

# E-Proxy: Understanding the New Delivery Options for the 2008 Proxy Season

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The Securities and Exchange Commission has adopted two significant modifications to the proxy rules that could dramatically change the ways that proxy solicitations are conducted. As a result, a new method for delivery of proxy materials to shareholders has been created. Issuers can use the new method, called the “notice and access model,” which we describe below, or they can continue to mail a complete set of proxy materials, which is the traditional method for delivery of proxy materials. If an issuer uses the traditional method, the revised rules require that the proxy materials must be posted on a qualified web site and that the mailed materials contain notice of their availability on the Internet.

The first modification occurred on December 13, 2006, when the SEC amended the proxy rules under the Securities Exchange Act of 1934 to provide an alternative method for issuers and other persons to furnish to shareholders a proxy statement and the annual report to shareholders, which collectively are the proxy materials, by posting them on a web site and providing shareholders with notice of the availability of the proxy materials. This is called the notice and access model of delivery. If used, hard copies of the proxy materials must also be made available to shareholders at no charge on request. [Release Nos. 34-55146; IC-27671, January 22, 2007](#). The second modification occurred on June 20, 2007, when the SEC further amended the proxy rules to require issuers and other soliciting persons to post their proxy materials on a web site and provide shareholders with a notice of the Internet availability of the materials whether or not the issuer is complying with the new notice and access model for delivery of proxy materials. [Release Nos. 34-56135; IC-27911, July 26, 2007](#).

Over time, issuers that rely on the notice and access model for delivery of proxy materials may be able to significantly lower the costs of their proxy solicitations as they are no longer required to deliver proxy materials in hard copy to each shareholder. The amendments will also likely reduce the cost of engaging in a proxy contest as third persons can take advantage of the notice and access model for delivery of proxy materials whether or not the issuer uses that method of delivery.

## Transition

The new rules regarding the notice and access model for delivery of proxy materials became effective on March 30, 2007, although no issuer could send a notice of Internet availability of proxy materials to shareholders prior to July 1, 2007.

The new rules regarding the posting of proxy materials on the Internet become effective on January 1, 2008, for all large accelerated filers and on January 1, 2009, for all other persons, although these other persons can voluntarily comply with the new rules on and after January 1, 2008. A large accelerated filer is defined in Rule 12b-2 under the Exchange Act as an issuer after it first meets the following conditions as of the end of a fiscal year:

- Had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of the issuer’s most recently completely second fiscal quarter;
- Has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for at least 12 calendar months;
- Has filed at least one annual report on Form 10-K; and
- Is not eligible to use Form 10-KSB or 10-QSB.

## Notice and Access Model

Under new Rule 14a-16 under the Exchange Act, an issuer relying on the notice and access model for delivery of proxy materials must send to shareholders a Notice of Internet Availability of Proxy Materials (the “Notice”) at least 40 calendar days in advance of the shareholder meeting (or the date that consents may be used to effect a corporate action). A proxy card cannot accompany the Notice. No other information may accompany the Notice except for the notice of a shareholders’ meeting that is required under state law. The two notices may be combined into one unless prohibited under state law.

A proxy card may only be sent to shareholders 10 or more calendar days after sending the Notice. An issuer may choose to accompany the proxy card with the proxy statement and the annual report. If the proxy statement and annual report do not accompany the proxy card, another copy of the Notice must accompany the proxy card. This will provide shareholders with the information on how to access the web site where the proxy statement and annual report are located without referring to the first Notice.

An issuer may use the notice and access model for delivery of proxy materials for some, all, or none of their shareholders’ meetings, but the notice and access model may not be used in connection with business combination transactions. Similarly, shareholders may request paper or electronic copies of proxy materials for some, all, or none of the shareholders’ meetings. However, a shareholder may make an election to receive paper or electronic copies of proxy materials for all future meetings and this election will continue in effect until it is revoked by the shareholder. An issuer may use the new notice and access model for delivery of some proxy materials but not others. For example, the issuer may mail the annual report but use the notice and access model for delivery of the proxy statement. In addition, issuers may use the notice and access model for delivery of proxy materials for some shareholders and the traditional method for delivery to the remaining shareholders.

## The Notice

The Notice must include a prominent legend in bold-face type that states:

Important Notice Regarding the 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 Internet website 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 date] to facilitate timely delivery.

