

SEC Adopts E-Proxy Rule Amendments, Enabling Shareholder Choice Regarding Access to Proxy Materials

Summary

In a release issued on July 26, 2007 (the "Adopting Release"),¹ the Securities and Exchange Commission (the "SEC") adopted amendments to the proxy rules under the Securities Exchange Act of 1934 (the "1934 Act") that provide shareholders with the ability to choose to access proxy materials² either by mail or electronically. The SEC voted to adopt the amendments, initially proposed in a release issued on January 22, 2007 (the "Proposing Release"),³ at an open meeting on June 20, 2007 (the "Meeting"). The amendments would expand the use of the Internet as a method to view proxy materials and thus to ultimately lower the cost of proxy solicitation and improve communication with shareholders. The adopted amendments will be implemented for large accelerated filers⁴ in January 2008 and for all other filers in January 2009.

¹ Rel. Nos. 34-56135; IC-27911 (July 26, 2007).

² The term "proxy materials" includes proxy statements on Schedule 14A, proxy cards, information statements on Schedule 14C, annual reports to security holders required by the 1934 Act, notices of shareholder meetings, additional soliciting materials and any amendments to such materials. For purposes of this release, the term does not include materials filed under Rule 14a-12 (solicitations made before furnishing security holders with a proxy statement meeting the requirements of Rule 14a-3(a)).

³ Rel. IC-27600A (Jan. 22, 2007).

⁴ A large accelerated filer, as defined in 1934 Act Rule 12b-2, 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

Discussion

From Voluntary to Mandatory E-Proxy Availability

In December 2006, the SEC adopted amendments to the proxy rules that allow companies the *option* to post proxy materials on a public and accessible internet web site, in lieu of traditional mail delivery (the "2006 Amendments"). Prior to the 2006 Amendments, companies were required to deliver to shareholders copies of proxy materials through the mail, as had been the case. Under the 2006 Amendments, or the "voluntary model," companies that choose to post proxy materials online must deliver postcard notice to shareholders alerting them to the availability of the materials online as well as information regarding how to access such materials. The SEC refers to this alternative delivery

more, as measured on the last business day of the issuer's most recently completed second fiscal quarter; has been subject to the requirements of Section 13(a) or 15(d) of the 1934 Act for a period of at least twelve calendar months; has filed at least one annual report pursuant to Section 13(a) or 15(d) of the 1934 Act; and is not eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports. A mutual fund must file at least one annual report pursuant to Rule 15d-1 of the 1934 Act and therefore will qualify as a large accelerated filer if it meets the asset level and longevity thresholds above.

method as the “notice and access model.” Under this model, shareholders are still given the option to receive traditional paper materials, either for a particular meeting or for all future meetings. Beneficial owners can also make a one-time request for mail delivery for all future shareholder meetings for all securities held in a particular brokerage account. The voluntary model took effect on July 1, 2007.

The amendments adopted in the Adopting Release create a mandatory e-proxy model that will replace the voluntary model. The mandatory model will require issuers to post proxy materials on the Internet, while retaining shareholders’ choice to receive paper or e-mail copies of materials, including the one-time request option. Under the mandatory model, companies may proceed under two regimes:

- *Notice only option:* identical to the voluntary notice and access model, the company gives notice to shareholders of the availability of proxy materials and gives shareholders the choice to receive proxy materials by mail or to access them electronically.
- *Full set delivery option:* this option is essentially identical to the current traditional mailing requirement, except that companies are now required to post materials online and to provide notice to shareholders that such materials are available online.

Companies need not choose a single regime for all shareholders; different shareholders can be notified of proxy materials via different delivery options. Under each regime, materials must be delivered to shareholders free of charge.

In addition to the differences set out above, the full set delivery option differs from the notice only option in the following material respects:

- Under the notice only option, issuers must send notice separately from the proxy card and materials, and the proxy card and materials must be sent together via the same medium. The full set delivery option allows for notice to accompany the proxy card and materials;
- Under the full set delivery option, an issuer need not prepare a separate notice if all of the

notice information is incorporated into the proxy card and statement;

- Because a full set of proxy materials has been delivered, an issuer using the full set delivery option need not provide shareholders with copies of such materials upon request; and
- Under the notice only option, issuers are required to send notice at least 40 days prior to the shareholder meeting date. In a response to comments on the Proposing Release, the Adopting Release clarifies that, because no extra time to request paper or e-mail copies of proxy materials is necessary under the full set delivery option, 40 days prior notice is not required under that option.

As clarified in the Adopting Release, the amendments do not require issuers to establish electronic voting platforms. Rather, an issuer can continue to meet the voting requirement through a variety of methods, including electronic voting, telephonic voting, or mail-in proxy cards.

