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CORPORATE ADVISOR

SEC Adopts Amendments to Proxy Rules to Enable Shareholders to Choose How They Access Proxy Materials

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Overview

On July 26, 2007, the SEC adopted amendments to the proxy rules under the Securities Exchange Act of 1934, as amended, to provide shareholders with the ability to choose the means by which they access proxy materials. The amendments require issuers and other soliciting persons to post their proxy materials on a publicly accessible website and provide a notice of the Internet availability of the proxy materials. Shareholders will have a choice of accessing the proxy materials online or having paper or email copies delivered to them. These amendments go one step further than the SEC's December 2006 amendments to the proxy rules which provided issuers with the *option* of posting proxy materials online. It is anticipated that the latest amendments will significantly reduce the cost of proxy solicitations and enhance the ability of shareholders to make informed voting decisions.

Large accelerated filers, with the exception of registered investment companies, must comply with the amendments regarding proxy solicitations on or after January 1, 2008. Registered investment companies, persons other than issuers, and issuers that are not large accelerated filers conducting proxy solicitations must comply on or after January 1, 2009.

Notice and Access Model

The SEC has labeled this alternative form of delivery, *the "notice and access model."* Under the model, issuers are required to post proxy materials on a specified, publicly-accessible website (other than the SEC's Edgar database) and provide shareholders with a notice informing them that the materials are available online with instructions for how to access them. Intermediaries are also required to follow this model to furnish the issuer's proxy materials to beneficial owners.

The notice and access model allows an issuer to select one of two options for providing proxy materials to shareholders. Under the "notice only option" an issuer must post its proxy materials on a website and send a notice to shareholders informing them of the electronic availability of the proxy materials at least 40 days prior to the shareholder meeting. If an issuer selects this option, it must respond to shareholder requests for paper or email copies, including a shareholder's permanent request for paper or email copies of proxy materials for all future shareholder meetings.

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Alternatively, an issuer may choose the “full set delivery option” whereby it delivers proxy materials by mail and is required to post the materials online and provide a notice to shareholders of the Internet availability of such materials. An issuer does not need to prepare and deliver a separate notice if it incorporates all of the information required to appear in the notice into its proxy statement and proxy card. It likewise does not have to respond to requests for paper or email copies as required under the notice only option.

An issuer is not required to choose one option or the other as the exclusive means for providing proxy materials to shareholders; rather it may select the notice only option for some shareholders and the full set delivery option for others.

Notice Only Option

The amendments provide specific guidance about the content and format of the notice of Internet availability sent to shareholders under the notice only option. First, the notice may not be accompanied by any other materials except the notice of a shareholder meeting as required by state corporation law. However, it may contain a warning to shareholders advising them that no personal information beyond their identification or control number is necessary to execute a proxy. Registered investment companies may also include a prospectus and/or report to shareholders with the notice. An issuer must file its notice with the Commission pursuant to Rule 14a-6(b) no later than the date it first sends it to shareholders.

In addition, the notice must meet substantially the plain English principles as apply to key sections of Securities Act prospectuses pursuant to Securities Act Rule 421(d) and must include the following information in clear and understandable terms:

- a. 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].

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 security holders] [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.”

- b. 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;
- c. 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;
- d. A list of the materials being made available at the specified Web site;

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- e. A toll-free telephone number, an e-mail address and an Internet Web site address where the shareholder can request a copy of the proxy materials, annual report to security holders and form of proxy for all meetings and for the particular meeting to which the Notice relates;
- f. Any control/identification numbers that the shareholder needs to access his or her proxy card;
- g. 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
- h. Information on how to obtain directions to be able to attend the meeting and vote in person.

The issuer must make all proxy materials identified in the notice publicly accessible on the specified website on or before the date it is sent to shareholders. In addition, it must post any subsequent additional soliciting materials on the website no later than the date on which such materials are sent to shareholders or made public. The materials should be presented on the website in a format that can easily be printed or viewed online.