The Notice must also include the following information in understandable terms:

- The date, time, and location of the meeting or, if action is to be taken by written consent, the earliest date on which the action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer’s recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available on the web site;
- A toll-free telephone number, an email address and a web 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 the 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 reference to the web address must clearly identify the location where the proxy materials are located. It must be specific enough to lead shareholders directly to the proxy materials, rather than to the home page or other section of

the web site, so that shareholders do not have to browse to find the materials.

The instructions in the Notice on how to access the proxy card may not include a telephone number for voting. However, the Notice may contain a telephone number for shareholders to call with any questions they may have regarding the solicitation process. A telephone number for accessing the proxy card and voting may only be included on the proxy card that is sent to shareholders or on the web site that contains the proxy materials.

In addition, the Notice may contain a statement advising shareholders that they are not required to provide any personal information, other than the identification or control number provided in the Notice, in order to execute a proxy.

The Notice must be limited to the information described above, unless it is being combined with the notice of a shareholders' meeting that is required under state law. In that case, the information required by state law may also be included in the Notice. It is important to note that the notice and access model for delivery does not supersede state law requirements for delivery of the notice of a shareholders' meeting.

The form of Notice will constitute "other soliciting material" that must be filed with the SEC pursuant to Rule 14a-6(b) under the Exchange Act no later than the date on which it is first sent or given to shareholders.

## Householding of the Notice

Rule 14a-3(e) under the Exchange Act has been revised to permit an issuer to send only a single copy of the Notice to one or more shareholders residing at the same address, known as "householding," or to send separate Notices for each householded account in a single envelope, if the other conditions contained in Rule 14a-3(e) are satisfied. These conditions are:

- The Notice may be addressed to the shareholders residing at the address, either as a group, individually, or in a different form to which each of the shareholders has consented in writing;
- The issuer must deliver a separate proxy card for each shareholder at the shared address; and
- The issuer must include an undertaking in the proxy statement to deliver promptly upon written or oral request

a separate copy of the annual report to shareholders, proxy statement, or Notice, as applicable, to a shareholder at a shared address to which a single copy of the document was delivered.

If a shareholder has previously consented to the householding of proxy materials, a separate consent need not be obtained regarding the householding of the Notice.

## Proxy Card

An issuer following the notice and access model for delivery of proxy materials must post the proxy card on the web site that contains the proxy statement and the annual report no later than the time at which the Notice is sent to shareholders. This will ensure that the documents are electronically available when a shareholder receives the Notice. It also means that the documents must be posted at least 40 days before the shareholders' meeting.

An issuer may provide a means to execute a proxy through a variety of methods in addition to the return of the hard copy of the proxy card by mail. For example, an issuer may provide an electronic voting platform linked to the web site where the proxy materials are posted or may provide a telephone number for executing a proxy.

Subsequent solicitations of shareholders, such as follow-up solicitations of shareholders who have not voted, must also include either a copy of the proxy statement and any annual report, unless they were previously delivered, or a copy of the Notice.

## Internet Posting of Proxy Materials for Compliance with Notice and Access Model

All proxy materials to be furnished through the notice and access model for delivery of proxy materials, other than additional soliciting materials, must be posted on the Internet by the time the issuer sends the Notice to shareholders. Additional soliciting materials must be posted no later than the day on which those materials are first sent or given to shareholders.

The web site used to post the proxy materials must not infringe on the anonymity of a shareholder accessing that web site; it may not track the identity of persons accessing the web site to view the proxy statement. In addition, the web site may not require the installation of any "cookies" or

other software that might collect information about the accessing person. Neither the issuer nor its agents may use any email address obtained from a shareholder for the purpose of requesting a copy of the proxy materials for any purpose other than to send a copy of those materials to that shareholder. The shareholder's email address may not be given to other persons without the shareholders' express consent, except in connection with the delivery of proxy materials.

All posted proxy materials must remain on that web site and be accessible to shareholders at no charge through the conclusion of the related shareholders' meeting.

The web site that an issuer uses to electronically furnish its proxy materials to shareholders must be publicly accessible, and cannot be the SEC's EDGAR web site.

