

January 26, 2007

SEC Publishes New “Voluntary” E-Proxy Rules and Proposes “Mandatory” Version

The SEC has published final rules related to the Internet distribution of proxy materials. Under these new “e-proxy” rules, companies and other soliciting persons will now have the option of adopting a “notice-and-access” model of proxy distribution allowing them to satisfy the SEC’s rules regarding the furnishing of proxy materials by giving shareholders notice of the Internet availability of, and online access to, the materials, unless a shareholder requests e-mail or paper copies of such materials instead. The earliest that companies may begin sending notices of Internet availability of proxy materials is July 1, 2007, which, pursuant to the timing requirements of the final rules, means that the earliest meeting date for which this option will be available is August 10, 2007. The notice-and-access model is not available for proxy materials related to business combinations, although the SEC intends to evaluate whether this model should be expanded in the future. For the final rules, see <http://sec.gov/rules/final/2007/34-55146.pdf>.

The SEC also concurrently proposed a so-called “mandatory” or “universal” version of the notice-and-access model where companies and other soliciting persons would be required to offer this option for all proxy solicitations (other than those related to business combinations). The SEC proposes to make this requirement effective for large accelerated filers (other than registered investment companies) beginning January 1, 2008, and for all other companies beginning January 1, 2009. Comments to this proposal are due March 30, 2007. For the proposal, see <http://www.sec.gov/rules/proposed/2007/34-55147.pdf>.

NEW NOTICE-AND-ACCESS “E-PROXY” PROCEDURES

Under the final rules, the SEC sets out the process for companies and other soliciting persons that opt into this new notice-and-access model to deliver proxy materials (including meeting notices, Schedule 14A proxy and consent solicitation statements, proxy cards, Schedule 14C information statements, annual reports to shareholders, additional soliciting materials after the proxy statement has been furnished and any amendments). The final rules may be broken into four general categories: (i) requirements regarding the content and delivery of a notice to shareholders regarding the Internet availability of proxy materials, (ii) requirements regarding the Internet posting of such materials; (iii) requirements to safeguard shareholders’ ability to receive paper or e-mail copies of such materials and (iv) requirements regarding the use of the notice-and-access model by soliciting persons other than the company and by intermediaries.

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Companies and other soliciting persons should note that the availability of the notice-and-access model does not affect the availability of existing means of delivery for proxy materials, such as e-mail delivery. Also, the choice to use the notice-and-access model for one proxy solicitation does not mean that the company or other soliciting person must use that model for all future solicitations (pending adoption of the “mandatory” model, if that occurs).

Content and Delivery of the Notice of Internet Availability of Proxy Materials

Companies opting to use the notice-and-access model must send a Notice of Internet Availability of Proxy Materials (a “Notice”) to its shareholders at least 40 calendar days before the date of the applicable shareholder meeting or the date that shareholder action will occur if there is no meeting. The Notice constitutes “other soliciting material” that must be filed with the SEC no later than the date on which it is first sent to shareholders.

The final rules specify the information that must be included in the Notice and prohibit the addition of other information therein. Besides this required and permissible information, the only additional items that may be included in the Notice is any information that is required for notices of annual meetings of shareholders under state law. The SEC is also requiring that companies follow plain English principles in creating the Notice. For more detail on the required form of Notice, see Exhibit A.

So that the Notice will receive proper attention, no materials may accompany the Notice, except for any state-law mandated shareholder meeting notices or a reply card for shareholders to request paper or e-mail copies of proxy materials in lieu of Internet delivery. To address the concerns of many commenters who cautioned against giving shareholders the ability to execute a proxy or vote without having access to the related proxy materials, under the final rules, unlike the proposed rules, companies may not include a form of proxy with the Notice, but instead must include in the Notice instructions on how to execute a proxy. Ten days after the initial delivery of the Notice, companies may send a proxy card if it is accompanied or preceded by a copy of the proxy statement and annual report or accompanied by another copy of the Notice, in the same medium.

In conformity with existing rules, the Notice may be sent by mail or e-mail, subject to certain conditions, including shareholder consent to electronic delivery of such communications. The final rules also permit companies to “household” the Notice pursuant to the existing conditions set forth in Rule 14a-3(e), meaning they can send a single copy to members of the same household. Companies do not have to resolicit the consent of shareholders in order to household the Notice.

