

August 15, 2007

Electronic Proxy Delivery: SEC Adopts Amendments to “Notice and Access” Rules

Building on the voluntary “notice-and-access” model for proxy delivery adopted earlier this year,¹ the Securities and Exchange Commission has approved further amendments to its proxy rules that will make Internet access to proxy materials a required element for most proxy solicitations.² Under the new rules, issuers and other soliciting persons generally will be required to choose one of two alternative models of delivery to conduct proxy solicitations: the “notice only” model, which essentially mirrors the voluntary notice-and-access model approved earlier this year by the SEC, or the “full set delivery” model, which allows issuers to deliver paper copies of proxy materials, as under the current rules, but also requires them to post a copy of such materials to an Internet website.³

Notice Only Model

The notice only model is essentially the same as the voluntary notice-and-access model of proxy delivery that became effective in July 2007. To use this model, an issuer or soliciting person must:

- post its proxy materials on an Internet website;⁴

¹ The SEC gave issuers and other soliciting persons an electronic alternative to physical delivery when it adopted the voluntary notice-and-access rules that became effective on July 1, 2007. See Internet Availability of Proxy Materials, Rel. No. 34-55146 (Jan. 22, 2007). The SEC proposed the notice-and-access rules “to update [the] regulatory framework to take advantage of communications technology and provide an alternative proxy model that could reduce the printing and mailing costs associated with furnishing proxy materials to shareholders.” Under the voluntary notice-and-access rules, an issuer or other soliciting person can satisfy its proxy delivery requirements by posting proxy materials on an Internet website, notifying shareholders of the availability of such materials and sending paper or e-mail copies of such materials upon request. The impact of the new rules on costs and shareholder participation remains to be seen. For more information about the notice and access model, see *Electronic Proxy Delivery: SEC Adopts “Notice and Access” Rules*, Covington & Burling LLP Securities Client Advisory (Mar. 19, 2007).

² Shareholder Choice Regarding Proxy Materials, Rel. No. 34-56135 (Jul. 26, 2007) (the “Shareholder Choice Release”). References to page numbers in the Shareholder Choice Release refer to the page numbers in the pdf version of the release that is available on the SEC’s website at <http://www.sec.gov/rules/final/2007/34-56135.pdf>. None of the SEC’s electronic delivery rules will apply to solicitations in respect of business combination transactions or where state law does not permit electronic delivery. See Exchange Act of 1934 Rule 14a-3(a).

³ The new rules will be phased in over the next two years. Large accelerated filers must begin to comply with the new rules on January 1, 2008. Registered investment companies, soliciting persons other than issuers, and issuers that are not large accelerated filers must comply with these rules no later than January 1, 2009, but may begin to comply with these rules as early as January 1, 2008. Shareholder Choice Release at 28-29.

⁴ The specified proxy materials consist of a proxy statement, annual report to shareholders and form of proxy. See Exchange Act Rule 14a-3. An issuer must send an information statement to any shareholder from whom the issuer is not requesting a proxy. See Exchange Act Rule 14c-2.

- send a notice to shareholders (the “Notice”) at least 40 calendar days before the meeting (or within 10 days of receiving the issuer’s notice in the case of persons other than the issuer) that informs shareholders that the proxy materials are available online and includes other required information;⁵
- provide shareholders with access to the proxy card, which must be accessible through the Internet website where the proxy materials are located at the same time that the Notice is sent;⁶ and
- provide shareholders, within three days of receiving a request, paper or e-mail copies of the proxy materials.⁷

Full Set Delivery Model

The full set delivery model is the same as the paper (physical) model of proxy delivery used historically, with one key change. Under this model, an issuer or other soliciting person, in addition to mailing physical copies of its proxy materials, must also post such materials on an Internet website no later than the date it first sends the proxy materials, and either (a) include a Notice with the physical copies of the proxy materials or (b) incorporate the content of the Notice into the proxy materials mailed to shareholders.⁸

For the many issuers that already post their proxy materials on the Internet, the latest amendments to the proxy delivery rules should not impact current practices significantly. Most issuers, however, will have to make adjustments to the Internet websites where they post their proxy materials, because the new rules include strict guidelines regarding the use of confidential and identifying information obtained from shareholders. Specifically, the Internet website upon which proxy materials are posted must be maintained so as not to infringe on the anonymity of persons accessing the site. As such, the use of cookies and other tracking technologies will not be permitted on the webpage where proxy materials are located. Similarly, the new rules protect the e-mail address of any shareholder who provides such address solely for the purpose of requesting copies of proxy materials.

