

## **SEC ADOPTS UNIVERSAL E-PROXY RULES**

The SEC has adopted amendments to the proxy rules that enable shareholders to choose the means by which they access proxy materials.

The new rules replace the voluntary e-proxy model that took effect on July 1, 2007. Under the new rules issuers are required to post their proxy materials on a publicly-accessible web site (other than the SEC's EDGAR website) and provide shareholders with a notice advising them that the materials are available and how to access them. Issuers may select one of the following methods to provide the proxy materials to shareholders: (1) the "notice only option" which requires issuers to comply with the requirements of the voluntary notice and access model approved by the SEC earlier this year; or (2) the "full set delivery option" which requires issuers to deliver a full set of proxy materials to shareholders along with the notice.

An issuer is not required to use one delivery option for all shareholders and may elect to use the "notice only option" for some shareholders and the "full set delivery option" for other shareholders.

Large accelerated filers must comply with the new rules for solicitations commencing on or after January 1, 2008. Issuers that are not large accelerated filers, registered investment companies and soliciting persons other than issuers are not required to comply with the new rules until January 1, 2009.

The new rules do not apply to solicitations in connection with business combination transactions.

Please contact Paul De Rosa (412-297-4821) at Cohen & Grigsby, P.C. for further information or if you have any questions concerning this topic.

**August 16, 2007**

### **What is the “notice only option”?**

The “notice only option” is identical to the “notice and access” model that was approved by the SEC earlier this year. Issuers who elect to comply with the “notice only option” must give notice to shareholders of the availability of proxy materials and give them the choice to access them electronically or to receive them by mail. A summary of the “notice only option” is attached as Annex A.

### **What is the “full set delivery option”?**

The “full set delivery option” is essentially the same as the current paper delivery model with the exceptions that an issuer must:

- Include a notice with the full set of proxy materials or incorporate all the information required to appear in the notice into the proxy statement and the proxy card.
  - The notice includes most, but not all, of the information that is required under the “notice only option” as set forth in Annex A:
    - For example, the notice should not contain items 1 and 3 of the bold face legend and need not provide instructions how shareholders can request paper or e-mail copies of the proxy materials.
- Post the proxy materials on a publicly accessible website (other than the SEC’s EDGAR website) no later than the date the notice was first sent to shareholders.
  - The website must meet the same requirements applicable to the “notice only option” described in Annex A:
    - For example, the website may not be the SEC’s EDGAR website and the proxy materials must be presented in formats convenient for both reading online and printing on paper and must remain available on the website through the conclusion of the shareholders’ meeting.

### **What are the differences between the “notice only option” and the “full set delivery option”?**

- An issuer using the “full set delivery option” need not prepare a separate notice if it incorporates all the notice information in the proxy statement and proxy card.
- An issuer may not include any other documents along with the notice under the “notice only option”. Under the “full set delivery option” the notice must be accompanied by a full set of proxy materials (not just some of them).

- Under the “full set delivery option” the issuer is not required to provide shareholders with a means to request paper or e-mail copies since it delivers a full set of proxy materials along with the notice.
- Under the “full set delivery option” the issuer is not required to comply with the 40-day deadline for sending the notice to shareholders.

**NOTICE ONLY OPTION****When must the issuer send the notice to shareholders?**

The issuer must send a notice to shareholders at least 40 calendar days prior to the date of the shareholders' meeting. If action is being taken by written consent the notice must be sent at least 40 calendar days prior to the date that consents may be used to effect the corporate action. For purposes of this calculation, the first day of the period is the day on which the issuer sends the notice and the 40th day is the day prior to the meeting date or date of the corporate action.

**What must the notice sent to shareholders contain?**

- The notice must contain a prominent bold-face legend in the following form prescribed by the SEC's rules.

**“Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**

**1. 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.**

**2. The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

**3. 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] to facilitate timely delivery.”**

- The notice must specifically identify the website address where the proxy materials are available so that it leads shareholders directly to the proxy materials and shareholders are not required to browse the website to locate the materials.
- The notice must also include the following information in plain-English:
  - The date, time and location of the meeting.

- A clear and impartial description of the matters to be acted on and the issuer's recommendations, if any, with respect to such matters.
  - A toll-free telephone number, an e-mail address and website address where the shareholder can request a copy of the proxy materials for the particular shareholder meeting referenced in the notice or make a permanent election to receive copies of the proxy materials on a continuing basis for all meetings.
  - A list of the materials being made available through the website.
  - Instructions on how to access the proxy card and any required control/identification numbers.
  - Information about attending the meeting and voting in person.
- No proxy card or other materials may accompany the notice except for any notice of a shareholder meeting required under state corporation law and a reply card for requesting a paper or e-mail copy of the proxy materials.
  - No information may be included in the notice beyond that permitted by the SEC's rules. For example, the issuer may not include any supporting statements in favor of a recommendation.

