

March 10, 2008

ERISA § 404(C) ISSUES RAISED UNDER SEC'S "NOTICE AND ACCESS" PROXY STATEMENT RULES

The Securities and Exchange Commission ("SEC") recently amended its rules to allow proxy materials to be furnished to shareholders through the Internet (the "Notice and Access" model). Companies with defined contribution plans that are intended to be ERISA § 404(c) ("404(c)") plans and contain company stock with pass-through voting rights, may be required to obtain participant consent before this electronic delivery will be effective under 404(c), and to provide certain participants with paper copies of the proxy materials.

SEC's Electronic Disclosure Requirements

The Notice and Access model, effective for proxies filed after July 1, 2007, allows companies to provide shareholders with a notice advising them of the availability of proxy materials at a specified website address; and the manner in which the shareholders may request paper copies of the proxy materials. Although optional, the SEC is considering making this procedure mandatory in the future.

ERISA § 404(c) Electronic Disclosure Requirements

ERISA § 404(c) shields plan fiduciaries from liability for any loss resulting from participants' investment direction of their defined contribution plan accounts, such as 401(k) Plans. This fiduciary protection is available when, among other requirements, a participant who is invested in company stock is provided with materials regarding exercise of voting, tender or similar rights (including the company's proxy materials).

The U.S. Department of Labor ("DOL") has issued regulations regarding the use of electronic communication by employee plans (the "DOL Regulations"), including § 404(c) disclosures. With respect to electronic disclosure of proxy materials, the DOL Regulations impose the requirement that electronic delivery may only be used if either (1) the employee has the ability to "effectively access" (as defined by the DOL) documents furnished in electronic form at work, or (2) the participant, beneficiary or other person entitled to documents under ERISA has previously consented to receiving the documents electronically.

Affirmative consent to the receipt of documents in electronic form requires that the company provide the individual, in electronic or non-electronic form, with a clear and conspicuous statement that includes specified information about the documents, the effect of consent, obtaining paper copies and the hardware and software requirements for accessing the documents. ***Merely providing notice to participants that the proxy statement is available and accessible in electronic format will not satisfy ERISA § 404(c).***

Next Steps

Before using the Notice and Access model, companies with 404(c) plans containing company stock should consider ERISA's electronic disclosure requirements as they prepare their annual proxy materials. Companies using the SEC's Notice and Access model are still required to obtain participant consent or distribute paper copies to comply with ERISA § 404(c).

If you have any questions regarding the foregoing, please feel free to contact one of the attorneys listed below.

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