The posted proxy materials must be convenient for both printing and viewing online. This may require posting the proxy materials in two different formats, at least one of which should be substantially similar to the paper version of the materials. The proxy materials must also be posted in a readily searchable format, such as HTML. This version could be the same version that is convenient for viewing online, and can incorporate various features, such as hyperlinks from the table of contents. If additional software is needed to view any of the posted proxy materials, the web site must contain a link that allows the shareholder to obtain the software free of charge.

In addition to the posting of proxy materials on the Internet, the issuer must concurrently provide shareholders with at least one method of executing a proxy, other than by requesting a paper proxy card, on that same web site. Examples include establishing an Internet voting platform, disclosing a toll-free telephone number for voting, or including a printable or downloadable proxy card.

## **Shareholder Requests for Copies of Proxy Materials**

Even if the notice and access model for delivery of proxy materials is used, an issuer has an ongoing requirement to provide a paper or electronic copy of the proxy statement, annual report to shareholders, and proxy card to a requesting shareholder. Upon the receipt of a request from a shareholder, the issuer must send the paper or electronic copy of the proxy materials to the shareholder within three business

days after the receipt of the request. Paper copies must be delivered by first class mail or other reasonably prompt means of delivery. The ability of a shareholder to request materials and the obligation of the issuer to deliver them will continue for up to one year after the conclusion of the meeting of shareholders, or the date the related action is taken in the case of a consent solicitation. However, after the meeting has occurred, delivery of the requested materials need not be made by first class mail and a request need not be satisfied within three business days of the receipt of the request.

## **Required Web Site Posting of Proxy Materials by All Issuers**

Rule 14a-16 also requires that all issuers, even those that use the traditional method for delivery, must, subject to the phase-in schedule discussed above, (1) post those materials to an Internet web site on the same terms that we discuss above under "Internet Posting of Proxy Materials for Compliance with the Notice and Access Model" and (2) include a Notice with the full set of proxy materials delivered to shareholders, or include the Notice information in the proxy statement and proxy card. As a result, all issuers and all intermediaries must prepare Notices and create qualified web sites, whether or not the issuer is relying on the notice and access model for delivery. However, the other requirements of the notice and access model for delivery of proxy materials, such as requiring that the web site provide shareholders with a method of executing a proxy or having the materials posted at least 40 days before the meeting will only apply to issuers choosing to use the notice and access model.

If the issuer is following the traditional method for delivery of proxy materials to shareholders, the prominent legend in bold-face type need not state:

- [T]his communication presents only an overview of the more complete proxy materials that are available on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.
- 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 date] to facilitate timely delivery.



In addition, the Notice may exclude the following information from that described above:

- A toll-free telephone number, an email address and a web 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; and
- 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.

## **Intermediaries, such as Brokers**

The process of distributing proxy materials to beneficial owners, as opposed to record owners, complicates the notice and access model for delivery of proxy materials. An intermediary may use the notice and access model for delivery only if the issuer requests it to do so. In general, the same rules described above, as they apply to the issuer, apply to the intermediary except:

- The intermediary must prepare its own Notice of Internet Availability of Proxy Materials with such specified changes as are necessary to reflect the differences between registered owners and beneficial owners. The intermediary cannot just forward the issuer's Notice.
- The intermediary's Notice of Internet Availability of Proxy Materials must also be prepared and sent to beneficial owners at least 40 days before the meeting date, so an issuer must provide information in sufficient time for the intermediary to prepare its notice.
- The intermediary may choose whether to direct beneficial owners to the issuer's identified web site or to its own in order to access the proxy materials. If the intermediary directs beneficial owners to the issuer's identified web site, the intermediary must inform beneficial owners that they can submit voting instructions to the intermediary, but cannot execute a proxy directly unless the intermediary has executed a proxy in favor of the beneficial owner.
- The intermediary's notice must also contain a brief description, if applicable, of the rules that permit the intermediary to vote the securities if the beneficial owner does not return voting instructions.

- The intermediary's notice must provide instructions on how a beneficial owner can request a hard copy of the proxy materials from the intermediary, not from the issuer. The intermediary must then request a copy from the issuer within three business days of receiving a request from the beneficial owner. The issuer then has three business days to respond to a request from the intermediary, who then has three business days after receipt from the issuer to mail the materials to a requesting beneficial owner.

