcoming stockholder meeting, and include a list of the materials that are available. The full set delivery option generally follows the traditional method for mailing a copy of the proxy statement and annual report to stockholders but also requires that the company post the materials on a website and include the same information required in the notice that the materials are available on a website with the mailing.

**ERISA Section 404(c) and E-Proxy Compliance**

Companies that use the full set delivery option will generally meet the ERISA pass-through requirements. However, for companies opting for the notice and access option, the pass-through requirements of ERISA § 404(c) will not be satisfied unless the electronic disclosure regulations promulgated by the Department of Labor (the "DOL") are followed.

Generally, and depending on each participant's situation, electronic disclosure is only permitted by the DOL if the participant either: (1) is an active employee that has the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and accesses the employer's information system as an integral part of the participant's duties; or (2) provides proper written consent to receive the materials through electronic delivery. Consent to electronic delivery requires that the participant be provided a clear and conspicuous statement indicating: (1) consent can be withdrawn at any time without charge; (2) the procedures for withdrawing consent and updating other contact information; (3) any hardware or software needed to access and retain necessary documents; (4) the participant has the right to obtain the notice by paper without charge; and (5) the types of documents to which the consent will apply.

**Conclusion**

Companies intending to shift to electronic delivery of proxy materials must make sure that they satisfy both the E-proxy rules and the DOL electronic disclosure regulations. Because the regulations under the SEC and DOL differ, trying to satisfy both through one electronic vehicle may be costly or unfeasible, risking SEC sanctions or the loss of ERISA § 404(c) protection. Due to these risks, companies should consider bifurcating the method of delivering proxy materials between plan participant stockholders and others.

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