⁵ See generally Exchange Act Rule 14a-16. In addition to sending the Notice within the prescribed time, an issuer or other soliciting person must provide a means to access and vote proxy cards at the time the Notice is sent and undertake to deliver paper copies of the proxy materials upon request. The Notice must provide information about the meeting and identify an Internet website where shareholders can review the complete proxy materials and execute proxy cards or voting instructions.

⁶ See Exchange Act Rule 14a-16(h). An issuer or other soliciting person relying on the notice only model may not send the proxy card with the initial Notice, but must wait at least 10 calendar days after sending the Notice to send shareholders the proxy card. This waiting period is intended to allow sufficient time for shareholders to access the proxy statement and annual report or request copies before executing the proxy card. A proxy card may be sent, however, before the conclusion of the 10-day period if it is accompanied or preceded, via the same medium, by a copy of the proxy statement and annual report.

⁷ See Exchange Act Rule 14a-16(j).

⁸ See Exchange Act Rule 14a-16(n). When used as part of the full set delivery model, the Notice may omit certain information required to be included when used with the notice only model. See Exchange Act Rule 14a-16(n)(4). As is the case under the notice only model, the Notice used with the full set delivery model must be filed with the SEC no later than the date it is first sent. See Exchange Act Rule 14a-16(i).

Comparison of the Notice Only Model to the Full Set Delivery Model

Some of the more noteworthy differences between the notice only model to the full set delivery model are:

- the full set delivery model does not require the issuer or other soliciting person to send the Notice and proxy materials 40 days before the meeting date, whereas the notice only model does;
- when using the full set delivery model, the proxy card may be distributed with the Notice (along with the other proxy materials), as opposed to having to wait 10 days to deliver the proxy card under the notice only model;
- the notice only model requires issuers or other soliciting persons to provide shareholders with paper or email copies of the proxy materials upon request, whereas this is not required under the full set delivery model; and
- because the proxy materials include a proxy card, an issuer or soliciting person using the full set delivery model need not provide another means for voting when the Notice is provided (unless it chooses to do so), as is required under the notice only model.

Intermediaries

As a general rule, intermediaries in the proxy delivery process, such as transfer agents, banks, brokers and their respective agents, must follow the proxy delivery model chosen by the issuer whose proxy materials they deliver. Thus, for example, if an issuer elects to use the notice only model, it will be required to provide its intermediaries with all the information needed by the intermediaries to allow the intermediaries to prepare and send the Notice to the issuer's beneficial shareholders at least 40 days before the date of the meeting. Similarly, issuers using the full set delivery model need not comply with the 40-day deadline applicable to the notice only model, but they must provide the Notice and proxy materials to their intermediaries in sufficient time for the intermediaries to prepare and send the Notice and proxy materials to beneficial owners (as is the case now).⁹

Conclusion

At the time that the new rules were proposed, they were characterized as mandating observance of the notice and access model of proxy delivery. This characterization caused angst among issuers and intermediaries, particularly among those who were uncertain about the projected cost savings of the notice and access model and its impact on shareholder participation. In light of these concerns, many commentators urged the Commission to delay the implementation of "mandatory" notice and access rules until issuers had sufficient experience with the voluntary notice and access rules.¹⁰

⁹ The intermediaries must forward the proxy materials to beneficial owners within five business days of receipt from the issuer or its agent. See Exchange Act Rule 14b-1(b)(2).

¹⁰ See, e.g., Comment letter of the American Business Conference regarding the proposal to make the notice and access model "universal". See Universal Internet Availability of Proxy Materials, Rel. No. 34-55147 (Jan. 22, 2007).

Time will tell whether the anticipated cost savings of the voluntary notice-and-access model will outweigh the additional burdens associated with such model. In light of this uncertainty, and yielding to commenters' concerns, the SEC backed off its original proposal and adopted a more limited modification of its proxy delivery rules that should assuage such concerns. At most, the new rules further integrate the concepts underlying the notice-and-access model into the structure of the proxy rules. For many companies, the new rules represent not so much a departure from current practice, but rather another delivery alternative.

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