



# Securities Briefing Vol. 6, No. 1

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## **TOPICS IN THIS SECURITIES BRIEFING:**

This Securities Briefing provides:

- An overview of the SEC's new e-proxy rules relating to internet availability of proxy materials for 2007 and 2008; and
- A reminder of change in SEC filing fees.

This Securities Briefing is intended only as a summary of the SEC rules discussed and you are encouraged to review the full text of the rules.

## **OVERVIEW OF THE SEC'S NEW E-PROXY RULES FOR 2007**

### **OVERVIEW**

The SEC's new e-proxy rules for the internet availability of proxy materials adopted in January 2007 are amendments to the existing proxy rules under the Securities Exchange Act of 1934. They create an optional "notice and access" approach for companies and other solicitors to use as an alternative to mailing out proxy materials to shareholders. However, the new rules prohibit the use of the notice and access method to solicit shareholder votes for a business combination transaction.

The optional notice and access model allows companies and other soliciting persons to post copies of the proxy materials on an internet web site, and then provide a written notice to shareholders that proxy materials are available on the web site. Companies that use the notice and access model must provide paper or email copies of the proxy materials upon request, at no charge to the requesting shareholder. A company may furnish some proxy materials by mail and other proxy materials in accordance with Rule 14a-16. For example, the proxy statement could be distributed in compliance with Rule 14a-16 while the annual report to shareholders could be mailed out.

The SEC has adopted these amendments to the proxy rules to take advantage of technological developments and the growth of the Internet and electronic communications. The SEC also believes that the notice and access proxy model "could reduce significantly the printing and mailing costs associated with furnishing proxy materials to shareholders." The SEC did acknowledge that the amendments may have the effect of reducing the costs of engaging in a proxy contest.



## **NEW RULE 14A-16 (INTERNET AVAILABILITY OF PROXY MATERIALS)**

Under the SEC's new Rule 14a-16, companies now have the option to satisfy the proxy solicitation requirements by sending shareholders a Notice of Internet Availability of Proxy Materials at least 40 calendar days prior to the shareholder meeting date and complying with the other requirements of Rule 14a-16 discussed below.

**Web site posting requirement.** All proxy materials identified in the Notice of Internet Availability of Proxy Materials must be posted on a publicly accessible and free web site on or before the time the Notice is furnished to shareholders. The SEC's web site can not be used for this purpose. The web site address must be listed in the Notice. These proxy materials must remain posted on the web site until the shareholder meeting is completed. The proxy materials posted on the web site must be presented in a format or formats convenient for reading online (html) and printing on paper (pdf). Any additional soliciting materials sent to shareholders or made public after the Notice is sent must be posted on the web site no later than the date the additional soliciting materials are first sent to shareholders or made public.

**Notice requirement.** The Notice of Internet Availability of Proxy Materials must be filed with the SEC no later than the date that it is first sent to shareholders. The Notice must comply with the SEC's plain English rules and contain the following information:

- A "prominent" legend in bold-face type that reads as follows:
- 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 shareholders] [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 date] to facilitate timely delivery.
- The date, time and location of the shareholder meeting.
- A "clear and impartial" identification of each matter to be voted on at the shareholder meeting, and the soliciting person's recommendation on each of those matters without any supporting statements.
- A list of all soliciting materials that are posted on the web site.
- A toll-free telephone number, an e-mail address and an Internet web site that the shareholders may use to request a copy of the proxy materials relating to the noticed meeting and relating to all future shareholder meetings.



- All control/identification numbers, if applicable, that the shareholder needs to access his or her form of proxy.
- Instructions on how to access the form of proxy. These instructions must not enable a shareholder to execute a proxy without access to the proxy statement and, if applicable, the annual report to shareholders.
- Information on how to obtain directions to attend the shareholder meeting and vote in person.

The Notice may contain (i) only the information listed above, (ii) any additional information required by state law for a notice of shareholder meeting and (iii) a statement that no personal information other than the identification or control number is necessary to execute a proxy. Pictures, logos and similar designs are permitted if the design is "not misleading and the required information is clear."

The Notice must be sent separately from any other soliciting materials. The only items that may accompany the Notice are a pre-addressed, postage-paid reply card for requesting a copy of the proxy materials and a notice of shareholder meeting required by state law.

**Proxy requirement.** A form of proxy may not be sent to shareholders with the initial Notice. A proxy card can be sent out 10 calendar days or more after the Notice was first sent to shareholders if it is accompanied by another copy of the Notice. If a company wishes to send out a proxy card prior to expiration of the 10 day waiting period, the proxy card must be accompanied or preceded by the proxy statement and if applicable, the annual report to shareholders, through the same delivery medium.

Shareholders must have a means to execute a proxy card as of the time the Notice is first sent to shareholders. Simply providing a means to request a hard copy of the proxy is not sufficient for this purpose. In addition, Rule 14a-16 requires that access to the proxy card on the web site must be structured in a manner that prevents a shareholder from executing a proxy card without access to the proxy statement, and if applicable, the annual report to shareholders. This could be accomplished by providing hyperlinks to the proxy statement and annual report to shareholders with the proxy card.