Internet Posting of Proxy Materials

Companies must post all proxy materials to be furnished through the notice-and-access model on the website specified in the Notice by the time they first send the Notice to shareholders. Additional soliciting materials used after the Notice is sent must be posted on the specified website no later than the day on which those materials are first sent to shareholders. The final rules also specify other conditions regarding the posting of these materials, including that:

- The website that companies use to furnish proxy materials electronically:
 - Cannot be the SEC's EDGAR site.
 - Must have a specific enough address (as disclosed in the Notice) to lead shareholders directly to the proxy materials, although it may be a central site with prominent links to the applicable materials.
 - Must preserve the anonymity of shareholders accessing the proxy materials. So, for instance, other than tracking shareholders for the purpose of validating election results, the identity of shareholders may not be tracked, and companies may not require the installation of any "cookies" or other software that collects information about shareholders.
- The proxy materials posted:
 - Must be publicly accessible, free of charge at the specified website not later than the time that the Notice is sent to shareholders and must remain available through the conclusion of the applicable shareholder meeting or action.
 - Must be substantially identical to the paper version of the materials.
 - Must be presented in a format or formats convenient for both printing and viewing online. If additional software is needed to view the materials, the website must contain a link to obtain the software free of charge.
 - Must, according to the promulgating release, be presented in a readily searchable format and may incorporate additional user-friendly features, such as hyperlinks to allow shareholders to easily navigate through the document.

Note that existing filing requirements for proxy materials under Rules 14a-6 (for proxy solicitations), 14c-5 (for information statements) and 14c-3 (for annual reports to shareholders) continue to apply. Companies must comply with these requirements by the time they post proxy materials on the applicable website.

Opting Out of the Notice-And-Access Model

Shareholders may request paper or e-mail copies of proxy materials at any time upon request to the company. Companies must then send copies of such materials free of charge by U.S. first class mail or other reasonably prompt means or by e-mail, as requested, within three business days after receipt of the request. A request for paper or e-mail copies of proxy materials will remain in effect until revoked by the shareholders, and companies are required to maintain a record of such requests for all future solicitations.

The SEC warns shareholders that it is their responsibility to make a timely request for paper or e-mail copies. To assist shareholders in this process, companies must include in the Notice a suggested date by which a copy of the materials should be requested to ensure timely receipt and review of the materials and execution of the proxy or vote. However, notwithstanding such date, shareholders may request paper or e-mail copies of proxy materials at any time for up to one year after the conclusion of the meeting or action to which those materials relate.

To protect shareholders' privacy, companies may not transfer to any person (other than an employee or agent in connection with the distribution of proxy materials) shareholder e-mail addresses collected for the purpose of sending proxy materials, and may not use such e-mail addresses for any purpose other than to send copies of proxy materials.

Finally, to assist companies in gauging how many paper copies of proxy materials will be needed to meet shareholder requests, the promulgating release states that issuers may send shareholders a communication before a proxy solicitation to determine their interest in receiving paper copies.

Other Soliciting Persons

Soliciting persons other than the company may also use the notice-and-access model to deliver their proxy materials. The procedures for soliciting persons are substantially similar to those for companies, except as follows:

- Because soliciting persons may choose not to initiate an opposing solicitation until after the company has filed its proxy statement, soliciting persons other than the company may send out their Notices by the later of (i) 40 calendar days before the shareholder meeting or action and (ii) ten calendar days after the company first sends its proxy statement or Notice to shareholders.
- Soliciting persons' Notices need only include those meeting agenda items known by them at the time the Notices are sent to shareholders.
- Soliciting persons' Notices must indicate clearly whether the execution of a proxy on their behalf will invalidate shareholders' earlier vote or proxy.

As is the case under existing rules, soliciting persons may continue to target their proxy solicitations by choosing those shareholders from whom they wish to solicit proxies, and are not required to send proxy materials to the entire shareholder base. However, the final rules did not incorporate the proposed option for soliciting persons to conduct conditional “electronic only” solicitations pursuant to which soliciting persons could solicit proxies only from those shareholders who consent to the notice-and-access model. Thus, the final rules require that soliciting persons send copies of the proxy materials to any requesting shareholder to whom they sent a Notice.

When providing shareholder lists to a requesting shareholder, companies must indicate which shareholders have permanently requested paper or e-mail copies of proxy materials. However, the promulgating release states that companies may not disclose shareholders’ e-mail addresses as originally proposed. If the company chooses to send the soliciting person’s proxy materials, the company must use the notice-and-access model if so requested by the soliciting person.

