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SEC Adopts New E-Proxy Rules

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On January 22, 2007, the U.S. Securities and Exchange Commission (the "SEC") promulgated new proxy rules (the "New Rules") permitting, but not requiring, new methods for issuers to furnish proxy materials to shareholders.^[1] Under the New Rules, issuers can satisfy their delivery obligations under the SEC's proxy rules by posting proxy materials on a Web site and providing a notice to shareholders of their availability.^[2] The SEC believes that this "notice and access" approach can meaningfully reduce costs associated with the proxy solicitation process, while more efficiently furnishing proxy materials to shareholders. The New Rules are effective March 30, 2007, but issuers may not send a Notice of Internet Availability of Proxy Materials (described below) to shareholders before July 1, 2007. While open-end funds, which are not typically required to convene annual shareholder meetings, will not benefit as much as other issuers, they will benefit to the extent they convene special meetings for advisory or Rule 12b-1 changes, Director/Trustee elections, or other extraordinary events.

The Notice and Access Model for Issuers

Under the New Rules, an issuer utilizing the notice and access approach is required to notify shareholders of the availability of proxy materials on the Internet by mailing to shareholders, or emailing those who have previously agreed to receive by email, a "Notice of Internet Availability of Proxy Materials" (a "Notice") at least 40 days before the shareholder meeting.^[3] The Notice, which can take the form of a postcard, is required to include the following items in plain English:

- A prominent, bold-face legend stating that proxy materials are available on the Internet and giving the Web site address, that shareholders can request copies of the materials at no charge, and the manner in which they may do so.
- The date, time, and location of the shareholder meeting.
- An identification of each matter intended to be acted upon and the issuer's recommendation regarding those matters.
- A list of proxy materials available on the Web site.
- A toll-free telephone number, email address, and Web site address where shareholders can request paper or email copies of the proxy materials.
- Any control or identification numbers that a shareholder will need in order to access a proxy card and instructions to obtain such access.
- Information about how to attend the meeting in person.

The Notice may *not* include or be accompanied by any additional information (except a reply card for requesting a paper or email copy of the proxy materials), such as a telephone number for executing a proxy, unless the additional information is required by state law. The New Rules do not alter state law requirements concerning the delivery of any document related to a shareholder meeting or proxy solicitation.

A proxy card may not accompany the initial Notice, but can be mailed to shareholders 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. In addition, an issuer must post the proxy card on the Web site with the proxy statement no later than the time the Notice is sent to

shareholders.

A shareholder must be allowed to request copies of the proxy materials without charge. An issuer must send a copy (by email or paper copy, as requested) of the proxy materials to the shareholder within three business days after receiving the request.

The Web site must be publicly accessible, and the Web site address provided to shareholders must lead directly to the proxy materials or have prominent links to each of the disclosure documents set forth in the Notice. Providing a link to the proxy materials on the SEC's EDGAR database does not comply with the notice and access approach. Also, proxy materials posted on a Web site must be made available in a printable format substantially identical to the paper versions of the materials and be in a readily searchable format.

On the Web site, an issuer also must provide shareholders with at least one method of executing a proxy vote. Consistent with the intent of the notice and access approach, the SEC believes that "a shareholder who accesses proxy materials on the Internet Web site should be able to execute a proxy as soon as the shareholder is able to electronically access the proxy statement."

Utilizing the notice and access approach to deliver proxy materials is voluntary and must be done on a meeting-by-meeting basis, in that opting to utilize it once will not require an issuer or others to utilize it on subsequent occasions. A shareholder can issue a standing request to receive paper or emailed proxy materials, revocable at any time, but cannot issue a standing order declining to receive a Notice or paper or email proxy materials.

The Role of Intermediaries

Existing SEC proxy rules require issuers to send their proxy materials to intermediaries, such as broker-dealers and banks, for forwarding to beneficial owners. The New Rules allow an intermediary to utilize the notice and access approach *only if* the issuer requests that the intermediary do so. If an issuer makes such a request, the intermediary *must* utilize the approach. If an issuer does not make such a request, however, the intermediary can continue to rely on any other permitted method of furnishing proxy materials to beneficial owners, including the electronic delivery of proxy materials to shareholders who have consented to receive communications in that manner.

An issuer relying on the notice and access model must provide the intermediary with all information necessary for the intermediary to prepare its own Notice, which it must send to beneficial owners at least 40 calendar days before the meeting date. The intermediary's Notice generally is required to contain the same information as the issuer's Notice, tailored to apply to beneficial owners.

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 issuer and an additional three business days from the receipt of the materials to forward them to the beneficial owner.

The Notice and Access Model for Other Solicitors

A person other than the issuer who undertakes a proxy solicitation also can rely on the notice and access model. The New Rules contain tailored provisions designed to facilitate use by other soliciting persons. For example, a soliciting person other than the issuer must send its Notice to shareholders by the later of (i) 40 calendar days prior to the meeting or other corporate action or (ii) 10 calendar days after the issuer first furnishes its proxy materials or Notice to shareholders.

The New Rules follow current practice requiring issuers either to provide a shareholder list to a requesting shareholder or to send the shareholder's proxy materials on the shareholder's behalf and clarify the obligations of intermediaries in this regard.

Business Combination Transactions

The notice and access model is not available to furnish proxy materials relating to business combination transactions covered by Rule 165 under the Securities Act of 1933. The SEC believes

that such transactions constitute highly extraordinary events, often entail a registration of securities and corresponding prospectus delivery requirement, and frequently involve proxy statements of considerable length and complexity. The SEC stated in the Release that, based on its experience with the approach in the context of more straightforward matters, it will consider extending the notice and access approach to business combination transactions.

Footnotes

[1] See Internet Availability of Proxy Materials, Investment Company Act Release No. 27671 (Jan. 22, 2007) (the "Release"). In a companion release, the SEC proposed amendments to the proxy rules *that would require* issuers to follow the notice and access model for all but business combination (merger) solicitations. See Universal Internet Availability of Proxy Materials, Investment Company Act Release No. 27672 (Jan. 22, 2007) (this proposal, if adopted, would require certain filers other than registered investment companies to follow the notice and access model beginning January 1, 2008, and all other issuers, including registered investment companies, beginning January 1, 2009). The comment period ends March 30, 2007.

[2] The New Rules apply to notices of shareholder meetings, Schedule 14A proxy statements and consent solicitation statements, forms of proxy (proxy cards), Schedule 14C information statements, annual reports to security holders, additional soliciting materials (if any), and any amendments to the materials. The New Rules are not available for satisfying the semi-annual shareholder report mailing requirements in Section 30(e) of the Investment Company Act of 1940 and the rules thereunder.

[3] Subject to compliance with the "householding" approach permitted under Securities Exchange Act Rule 14a-3(e), a single Notice may be sent to one or more shareholders residing at the same address. The householding approach is not available, however, with respect to email Notices furnished to shareholders who have consented to receive them.