**Intermediary requirements.** Intermediaries such as banks, broker-dealers, nominee holders and others must follow the proxy delivery model selected by the issuer. If the issuer selects the notice and access delivery model then the intermediary must prepare and send its own Notice of Internet Availability of Proxy Materials within the time-frame required by Rule 14a-16. All information required to be included in the Notice must be provided to each intermediary (broker-dealers, bank or other intermediary) in sufficient time to allow the intermediary to prepare, print and send its own Notice at least 40 calendar days before the shareholder meeting date. Note that an intermediary could seek the affirmative consent of account holders to electronic delivery of proxy materials and if obtained, it may deliver proxy materials electronically to consenting account holders even if the issuer has not elected to use the notice and access model.



***Obligation to provide copies.*** Any issuer using the notice and access model must provide:

- paper copies of the proxy materials by U.S. first class mail (or other reasonably prompt means) within three business days after receiving a request for paper copies from a shareholder or intermediary at no cost to the requester; and
- electronic copies of the proxy materials via e-mail within three business days after receiving a request for electronic copies via e-mail from a shareholder or intermediary at no cost to the requester.

The obligation to provide copies of proxy materials continues for one year following the shareholder meeting.

The issuer must maintain records of shareholders that request proxy materials in paper or by e-mail for future solicitations. The issuer must continue to provide proxy materials in the form requested by the shareholder until the shareholder revokes the request. The SEC noted in its adopting release that Rule 14a-16 does not prohibit an issuer from structuring incentives to encourage shareholders to accept electronic delivery or the notice and access model.

***Householding requirements.*** The issuer may "household" the Notice of Internet Availability of Proxy Materials pursuant to Rule 14a-3(e). An issuer need not re-solicit specific consent to householding the Notice if it has obtained the shareholders' consent to householding of proxy materials in the past. The issuer must allow each householded account to execute separate proxy cards. If the issuer uses identification or control numbers for proxy voting, it must provide a separate number to each account at the shared address. In the alternative, the issuer may send separate Notices for each householded account in a single envelope.

***Shareholder privacy requirements.*** The web site used for posting proxy materials must be maintained in a manner that "does not infringe on the anonymity of a person accessing such Web site." The SEC's adopting release clarified that this means the web site may not track the identity of the person accessing the web site to view proxy materials or require the installation of any "cookies" or other software that might collect information about the accessing person. The e-mail address obtained from a shareholder requesting paper or e-mail copies of proxy materials may only be used by the issuer for the purpose of providing proxy materials to that shareholder. The e-mail address may not be disclosed to any other person other than an employee or agent of the issuer and then, only for the purpose of providing proxy materials.

#### **EFFECTIVE DATE**

The new e-proxy rules for 2007 are effective March 20, 2007, but a Notice of Internet Availability of Proxy Materials may not be sent out prior to July 1, 2007. Because the Notice must be mailed out at least 40 days prior to the date of the shareholder meeting, the notice and access model can be used only for shareholder meetings occurring on or after August 10, 2007.



## **COPY OF FINAL SEC RULES REGARDING E-PROXY PROCEDURES FOR 2007**

A copy of the final SEC rules regarding e-proxy procedures for 2007 is available on the SEC's website at [www.sec.gov](http://www.sec.gov) by selecting Final Rule: Internet Availability of Proxy Materials or by going to <http://www.sec.gov/rules/final/2007/34-55146.pdf>.

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## **OVERVIEW OF THE SEC'S NEW E-PROXY RULES FOR 2008**

### **OVERVIEW**

In June 2007, the SEC adopted final rules that require public companies to post proxy materials on the internet on a phased-in schedule. Beginning January 1, 2008, large accelerated filers must post proxy materials on their websites and use one of two options for the delivery of proxy materials. Non-large accelerated filers and third-party solicitors will be required to comply with the new rules beginning on January 1, 2009. The new rules do not apply to shareholder meetings called to consider business combinations. Soliciting parties may select one method for soliciting certain shareholders and the other method for soliciting different shareholders.

### **NOTICE ONLY DELIVERY OPTION**

The notice only delivery option is the same as the voluntary 2007 notice and access model. Companies choosing this delivery method must:

- Send a Notice of Internet Availability of Proxy Materials to shareholders at least 40 days before the shareholder meeting date;
- Post the proxy materials on an internet web site at least 40 days before the shareholder meeting; and
- Fill shareholder requests for paper copies of the proxy materials, free of charge.

### **MAIL FULL SET DELIVERY OPTION**

The other option is the traditional method of delivering proxy materials through the mail. In addition to mailing a full set of the proxy materials to shareholders, the company must also:

- Send a Notice of Internet Availability of Proxy Materials to shareholders at least 40 days before the shareholder meeting date (this notice can be included with the proxy materials or accompany the proxy materials as a separate notice); and
- Post the proxy materials on an internet web site at least 40 days before the shareholder meeting.

## **COPY OF FINAL SEC RULES REGARDING E-PROXY PROCEDURES**

A copy of the final SEC rules regarding e-proxy procedures for 2008 and 2009 will be available on the SEC's website at [www.sec.gov](http://www.sec.gov) in the near future.

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## **CHANGE IN SEC FILING FEES**

The SEC filing fee rates under Section 6(b) of the Securities Act of 1933 for registration statements and Sections 13(e) and 14(g) of the Securities Exchange Act of 1934 for tender offers and mergers are changed to \$30.70 per million retroactively effective to February 2007.

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