



## **SEC ADOPTS NEW E-PROXY RULE AMENDMENTS**

At its open meeting on December 13, 2006, the SEC published final rules related to the Internet distribution of proxy materials. Under these new so-called “e-proxy” rules, companies and other soliciting persons can use a “notice-and-access” model of proxy distribution to satisfy the SEC’s delivery requirements by giving stockholders notice of the Internet availability of, and online access to, the materials. The notice-and-access model will not be available for proxy materials related to business combinations, although the SEC intends to evaluate whether this model should be expanded in the future. The final rules are available at [www.sec.gov/rules/final/2007/34-55146.pdf](http://www.sec.gov/rules/final/2007/34-55146.pdf).<sup>1</sup>

This Alert summarizes the key elements of the new final rules.

### **The Notice and Access Model**

The new rules allow, but do not require, registered companies and other persons conducting proxy solicitations to satisfy the Rule 14a-3 requirement to furnish proxy materials to stockholders by posting those materials on a website and providing notice to stockholders of the posting. The posted materials may include the notice of meeting, the Schedule 14A proxy statement, proxy card and the annual report to stockholders. A company using this method must mail a notice of the Internet posting of proxy materials to its stockholders at least 40 days before the meeting date.

At this point, the notice-and-access model is optional and does not affect the availability of existing means of delivery for proxy materials, such as e-mail and traditional paper/postal 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 any future solicitations.

The final rules specify that the following information must be included in the notice under the notice-and-access model (the “Notice”), in plain English:

- a prominent bold-face legend stating that the proxy materials are available on the Internet and an explanation how to access the materials
- a toll free number, email address and a website that stockholders may use to request copies of the proxy materials

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<sup>1</sup> Although the Commission received approximately 140 comment letters in response to its initial 2005 rule proposal, the version of the “notice-and-access” model adopted is substantially similar to the proposed model.

- information about how to attend the meeting in person
- the date, time and location of the meeting
- a description of the matters to be considered at the meeting
- how a stockholder can indicate a preference for a paper or email copy in the future<sup>2</sup>

Except for the required and permissible information, the Notice may not include or be accompanied by any additional information, unless the additional information is any information that is required for notices of annual meetings of stockholders under state law.

A proxy card may not accompany the initial Notice, but can be mailed to stockholders 10 calendar days or more after the Notice is sent, accompanied by another copy of the Notice. The proxy card may include a telephone number for executing the proxy. Companies must post the proxy card on the website with the proxy statement no later than the time the Notice is sent to stockholders.

As permitted under the current proxy rules, the Notice may be sent by regular postal mail or email, subject to certain conditions, including stockholder 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 stockholders in order to household the Notice.

If a stockholder requests a copy of the materials, the company must send it within three business days. A stockholder may make a permanent election to receive all proxy materials in paper or by email with respect to future proxy solicitations.

The website site must be publicly accessible, and the site address provided to stockholders must link directly to the proxy materials or have prominent links to each of the disclosure documents set forth in the Notice. Notably, providing a link to the proxy materials on the SEC’s EDGAR database does not comply with the notice and access approach. The website must also provide stockholders with at least one method of executing a proxy vote. Consistent with the intent of the notice and access approach, the SEC requires that a stockholder who accesses proxy materials on the website be able to execute a proxy as soon as the stockholder is able to electronically access the proxy statement. Merely providing a stockholder with a means to request a paper proxy card would not be sufficient because a stockholder would not be able to execute a proxy at the time the stockholder accesses the proxy materials.

## **Intermediaries**

The final rules require intermediaries (e.g., banks and brokerage firms) to use the notice-and-access model if requested by a company or other soliciting person. 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 the Notice to beneficial owners (i)

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<sup>2</sup> The required contents of the Notice are contained in new Rule 14a-16(d).

at least 40 calendar days before the stockholder meeting or action, for company solicitations, or (ii) the later of 40 calendar days before the stockholder meeting or action and ten calendar days after the date that the company first sends its proxy statement or Notice to stockholders, for solicitations by other persons.

An intermediary's Notice must provide instructions about how to request copies of the proxy materials from the intermediary. If a beneficial owner makes such a request, the intermediary will have three business days in which to request copies of the materials from the company and an additional three business days from the receipt of the materials to forward them to the beneficial owner.

### **Other Soliciting Persons**

Soliciting persons other than registered companies may also use the notice-and-access model to deliver their proxy materials.

Other soliciting persons must send a Notice to stockholders by the later of 40 days before the meeting or 10 days after the company files its proxy materials. Unlike companies, other soliciting persons may limit their solicitation to stockholders who have not previously requested paper or email copies. Other solicitors are also required to provide hard copies of the materials to any stockholder who receives a Notice and requests the copies.

The final rules follow the current practice requiring companies either to provide a stockholder list to a requesting stockholder or to send the stockholder's proxy materials on the stockholder's behalf, and clarify that intermediaries must send proxy materials on behalf of other soliciting persons.

This new alternative for furnishing proxy materials is intended to decrease expenses incurred by companies in complying with the proxy rules and to provide others with a more cost effective means to undertake their own proxy solicitations.

### **Compliance Date**

Registered companies and other soliciting persons may comply with the new rules on or after July 1, 2007 and no reliance on this model prior to this date is permitted.

### **Proposed Rules for Universal Internet Availability**

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. Stockholders 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 rules are available at <http://www.sec.gov/rules/proposed/2007/34-55147.pdf>.

## What to Do?

The new rules potentially represent a sea change in how stockholder communications are prepared and delivered and signify another of the Commission's on-going efforts to promote the use of the Internet and other technologies to streamline disclosure. Although the use of the Internet is undeniably a highly effective and cost-efficient means of making documents available to stockholders and other constituencies, the possible benefits of the new rules range beyond simple cost savings and easier compliance. For example, it is hoped that the new rules will promote transparency and better governance by reducing traditional solicitation printing and mailing costs and potentially provide more stockholders with an actual voice in setting corporate policy.

To take advantage of the new rules, advance planning is key. Because a Notice must be sent at least 40 days prior to a meeting, the earliest date of a meeting eligible to use the new "notice-and-access" model is August 10, 2007. This lead-time affords companies an opportunity to gather the necessary facts about its stockholder base and determine whether adopting the new model for the 2008 proxy season or a late 2007 meeting makes sense.

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The WT&P Securities Practice Group is available to assist you in addressing any questions that you may have regarding the matters discussed in this Alert. You can also visit our Website at [www.wtplaw.com](http://www.wtplaw.com)

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