

## securities group

## SEC Adopts E-Proxy Rules

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The SEC has approved amendments to its proxy rules that allow issuers or other soliciting persons to furnish proxy materials to shareholders via the Internet through a voluntary “notice and access” model. This new voluntary “notice and access” model is not available for proxy materials related to business combinations.

The SEC also recently adopted a “mandatory” or “universal” version of the notice and access model, whereby issuers and other soliciting persons would be required to offer an e-proxy option for all proxy solicitations (other than those related to business combinations). This requirement will supersede the voluntary rules and will become effective for large accelerated filers beginning January 1, 2008, and for all other filers beginning January 1, 2009.

Each of these items is discussed further below.

### New Voluntary E-Proxy Rules

#### SOLICITATIONS BY THE ISSUER

An issuer may, but is not required to, furnish proxy materials to shareholders through the “notice and access” model.

In order to satisfy the notice and access model, an issuer will be required to (i) post proxy materials on a publicly accessible website (other than the SEC’s website) and (ii) mail a physical Notice of Internet Availability of Proxy Materials (the “Notice”), which may be in the form of a postcard to shareholders, at least 40 calendar days in advance of the shareholders’ meeting date or proposed corporate action. The Notice should indicate that proxy materials are available electronically and explain how to access those materials.

#### CONTENTS OF NOTICE

The Notice must comply with the “plain English” rules adopted by the SEC, and must include:

- a prominent legend in bold-faced type (i) stating that proxy materials are available on the Internet, (ii) providing the address of the website where the proxy materials are available, and (iii) informing shareholders that they can request copies of the materials



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- the date, time, and location of the shareholders' meeting (or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected);
- an identification of each matter intended to be acted upon and the issuer's recommendation regarding those matters (but no supporting statements);
- a list of proxy materials available on the website;
- a toll-free number, email address, and website address where shareholders can request paper or email copies of the proxy materials;
- any control or identification numbers required to access a proxy card and instructions to obtain such access; and
- information about how to attend the meeting in person.

**OTHER PROXY MATERIALS**

A proxy card may not accompany the Notice. The Notice may include only the information specified in the new proxy rules and any information required by state law. To the extent that state law requires a notice of shareholder meeting and proxy materials to be delivered by a particular means, the new e-proxy rules do not alter those requirements.

If an issuer chooses to provide additional soliciting materials to its shareholders, they must be filed with the SEC and posted on the same website on which the proxy materials are posted no later than the day on which the additional materials are first sent to shareholders or made public.

**PROXY CARD**

An issuer must make a proxy card available on the website with the proxy statement and any annual report no later than the date on which it sends the Notice to shareholders. Shareholders must be able to vote their proxies at the time they electronically access the proxy materials. Issuers may implement a variety of methods for shareholders to vote their proxies, including voting via the Internet, by physical proxy card, or by telephone. While the issuer may not include a proxy card with the initial Notice, it may send a paper proxy card accompanied by another copy of the Notice (or a paper copy of the proxy statement) 10 days or more after sending the initial Notice.

**WEBSITE REQUIREMENTS**

All proxy materials to be furnished through the notice and access model, other than additional soliciting materials, must be posted to a specified website by the time the issuer sends the initial Notice to shareholders. This means that issuers who elect to utilize the notice and access model may have to change the scheduling of their annual meeting or adapt their timetable for preparing the proxy materials to ensure that all proxy materials will be made available to shareholders at least 40 days before the annual meeting. Proxy materials must remain posted on the website through the conclusion of the shareholders' meeting. The website address provided in the Notice must be specific enough to lead shareholders directly to the proxy materials. The website must present the proxy materials in a format that is convenient for both printing and viewing online and, to the extent a shareholder may need additional software to view the proxy materials, the website must contain a link to enable the shareholder to obtain the software free

Additionally, the proxy materials must be presented in a readily searchable format. Furthermore, an issuer must maintain the website in such a way that it does not infringe on the anonymity of a shareholder accessing that website. For example, the issuer may not track the identity of persons accessing its website to view the proxy statement, and the website may not require the installation of any “cookies” or other software that collects information about the accessing person.