To ensure shareholders’ confidentiality and anonymity, the amendments contain a number of provisions intended to protect shareholders’ privacy when accessing an issuer’s web site or providing an e-mail address. In particular, the amended proxy rules prohibit web sites’ use of “cookies,” which may be used for information tracking, and the use of a shareholder’s e-mail address provided solely to request proxy materials for any other purpose.

The amended proxy rules also deal with the application of the notice and access model to intermediaries and soliciting persons other than the issuer. Any issuer that complies with the notice only model, for example, must provide intermediaries with sufficient information to prepare notice and post proxy materials at least 40 days prior to the meeting. Notice issued by intermediaries is generally similar to an issuer’s notice but must be tailored specifically to beneficial owners, including providing the option to permanently elect to receive paper or e-mail proxy materials as noted above. Soliciting persons other than the issuer must also comply with the notice and access model, but are treated differently in certain respects. Most importantly, such persons may select which shareholders from whom to solicit proxies, and such persons following the notice only option must send

notice by the later of (i) 40 days prior to the meeting date or (ii) 10 days after the date the issuer first sends proxy materials.

The Anticipated Benefits and Costs of the Adopted Mandatory E-proxy Model

In the Adopting Release and at the Meeting, the anticipated benefits and costs of the amendments were discussed in detail.

The *benefits* mentioned include the following:

- *Maximizes shareholder choice while maintaining issuer flexibility:* While the electronic availability of proxy materials will be mandatory for all public companies, the companies can choose between two methods of proxy presentation. Shareholders retain the choice between delivery methods present under the voluntary model. The de facto effect of the shift from a voluntary to a mandatory model is a shift of the decision to use e-proxy materials from companies to investors. Shareholders of all public companies, rather than only those of companies participating in the voluntary program, will now be able to opt for electronic delivery. In general, the amendments further the goal of increasing reliance on technology to improve proxy distribution.
- *Cost-Efficient:* Mandatory e-proxy will save time and costs for issuers and, indirectly, their shareholders. An important benefit of the proxy rule amendments is a significant reduction of the volume of paper processing required.
- *Minimizes compliance burdens:* At the Meeting, the commissioners noted the modest scope of the amendments, which minimize the burden on companies by not requiring the implementation of a potentially costly voting platform. In addition, the cost of obtaining a web site and posting materials on it would be minimal. Furthermore, most large accelerated filers already post online.⁵

⁵ Approximately 3/4 of large accelerated filers currently post proxy materials on the Internet. According to SEC staff estimates, fewer than 5 large accelerated filers do not currently have, and thus will be required to create, a web site.

- *Tiered implementation:* The staged implementation of the proxy rule amendments will lessen any burden imposed by requiring smaller companies to follow the model. Further, the tiered compliance regime will allow the SEC to study the effects of the notice and access model on large accelerated filers during the 2008 proxy season and modify requirements as appropriate before imposing them on other filers.

The costs and concerns mentioned include the following:

- *Introduces new costs:* New costs for issuers will be generated from: (i) posting proxy materials on an Internet web site; (ii) preparing, producing and sending notice to shareholders; and (iii) processing shareholders' requests for copies of the proxy materials and maintaining their permanent delivery preferences.
- *Insufficient data from voluntary notice and access model:* The mandatory program will be implemented without the benefit of observing the efficacy of the voluntary program for a full proxy season. The aggressive implementation of the mandatory program was raised as a concern in comments on the Proposing Release. The concern is mitigated by the fact that most large issuers already post their proxy materials online, and by the gradual implementation period for the new rule, as discussed above.
- *Insufficient data regarding effects on voter participation:* At the Meeting, the commissioners noted the lack of data regarding the effect of the notice only option on voters' participation and suggested that the staff perform a close study of shareholder participation during the 2008 proxy season.
- *Under-utilizes existing technology:* At the Meeting, some commissioners expressed disappointment that the amendment does not require an online voting platform, since some of the efficiency benefits to be gained from the e-proxy amendments would be lost. In response to this concern, the staff suggested that research regarding the SEC's authority to mandate electronic voting, as well as a closer study of the costs and implications of such a requirement, would need

to be performed prior to such an expansion of the rule amendments.

- *May compromise voters' anonymity:* Despite safeguards implemented in the amendments, some concerns were raised at the Meeting regarding voter anonymity under the new technology. In response, the members of the staff suggested that maintaining online anonymity is a simple, and almost costless, process of web site design.

intermediaries, and other solicitors on the one hand, and shareholders on the other, while furthering the goal of improved proxy delivery.



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Conclusion

We believe that the amendments strike a reasonable balance between costs and other burdens on issuers,

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