

SEC ADOPTS NEW RULES FOR INTERNET DELIVERY OF PROXY MATERIALS

The Securities and Exchange Commission (SEC) recently adopted so-called “E-Proxy” amendments to its proxy rules under the Securities Exchange Act of 1934. The new rules create a new “notice and access model” for proxy solicitations for public companies¹ and provide for two alternative delivery options: the “notice only option” and the “full set delivery option.”

Under either alternative, public companies will be required to post their proxy materials² on an Internet website and send a Notice of Internet Availability of Proxy Materials (Notice) to stockholders. Companies have the choice of (1) continuing to provide all stockholders with a full set of paper copies of the proxy materials together with the Notice either as a separate document or by incorporating the Notice information into their proxy statement and proxy card (Full Set Delivery Option), or (2) fully implementing all elements of the notice and access model (Notice Only Option) described below.³

Phased-in Compliance Dates

Large accelerated filers (issuers having a worldwide public float of \$700 million or more) must comply with the amended rules for proxy solicitations beginning on or after January 1, 2008. Issuers that are not large accelerated filers and soliciting persons that are not issuers *may* comply with the amendments for proxy solicitations beginning on or after January 1, 2008 and *must* comply with the amendments for proxy solicitations beginning on or after January 1, 2009.

Notice Only Option

Under the Notice Only Option, companies must send a prescribed notice at least 40 days prior to the scheduled stockholder meeting or corporate action informing stockholders of the Internet availability of the proxy materials.⁴ If action is to be taken by written consent, the Internet Notice must be sent no later than 40 calendar days prior to the date the consents may be used to effect the corporate action.

The Notice must, among other things, (i) include the date, time and location of the meeting, or, if action is to be taken by written consent, the earliest day on which the consents may be used to effect the corporate action, (ii) voting instructions for the proposed meeting, (iii) a list of

¹ Shareholder Choice Regarding Proxy Materials, Rel. No. 34-56135 (July 26, 2007).

² Proxy materials include the notice of stockholder meeting, proxy statement, proxy card, annual report to stockholders, and any amendments to the materials.

³ The SEC has made it clear that a company need not make an exclusive choice between the two models and may use the Notice Only Option for one group of stockholders and provide full paper proxy materials to others.

⁴ The Notice could be sent electronically to stockholders who have previously provided affirmative consent, or other evidence to show delivery, pursuant to our earlier guidance on electronic delivery. See Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995) and Use of Electronic Media, Release No. 33-7856 (Apr. 28, 2000).

matters to be acted on (including the issuer's recommendations but no supporting statements), (iv) information on how stockholders may obtain paper or email copies of the proxy materials, and (v) instructions on how to access a proxy card. The Notice may not, however, enable a stockholder to execute a proxy without having access to the proxy statement. For this reason, the Notice cannot include telephone numbers or Internet web sites for voting purposes, or be accompanied by a proxy card or any other documents, other than a reply card for requesting paper or e-mail copies of the proxy materials. Although a proxy card may not be sent with the Notice, an issuer must provide a means for executing a proxy at the time the Notice is sent, which may be satisfied by providing an electronic voting platform, a toll-free telephone number for voting or a printable and downloadable proxy card on the web site.

Shareholder Request for Copies

Under the Notice Only Option, companies are required to deliver a paper or e-mail copy of the proxy materials directly to any stockholder so requesting, at no charge. Companies must also allow stockholders to make a permanent election to receive paper or e-mail copies of the materials, and maintain a record of these elections. Companies must provide paper or e-mail copies within three business days after receipt of the stockholder request made prior to the stockholder meeting. Stockholders may continue to request copies of proxy materials for one year after the meeting. However, if the request is made after the date of the meeting, copies do not need to be sent within three business days.

Full Set Delivery Option

Under the Full Set Delivery Option, companies will follow procedures that are substantially similar to the traditional process of delivering proxy materials in paper form. Companies can choose to prepare a separate Notice to be delivered with the proxy materials or to incorporate the required Notice into the proxy materials themselves.

In the Full Set Delivery Option, the Notice does not have to provide a means by which shareholders can request an e-mail or paper copy of the proxy materials, or instructions on how to access the proxy card, since the shareholder will have received the proxy materials simultaneously with receipt of the Notice.

Intermediaries

In the case of brokerage firms and other intermediaries that hold securities in "street name," the intermediaries must also participate in the distribution of proxy materials to stockholders and, if the company instructs the intermediaries to follow the Notice Only Option, then intermediaries must comply by preparing and sending their own notice to beneficial owners at least 40 days before the meeting date, based on information that the company provides to the intermediary.⁵ In addition to the information included in the company's notice, the intermediary's notice must also include the telephone number, email address and Internet website of the intermediary or its agent, as well as instructions on how to access the request for voting instructions on the intermediary's website.

⁵ Broadridge Financial Solutions, Inc. (formerly a division of ADP) has indicated that it will need the information to complete the Notice five business days in advance in order to meet that deadline.

Website Requirements

Both delivery methods require that the website the company uses to electronically furnish its proxy materials to stockholders must be a publicly accessible Internet website other than the SEC's EDGAR website. The site must lead stockholders directly to the proxy materials through prominent hyperlinks to each of the proxy-related disclosure documents. The online proxy materials must be available at least until the conclusion of the stockholder meeting.

Note that, due to privacy concerns, the website on which the proxy materials are posted must not compromise the anonymity of a stockholder accessing that website. For example, the website may not track the identity of persons accessing that website to view the proxy statement, and it cannot require the installation of any "cookies" or other software that might collect information about the accessing person. Companies are also restricted in how they can use email addresses received from stockholders who request email copies of the proxy materials; cannot share stockholder e-mail addresses, except with an agent assisting with the distribution of proxy materials; and may not sell them.

What to do?

Over the long term, the Notice Only Option is likely to result in significant cost savings. However, the first year or two of implementation of the Notice Only Option may involve higher costs than future years due to uncertainties such as the rate at which stockholders will elect to receive paper materials and the potential loss of cost savings associated with bulk mailing and printing.

The Full Set Delivery Option is far less of a departure from the current proxy process and requires only minimal changes for companies planning for 2008. For these reasons, the Full Set Delivery Option may be advantageous for smaller public companies whose stockholder base may be more reliant on and responsive to paper proxy materials. Also, the number of paper copies to print would be predictable. On the other hand, the company would continue to incur the cost of printing and mailing proxy materials for each stockholder. Significantly, companies implementing the Full Set Delivery Option are not required to mail their proxy materials 40 calendar days in advance of a meeting date and need not provide stockholders with any additional means for voting other than a proxy card or request for voting instructions. Under either delivery option, companies must take care to ensure that the website where proxy materials are posted complies with the investor anonymity and privacy requirements of the rules.

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