**When may a proxy card first be sent to shareholders?**

- An issuer may not furnish a proxy card with the initial notice. However, an issuer may mail a proxy card, a telephone number for telephonic voting or any other means for executing a proxy 10 calendar days after mailing the initial notice provided that either a copy of the initial notice or the proxy statement and annual report are included with the proxy card. The waiting period gives shareholders time to access the proxy materials on the website or request a copy of the proxy materials before receiving a proxy card. Issuers need not wait 10 calendar days if they provide a copy of the proxy statement and the annual report along with the proxy card.

**When must the proxy materials be posted on the website?**

- The issuer must post the proxy materials on a website other than the SEC's EDGAR website no later than the time at which it sends the notice to shareholders in order that the materials are electronically available when shareholders receive the notice.
- Any additional soliciting materials required to be filed with the SEC must be posted on the website no later than the day that these additional materials are first sent to shareholders or made public.

### **What must the website contain?**

- In addition to the proxy statement and any other proxy materials the issuer must provide shareholders with at least one method of executing a proxy vote as soon as the shareholder is able to electronically access the proxy statement. Such methods may be an electronic voting platform linked to the website where the proxy materials are posted or a telephone number for executing a proxy.
- The proxy materials must be provided both in a format that is readily searchable, such as HTML, and in a format that provides a version of the materials that is substantially identical to the paper version of the materials and is convenient for printing and viewing online (e.g., a PDF version).
- The website must be maintained in a manner that does not infringe on the anonymity of a person accessing the website.
  - An issuer also may not use any e-mail address provided by a shareholder solely to request a copy of proxy materials for any other purpose.
  - The issuer may not disclose a shareholder's e-mail address to any person, except to its agent or an employee of the issuer only for the purpose of facilitating delivery of a copy of the issuer's proxy materials.

### **How long must the proxy materials remain available?**

- The proxy materials must remain available on the designated website through the conclusion of the shareholders' meeting.

### **Is the notice required to be filed with the SEC?**

- Yes. The form of notice is required to be filed with the SEC as additional soliciting material pursuant to Rule 14a-6(b) no later than the date the notice is first sent or given to shareholders.

### **Can shareholders request paper or e-mail copies of the proxy materials?**

- Yes. Issuers must send a paper or e-mail copy of the proxy materials to shareholders via first class mail within three business days of receiving a request. Shareholders can request to receive a paper or e-mail copy of the proxy materials for the particular meeting to which the notice relates, or permanently elect to receive a paper or e-mail copy of the proxy materials for all future meetings.
- Shareholders may request a copy of the proxy materials until one year after the meeting (after the meeting the issuer is not required to use first class mail or respond within three business days).

### **Is the notice subject to the SEC's "householding" rules?**

- Yes. Issuers may send a single copy of the notice to multiple shareholders residing at the same address so long as the SEC's householding rules are satisfied.

### **How do persons other than the issuer utilize the "notice only option" model?**

- Any person other than the issuer must send its notice to shareholders by the later of 40 days prior to the meeting or 10 days after the issuer sends out its proxy statement or notice to shareholders. The soliciting person must include the agenda items in its notice only to the extent known but may provide a partial proxy card in which event the notice must clearly state whether execution of that card will invalidate the shareholder's earlier vote on the other matters reflected on the issuer's proxy card. The rules also allow a soliciting person other than the issuer to solicit proxies only from a select group of shareholders.

### **How does the "notice option only" model affect brokers and other intermediaries?**

- An intermediary is required to use the "notice and access" model upon the issuer's or other soliciting person's request. An intermediary cannot independently elect to use the "notice and access" model but may deliver proxy materials to a beneficial owner electronically if the beneficial owner has previously affirmatively consented to electronic delivery.
- An issuer or other soliciting person must provide the necessary information sufficiently in advance for the intermediary to prepare and send its own notice at least 40 days before the meeting date.
  - The intermediary's notice generally must contain the same information as the issuer's notice and must contain instructions on how to access the request for voting instructions on the intermediary's website.
  - The intermediary may direct beneficial owners to either the issuer's website or its own website to access the proxy materials.
  - Intermediaries are not permitted to include a request for voting instructions with the initial notice.
  - At the issuer's request, the intermediary must send beneficial owners a request for voting instructions 10 days or more after the intermediary sent the original notice.
  - The request for voting instructions must be accompanied by either a copy of the proxy statement or the intermediary's original notice.

- A beneficial owner must request a paper or e-mail copy of the proxy materials from the intermediary who must then request a copy of these materials from the issuer or other soliciting person within three business days of receiving the request and must forward the materials to the beneficial owner within three business days after receipt.
- The notice must make clear that if a shareholder elects to receive paper or e-mail copies of proxy materials for a meeting, the intermediary will apply that request to all securities of all issuers held by the intermediary on behalf of the beneficial owner.