## **Solicitations by Third Parties**

A person other than the issuer who undertakes a proxy solicitation can rely on the notice and access model for delivery of proxy materials and is generally subject to the same rules that apply to issuers. However, while issuers must distribute proxy materials to all shareholders, third parties need only distribute proxy materials to those shareholders from whom they are seeking proxy authority. For example, if the third party does not wish to solicit proxies by either mail or email, it need not do so. Also, a third party may use the notice and access model even if the issuer does not.

If a third party is going to use the notice and access model for delivery of proxy materials, it must send out its Notice of Internet Availability of Proxy Materials by the later of 40 calendar days prior to the meeting or 10 calendar days after the issuer sends out its proxy statement or Notice. The Notice of Internet Availability of Proxy Materials prepared by a third party generally must comply with the requirements that are applicable to the issuer, with such specified changes as are necessary to reflect the applicable permitted differences.

The SEC has revised Rule 14a-7 under the Exchange Act to require that the shareholder list provided to a third party in connection with distributing its proxy materials must distinguish between shareholders who have requested paper or electronic copies and those who have not if so requested by the third party. Similarly, if the issuer elects to distribute proxy materials for the third party rather than providing the shareholder list, the issuer must follow the instructions of the third party.

## **Practical Considerations**

The new and revised rules result in significant changes to the way information may be disseminated in the upcoming proxy season. To the extent that companies have not yet begun

to address the new delivery alternatives and requirements, they should do so sooner rather than later. The following points should be considered when preparing for the new requirements:

- Issuers that will use the notice and access model for delivery of proxy materials should revise their proxy preparation timelines sufficiently in advance of the meeting of shareholders to allow compliance with the new requirements, keeping in mind that all proxy materials must be posted at least 40 days before the meeting of shareholders. In addition, issuers must give their intermediaries the necessary information to allow them to prepare their corresponding notices and, if the intermediaries are posting the proxy materials on their own web sites, must give the intermediaries the final proxy materials in time for the intermediaries to meet the same 40-day deadline. This could add at least five days to the timeline.
- If an issuer or intermediary uses a third party to assist in the distribution process, those third parties should be consulted sooner rather than later in order to determine how the third party intends to comply with the new requirements. For example, issuers will need to determine the logistics of who will be preparing and maintaining the hosting web site. Also keep in mind that these third parties will be charging for these additional services.
- Check state law requirements for delivery of the state law notice of shareholders' meeting and determine how, if at all, it impacts the proposed process.
- Issuers should consider whether it makes sense to use a bifurcated approach for delivery of proxy materials, using the notice and access model for certain shareholders and the traditional method for the remaining shareholders. Issuers should also consider whether it makes sense to use the notice and access model for all proxy materials, or whether they will distribute certain materials, such as the annual report, in hard copy.
- Issuers may choose different delivery option for different meetings. For example, if an issuer is concerned that the notice and access model for delivery of proxy materials will result in a lower percentage of proxies being executed, the issuer may opt for the traditional method of delivery, such as with respect to a meeting at which a potentially

controversial proposal will be voted on, while using the notice and access model for other, more routine, shareholder meetings.

- It is perfectly acceptable to wait a proxy season or two to see how the notice and access model works in practice – i.e., to see what the cost savings to other issuers are and what impact the new system has on the number of proxies actually being executed – before electing to adopt the notice and access model, as long as the required web site posting is complied with.
- Because proxy materials posted on the web site must be convenient for both printing and viewing online, each issuer should review the format of its proxy statement and determine whether the proxy needs to be revised and whether more than one format will be needed, in each case, in order to meet the new requirements.
- Issuers that will use their own web site to post their proxy materials should work with their technology departments sooner rather than later to be sure they have a plan in place to comply with the web site anonymity requirements (e.g., no tracking cookies) of the new rules.
- Issuers using the notice and access model should work with their intermediaries sooner rather than later to determine the most cost effective method of complying with fulfillment requests when shareholders receiving a Notice request a hard copy of the proxy materials. It is important for issuers to keep in mind the timing deadlines imposed by the new rules and that deliveries pursuant to requests for hard copies must be made by first class mail.
- While the notice and access model for delivery of proxy materials will provide cost savings, there are also some incremental costs. Issuers with a relatively small number of shareholders should carefully consider whether the incremental costs involved balance sufficiently the cost savings.

## Conclusion

The new rules may have a significant impact on the way proxy solicitations are conducted going forward. As a result, companies should begin preparing in order to be able to comply with the new requirements in a timely manner.

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