

# Client Alert

A report  
for clients  
and friends  
of the Firm     **January 2007**

## SEC Adopts E-Proxy Rule Amendments Allowing Issuers to Voluntarily Post Proxy Materials on the Internet Starting July 1, 2007, and Proposes that the E-Proxies Become Mandatory in the Future

On December 13, 2006, the Securities and Exchange Commission adopted amendments to its proxy rules that would allow issuers and other soliciting persons to furnish proxy materials to shareholders through a voluntary "notice and access" model using the internet, as briefly summarized below.<sup>1</sup> An issuer or other soliciting person may use the voluntary notice and access model beginning July 1, 2007.

Issuers that use the voluntary notice and access model may be able to significantly lower the costs of their proxy solicitations. The model might also reduce the costs of engaging in a proxy contest for soliciting persons other than the issuer. The amendments do not apply to proxy solicitations for business combinations.

On December 13, 2006, the SEC also proposed rule changes that would require issuers and soliciting

persons to comply with requirements substantially similar to the voluntary notice and access model for all solicitations not related to a business combination transaction in the future.<sup>2</sup> The SEC is considering making the proposals effective for large accelerated filers<sup>3</sup> on January 1, 2008, and for all other issuers, on January 1, 2009. Comments on the proposals are due to the SEC within sixty days of their publication in the Federal Register.

### The New Rules

**Issuers may voluntarily post proxy materials on an internet website**

Pursuant to the amendments to the SEC's proxy rules, an issuer may, but is not required to, furnish proxy materials to shareholders through a voluntary "notice and access" model. An issuer choosing to follow the model must post its proxy materials on an internet web site (not the SEC's EDGAR system) and send a "notice of internet availability of proxy materials" to shareholders at least forty days before the meeting date. The notice also will advise shareholders how to elect to receive a paper or email copy of the proxy materials at no charge to them. A proxy card may not accompany the notice, although an issuer may send a paper proxy card accompanied by another copy of the notice (or a paper copy of the proxy statement) ten days or more after sending the initial notice. Shareholders may elect to vote on the internet, by proxy card or, under certain circumstances, by telephone.

The notice must be written using the "plain English" standards adopted by the SEC in 1998. The notice must also contain the following information:

<sup>1</sup> The adopting release, Release No. 34-55146, is available at <http://www.sec.gov/rules/final/2007/34-55146.pdf>

<sup>2</sup> The proposing release, Release No. 34-55147, is available at <http://www.sec.gov/rules/proposed/2007/34-55147.pdf>

<sup>3</sup> A large accelerated filer is an issuer that as of the end of its fiscal year, has an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as measured on the last business day of the issuer's most recently completed fiscal quarter; has been subject to the reporting requirements of the Exchange Act of 1934 for a period of at least twelve calendar months; has filed at least one annual report; and is not eligible to use small business issuer Forms 10-KSB or 10-QSB.

- A prominent legend in bold-face type that states:

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

- 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.
- The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [insert web site address].
- 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 date, time, and location of the meeting, or if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- a clear and impartial identification of each separate matter intended to be acted on and the issuer’s recommendations regarding those matters, but no supporting statements;
- a list of the materials being made available at the specified web site;
- (1) a toll-free telephone number; (2) an e-mail address; and (3) an internet web site address where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the notice relates;
- any control/identification numbers that the shareholder needs to access his or her proxy card;
- instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement and annual report; and
- information on how to obtain directions to be able to attend the meeting and vote in person.

The notice may include, or be accompanied by, a notice of meeting required under applicable state law and a post card to request a paper copy of the proxy materials.

### **Intermediaries must notify beneficial owners**

When an issuer chooses to rely on the voluntary notice and access model, brokers, banks and similar intermediaries must prepare and send their own notices designed for beneficial shareholders. A beneficial shareholder desiring a paper or e-mail copy of the proxy materials must request one from the broker, bank or other intermediary, and not the issuer.

### **Shareholders may make a permanent election to receive proxy materials by paper or email**

An issuer must send a copy of the materials within three business days after receiving a request from a shareholder. A shareholder may make a permanent election to receive all proxy materials in paper or by e-mail with respect to future proxy solicitations conducted by the issuer.

### **Soliciting persons may follow the voluntary notice and access model**

A soliciting person other than the issuer may follow the voluntary notice and access model in substantially the same manner as an issuer. A soliciting person’s notice must be sent to shareholders by the later of forty days before the meeting and ten days after the issuer filed its proxy materials.

A soliciting person may selectively solicit shareholders, just as it could under the current proxy rules. As such, a soliciting person using the voluntary notice and access model may limit its solicitation to shareholders who have not previously requested paper or e-mail copies. But if the soliciting person sends a notice to a shareholder, it must send that shareholder a paper or e-mail copy upon request.

## **The Proposed Rules**

### **Mandatory internet availability of proxy materials**

The SEC also is proposing to require companies and soliciting persons to comply with requirements substantially similar to the voluntary notice and access model for all solicitations not related to a business combination transaction in the future. Unlike the voluntary model, under the proposed mandatory model, the notice could be accompanied by a full set of proxy materials, including the proxy statement, annual report and proxy card if the issuer

elected to make paper copies of the proxy materials to some or all shareholders in the first instance. Shareholders would retain the ability to request paper or email copies for a particular meeting or to make a permanent request for proxy materials relating to all shareholder meetings.

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