#### PRIVACY CONCERNS

The issuer and its agents may not use an email address obtained from a shareholder requesting proxy materials for any purpose other than to send a copy of the proxy materials to that shareholder. In addition, an issuer may not transfer a shareholder’s email address to any other person without the shareholder’s express consent, except in connection with the distribution of proxy materials.

#### SHAREHOLDER OPTION TO RECEIVE COPIES OF THE PROXY MATERIALS

An issuer must send a copy (by email or paper copy, as requested) of its proxy materials, free of charge, within three business days after receiving a request from a shareholder, even if the request is made after the date of the shareholders’ meeting or corporate action to which the proxy materials relate. However, the issuer is obligated only to provide copies of the proxy materials up to one year after the conclusion of the shareholders’ meeting or corporate action to which the proxy materials relate.

#### SOLICITING PERSONS OTHER THAN THE ISSUER

Soliciting persons other than an issuer may also use the notice and access model to deliver their proxy materials. While the procedures for soliciting persons are substantially similar to those for issuers, there are some important differences between the procedures for soliciting persons and issuers, as noted below:

- Because a soliciting person may choose not to initiate an opposing solicitation until after an issuer has filed its proxy statement, a soliciting person may send out its Notice by the later of (i) 40 calendar days prior to the shareholders’ meeting or proposed corporate action or (ii) 10 calendar days after the issuer first sends its proxy statement or Notice to shareholders.
- The soliciting person’s Notice need only include those meeting agenda items known at the time the Notice is sent to shareholders.
- The soliciting person’s Notice must indicate clearly whether the execution of a proxy on a particular shareholder’s behalf will invalidate that shareholder’s earlier vote or proxy.

When providing shareholder lists to a requesting shareholder, an issuer must indicate which shareholders have permanently requested paper copies of proxy materials. If the issuer chooses to send the soliciting person’s proxy materials, the company must use the notice and access model if so requested by the soliciting person.

## ROLE OF INTERMEDIARIES

The SEC's new amendments also allow an intermediary (such as a broker, bank, or similar intermediary) to utilize the notice and access model to furnish proxy materials to beneficial owners of the issuer's securities only if the issuer requests that the intermediary do so. If an issuer makes such a request, the intermediary must utilize the notice and access model.

An issuer relying on the notice and access model must provide the intermediary with all the information necessary for the intermediary to prepare its own Notice, which the intermediary must send to beneficial owners at least 40 calendar days before the meeting date. The new proxy rules specify the procedures that must be followed by intermediaries in connection with the notice and access model.

The SEC's adopting release with respect to the e-proxy rules adopted by the SEC is available online at <http://www.sec.gov/rules/final/2007/34-55146.pdf>.

## Mandatory or Universal Notice and Access Model

On June 20, 2007, the SEC adopted a rule that would require issuers, other soliciting persons, and intermediaries to use the notice and access model for all proxy solicitations not related to a business combination transaction. Shareholders would continue to be able to opt out of this mandatory or universal notice and access model by requesting paper or email copies of the proxy materials from the issuer or their intermediary. Similarly, although issuers and soliciting persons must use the notice and access model, they could also continue to send paper copies of proxy materials to shareholders, if they so choose. The mandatory notice and access model will become effective for large accelerated filers, not including registered investment companies, on January 1, 2008, and for all other issuers on January 1, 2009.

As of the date of this publication, the SEC's adopting release with respect to the mandatory or universal "notice and access" model has not yet been made available by the SEC. However, the proposed mandatory e-proxy rules are available at <http://www.sec.gov/rules/proposed/2007/34-55147.pdf>.



If you have any questions about the matters discussed in this memorandum, please contact one of the attorneys listed below.

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