

SEC UPDATE

SEC Votes to Propose Rule to Provide Investors with Internet Availability of Proxy Materials

The SEC has proposed for public comment rules that would allow companies and other persons to use the Internet to satisfy proxy material delivery requirements.

The current SEC rules and interpretations require a person soliciting a proxy from the shareholders of a company to deliver the proxy statement and an annual report in paper form or, if a shareholder consents, deliver these materials electronically (for example, by e-mail). The electronic delivery option currently requires affirmative shareholder consent and is used only on a limited basis.

The SEC believes that the proposed rules could result in a substantial decrease in the expense incurred by issuers to comply with the proxy rules and provide persons other than the company with a more cost-effective means to undertake their own proxy solicitations.

Proposed “Notice and Access” Model to Furnish Proxy Materials – for the Company

The proposed rules would provide that a company could satisfy its obligation to furnish proxy materials to shareholders through a “notice and access” model (the “Model”). The company would post its proxy materials on an Internet Web site (other than EDGAR) and would send shareholders a “Notice of Electronic Proxy Materials” (a “Notice”), which would inform them that the materials are available and explain how to access those materials. A Notice could be sent in paper form or electronically under existing permitted methods. The company would be able to send a Notice to shareholders 30 days before the meeting, or if no meeting is to be held, at least 30 days before the date that votes, consents or authorizations may be used to effect a corporate action.

The Notice would have to contain the following information:

- a prominent legend in bold-face type, which is set forth in the proposed rule;¹
- 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 would be effected;
- a list of the materials being made available at the specified Internet Web site address;
- a toll-free phone number and an e-mail address that shareholders may use to request paper copies of the proxy materials; and

¹ The required legend is included in Annex A to this memorandum.

- a clear and impartial description of the matters to be considered at the meeting along with the company's recommendation regarding those matters (without including supporting statements).

Only the information described above and, if it is being combined with the state law meeting notice, any information required by applicable state law, may be included in the Notice. The Notice would have to be written in plain English and could not include any additional information. The following procedural requirements also would apply:

- The proxy card would have to be accompanied by, and delivered through the same medium (paper or electronic) as, either the Notice or the proxy statement.
- All proxy materials would have to be posted on the specified Internet Web site by the time the issuer sends the Notice to shareholders and would have to remain on that Internet Web site and be accessible to shareholders through the time of the related shareholder meeting, at no charge to the shareholder. The Notice must clearly identify the Internet Web site and the Internet Web site address must be specific enough to lead shareholders directly to the proxy materials.
- If a shareholder requests a copy of the proxy materials identified in the Notice, the company would be obligated to send the materials (in paper or by e-mail, as requested by the shareholder) within two business days, even if the request is made after the date of the shareholder meeting or corporate action.
- The Model would be effective only with respect to a particular meeting as an issuer's choice to rely on the Model for one meeting would not affect its determination of whether to rely on the Model for subsequent meetings. Likewise, a shareholder that does not request a copy (in paper or by e-mail, as requested by the shareholder) of the proxy materials for one meeting would not be bound by that decision with respect to any other shareholder meeting. Therefore, each time that an issuer chooses to rely on the proposed Model for a shareholder meeting, it would have to comply with all requirements under the Model, including delivery of the Notice and the 30-day notice period.
- Additional soliciting materials that are distributed after the Notice is sent would have to be posted on the Internet Web site specified in the Notice no later than the day on which the additional soliciting materials are first sent to shareholders or made public.
- For shareholders holding their shares through brokers, banks or other intermediaries:
 - the intermediary would have to forward the issuer's Notice to beneficial owners, unless it prepares its own Notice;
 - if the issuer posts its proxy card on the Internet Web site, the intermediary would have to supplement the issuer's Notice or create and send its own Notice to clarify how beneficial owners can return their voting instructions;
 - if the intermediary chooses to post its request for voting instructions on an Internet Web site, it would have to maintain an Internet Web site for posting that request for voting instructions, as well as the issuer's proxy materials, other than the proxy card;

- if the intermediary chooses not to post its request for voting instructions on an Internet Web site, it would have to prepare and send, with the Notice, a copy of the intermediary's request for voting instructions; and
- the intermediary would have to request and forward a copy of the proxy materials from the issuer in response to requests from its beneficial shareholder customers.