Request for Paper or Email Copies

An issuer selecting the notice only option must provide paper or e-mail copies at no charge to shareholders. It also must allow shareholders to make a permanent election to receive paper or e-mail copies of proxy materials distributed in connection with future proxy solicitations, and maintain records of those elections. Further, the issuer must provide a toll-free telephone number, e-mail address, and web address as a means by which a shareholder can request a copy of the proxy materials for the particular shareholder meeting referenced in the notice or make a permanent election to receive copies of the proxy materials for all future meetings. The issuer also may include a pre-addressed, postage-paid reply card with the notice that shareholders can use to request a copy of the proxy materials.

Voting

An issuer may not send a paper or e-mail proxy card to a shareholder until ten calendar days or more after the date it sends the notice to the shareholder, unless the proxy card is accompanied or preceded by a copy of the proxy statement and the annual report, if required, to security holders sent via the same method.

An issuer must provide shareholders with a method to execute proxies as of the time the notice is first sent to shareholders. Issuers are not required to establish an Internet voting platform. In fact, an issuer can satisfy this requirement through a variety of methods, including electronic voting platforms, a toll-free telephone number for voting, or a printable or downloadable proxy card on the website. However, if a telephone number for executing a proxy is provided, such a telephone number may appear on the website, but not on the notice because it would enable a shareholder to execute a proxy without having access to the proxy statement.

Notice and Access Model for Intermediaries

An issuer must provide each intermediary with the information necessary for it to prepare and distribute the notice to beneficial owners within the notice and access model timescales. For an issuer

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selecting the notice only option, information must be delivered to the intermediary in sufficient time for it to prepare and distribute the notice and post proxy materials on its website at least 40 days prior to the shareholder meeting.

An issuer following the full set delivery option only needs to provide the relevant information to the intermediary in sufficient time for the intermediary to prepare and distribute the notice and full set of proxy materials provided by the issuer to beneficial owners within five business days of receipt from the issuer or issuer's agent.

The intermediary's notice should contain the same information as an issuer's notice, but must be tailored specifically for beneficial owners. With respect to beneficial owners who receive a notice under the notice only option, the intermediary also must forward paper or e-mail copies of the proxy materials upon request, permit the beneficial owners to make a permanent election to receive paper or e-mail copies of the proxy materials, keep records of beneficial owner preferences, provide proxy materials in accordance with those preferences, and provide a means to access a request for voting instructions for its beneficial owner customers no later than the date the notice is first sent.

When the issuer is delivering full sets of proxy materials to beneficial owners, the intermediary must either prepare a separate notice and forward it with the full set of proxy materials, or incorporate any information required in the notice, but not appearing in the issuer's proxy statement, in its request for voting instructions.

Notice and Access Model for Soliciting Persons Other Than the Issuer

Under the amendments, a soliciting person other than the issuer must comply with the notice and access model and similarly may select the notice only option, the full set delivery option, or a combination of the two, but the amendments treat such soliciting persons differently from issuers in certain important respects.

First, a soliciting person other than the issuer is not required to solicit every shareholder or to furnish an information statement to shareholders not being solicited. It may select the specific shareholders from whom it wishes to solicit proxies. Second, if a soliciting person other than the issuer elects to follow the notice only option, it must send a notice to shareholders by the later of:

- 40 calendar days prior to the shareholder meeting date or, if no meeting is to be held, 40 calendar days prior to the date that votes, consents, or authorizations may be used to effect the corporate action; or
- 10 calendar days after the date that the issuer first sends its proxy materials to shareholders.

This timing requirement does not apply to a solicitation pursuant to the full set delivery model.

If the full agenda to be covered in the shareholder meeting is unknown to the soliciting person at the time the notice is distributed, it must provide a clear and impartial identification of each separate matter to be acted upon at the meeting to the extent known by the soliciting person. The notice also must include a clear statement that there may be additional agenda items that the soliciting person is unaware of, and that the shareholder cannot direct a vote for those items on the soliciting person's proxy card provided at that time. If a soliciting person other than the issuer sends a proxy card that does not reference all matters that

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shareholders will act upon at the meeting, the notice must clearly state whether execution of the proxy card would invalidate a shareholder's prior vote using the issuer's card on matters not presented on the soliciting person's proxy card.

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For further information about Babirak, Vangellow & Carr, P.C., and its lawyers, you may visit our web site at www.bvcpc.com. If you have any question regarding any topic covered in this Corporate Advisor or regarding any corporate finance or related matter, please feel free to contact one of the following:

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