Intermediaries

The final rules require intermediaries to use the notice-and-access model if a company or other soliciting person so requests, but only if a company or the soliciting person so requests. Companies and other soliciting persons must provide the intermediary with the information necessary to prepare its own Notice, with sufficient time for the intermediary to send its Notice to beneficial owners (i) at least 40 calendar days before the shareholder meeting or action, for company solicitations, or (ii) the later of 40 calendar days before the shareholder meeting or action and ten calendar days after the date that the company first sends its proxy statement or Notice to shareholders, for solicitations by other persons. Because the SEC anticipates that there will be significant coordination between the intermediaries and companies and soliciting persons in this regard, the SEC did not specify a time frame for timely delivery of information to the intermediary.

Once the intermediary receives a request to use the notice-and-access model, the remainder of the procedure is substantially similar to that for companies, with changes primarily to reflect the intermediary/beneficial owner relationship, such as the following:

- The form of Notice includes changes to reflect the fact that shareholders are providing voting instructions to the intermediary instead of executing a proxy or voting directly with the company.
- The intermediary may direct beneficial owners to the company’s website or to its own website to access the proxy materials.
- Shareholders may not request paper or e-mail copies of proxy materials directly from the company, but must send the request to the intermediary. Upon receipt of a request from a shareholder for paper or e-mail copies, the intermediary must, within three business days, relay such request to the company. Thereafter, the company has three business days to provide the materials to the intermediary, and the intermediary has another three business days after receipt thereof to provide the materials to the shareholder.

Intermediaries must clarify that a permanent election to receive paper or e-mail copies of proxy materials will apply to all securities in the requesting shareholder's account.

PROPOSED "MANDATORY" OR "UNIVERSAL" NOTICE-AND-ACCESS MODEL

Concurrently with the issuance of the final, voluntary e-proxy rules, the SEC also issued a proposed rule that would require companies and other soliciting persons to use the notice-and-access model for all proxy solicitations. Shareholders would continue to be able to opt out of this model by requesting paper or e-mail copies of the proxy materials from the company or their intermediary.

The proposed mandatory notice-and-access model includes procedures that are substantially similar to those set forth in the final, voluntary e-proxy rules, except that, to preserve the ability of companies and other soliciting persons to send paper or e-mail copies of proxy materials, a full set of proxy materials may accompany the Notice so that companies and other soliciting persons will not be required to make multiple mailings.

* * *

This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. If you have questions regarding the foregoing, please contact:

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EXHIBIT A**INFORMATION TO BE INCLUDED IN THE
NOTICE OF INTERNET AVAILABILITY OF PROXY MATERIALS****Information that must be included in the Notice:**

- A prominent legend in bold-face type that states:

“Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].

 - This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.
 - The [proxy statement/information statement/annual report to security holders] [is/are] available at [insert website address].
 - If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [insert a date] to facilitate timely delivery.”
- The date, time and location of the meeting, or if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected.
- Clear and impartial identification of each separate matter intended to be acted on and the soliciting person’s recommendations regarding those matters, but no supporting statements.
- A list of the materials being made available at the specified website.
- A toll-free telephone number, e-mail address and Internet website where a shareholder can request paper or e-mail copies of the proxy materials for the current and all future shareholder meetings.
- Control/identification numbers that the shareholder needs to access his or her form of proxy.
- Instructions on how to access the form of proxy; provided that such instructions do not enable a shareholder to execute a proxy without having access to the related proxy materials.
 - For instance, the Notice may not include a telephone number or any other means that would allow shareholders to execute their proxy without accessing the related proxy materials. Such a telephone number may,

however, be included on companies' websites that includes access to the proxy materials or on a proxy card that is sent to shareholders ten days after the Notice is initially sent.

- Information on how to obtain directions to attend the meeting and vote in person.

Permitted changes to the above required information or other permissible information

- Companies may include in the Notice any information that is required to be included in a notice of shareholder meeting by state law, unless state law prohibits such incorporation or combination.
- If the Notice relates to a consent solicitation or an information statement, companies must revise the Notice to reflect that fact.
- Companies may include a statement to educate shareholders that no personal information other than the identification or control number is necessary to execute a proxy.
- Companies may include pictures, logos or similar design elements as long as the design is not misleading and the required information is clear.

Plain English principles that must be substantially complied with in drafting the Notice

- Use short sentences, definite, concrete, everyday words, active voice and tabular presentation or bullet lists for complex material, whenever possible.
- Do not use legal jargon or highly technical business terms or multiple negatives.