A registrant or other soliciting person would not be required to rely on the Model with regard to all proxy-related materials. The proposed amendments to the current proxy rules would permit a soliciting person to choose to rely on the Model as a means of furnishing some proxy-related documents to shareholders and use other means, such as paper documents, with regard to other proxy-related materials.

The proposed rules would have no impact on any state law obligation regarding soliciting proxies or holding annual meetings. Therefore, to the extent that state law requires a notice of shareholder meeting or proxy materials to be delivered by a particular means, the proposed rules would not alter those requirements.

The proposed rules would also not apply to proxy materials for business combination transactions in which proxy materials are distributed.

Proposed “Notice and Access” Model to Furnish Proxy Materials – for Others

The proposed rules would permit a person other than the company that is soliciting proxies to rely on the proposed Model in substantially the same manner as the company. However, because such a person is not obligated to solicit everyone, it may revise its Notice to clearly explain that it will not provide a copy to any shareholder that requests a copy. In this case, the Notice must clearly state that the person is soliciting only shareholders who are willing to access the proxy materials via the Internet Web site posting. Because a competing solicitation likely would begin only after the company began its solicitation, the Notice would have to be provided to shareholders by the later of 30 days before the meeting or 10 days after the company filed its proxy materials.

A soliciting person other than the issuer also could choose to not furnish a Notice to any shareholder. Instead, the soliciting person could simply post its proxy materials, including the proxy card, on a publicly accessible Internet Web site and direct persons to that Internet Web site by means of communications under Rule 14a-12 under the 1934 Act.

Under this scenario, all persons accessing the proxy card also would have accessed the Internet Web site on which the proxy statement was located. Therefore, under the proposed rules, a person other than an issuer could conduct a proxy contest in the following manner:

- furnish a proxy statement and proxy card under existing permitted methods (in paper form, or if shareholder consents, electronically);
- furnish a Notice and proxy card together and through the same medium (paper or electronic), and post the proxy statement on an Internet Web site;

- furnish a Notice and post the proxy statement and proxy card together on an Internet Web site; or
- do not furnish a Notice and post the proxy statement and proxy card together on an Internet Web site.

A soliciting person may use any combination of these options and may rely on Rule 14a-12 to issue soliciting materials prior to furnishing a proxy statement under any of these scenarios.

In the case where a person uses a medium such as a press release to effect a solicitation prior to furnishing a proxy statement pursuant to Rule 14a-12, it would incur an obligation to furnish a proxy statement at the time a proxy card is provided. As such person is not obligated to solicit all persons receiving that communication, delivery of a Notice would be required only if the soliciting person sends a proxy card to a shareholder that is not accompanied by a proxy statement. With respect to shareholders not receiving a proxy card from the soliciting person, but who are directed to the Internet Web site by the Rule 14a-12 communication and choose to execute a proxy in favor of the soliciting person, the proxy statement would have accompanied, or preceded, the proxy card. A person receiving such a request from a shareholder may assume that the shareholder has had access to the proxy statement. Therefore, a soliciting person, other than the issuer, could effect a widespread solicitation of proxies without delivering any Notices at all, provided that it does not furnish or provide a means of obtaining a proxy card except on the Internet Web site where its proxy materials are posted.

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. Questions concerning issues addressed in this memorandum should be directed to any member of the Paul, Weiss Securities Group, including:

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ANNEX A

Legend for Notice

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 shareholders] [proxy card] are available at [Insert Web site 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 that is two weeks or more before the meeting date] to facilitate timely delivery. If you hold your shares through a broker, bank, or other intermediary, you may request delivery of a copy of the proxy materials through that intermediary, but it likely will take longer to receive your materials through an intermediary than directly from the company.**