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CORPORATE ADVISOR

SEC Adopts Amendments to Proxy Rules Permitting Proxy Materials to be Furnished Via the Internet

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Overview

In December 2006, the SEC adopted certain amendments to the proxy rules under the Securities Exchange Act of 1934 to provide an alternative method for issuers and other soliciting persons to furnish proxy materials to shareholders through a "notice and access model" using the Internet.

The new rules will become available to issuers and other persons July 1, 2007 and will therefore not affect the 2007 proxy season for those companies with fiscal years ending on December 31, 2006.

The new rules provide that:

- Issuers and other soliciting persons may satisfy their obligation to furnish proxy materials to shareholders by posting materials on a designated web site
- Issuers and other soliciting persons must send a Notice ("Notice") to shareholders at least 40 days in advance of a meeting
- The Notice must explain how shareholders can obtain a copy of proxy materials and how to elect a preference for paper or email proxy materials in future
- The Notice may not be accompanied by a proxy card, however, ten days or more after sending the Notice the issuer may send a paper proxy card with another copy of the Notice
- The notice and access model is not available for business combination transactions
- Upon request by an issuer, brokers or dealers are required to prepare their own Notice for distribution to beneficial owners and provide a means for beneficial owners to elect a preference for paper or email copies of proxy materials in future
- A soliciting person other than the issuer is entitled to selectively choose shareholders for their proxy and is not required to send an information statement to all other shareholders

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- If a soliciting person other than the issuer elects to send a Notice to a shareholder he is then obligated to furnish a paper copy of proxy materials upon request to any shareholder who has received such Notice

Notice of Internet Availability of Proxy Materials

An issuer that chooses to follow the notice and access model is required to send a Notice to shareholders at least 40 days prior to the meeting date indicating that the proxy materials are available online and explaining how to access them. This Notice may not be accompanied by any other materials except the notice of a shareholder meeting as required by state corporation law.

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;
- 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;

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- 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.

An issuer is required to send a paper copy of the proxy materials to a shareholder within three business days of receiving such a request. Shareholders must also be given the option to make a permanent election to receive proxy materials in paper or via email in future.

A Notice may not be accompanied by a proxy card. However, an issuer may send a paper proxy card ten calendar days or more after sending the Notice. If a copy of the proxy statement and annual report do not accompany or precede the proxy card, a copy of the Notice must accompany the proxy card so that shareholders can access the designated web site without referring to the earlier Notice.

The Internet address selected must be publicly accessible and be specific enough to lead shareholders directly to the proxy materials. The materials must remain on the web site and be accessible to shareholders through the conclusion of the related shareholder meeting at no charge to the shareholder. The materials must be posted in a format that is convenient for both printing and viewing online and should provide a searchable format, such as HTML. If a shareholder needs additional software to view the document, the web site must contain a link to enable the shareholder to obtain the software free of charge.

Householding

The rule permits an issuer to "household" the Notice pursuant to Rule 14a-3(e). Accordingly, an issuer can send a single copy of the Notice to one or more shareholders residing at the same address if the issuer satisfies all of the Rule 14a-3(e) conditions. An issuer is not required to re-solicit specific consent regarding the householding of the Notice from shareholders if it has obtained their consent to householding of proxy materials in the past. However, an issuer must allow each householded account to execute separate proxies. Therefore, the issuer must provide separate identification or control numbers (if it uses such numbers) to each account at the shared address or alternatively may send separate Notices for each householded account in a single envelope. State corporate law may impose additional obligations or restrictions on "householding" such as Section 223 of the Delaware General Corporation Law which allows for a single set of proxy materials to be sent to a household if consent is obtained.

Proxy Card

An issuer is required to post the proxy card on the specified web site with the proxy statement and annual report no later than the time at which the Notice is sent to shareholders so that the documents are electronically available at the time shareholders receive the Notice. In addition, the designated web site must concurrently provide shareholders with at least one method of executing a proxy vote. Although an issuer may provide a means to execute a proxy through a variety of methods, a shareholder must be able to execute a proxy at the time it accesses the proxy materials so merely providing a means to request a paper proxy card will not be sufficient.

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Period of Reliance

The decision by an issuer to follow the notice and access model is effective only with respect to a particular meeting. An issuer's choice to rely on this model for one meeting therefore does not affect its determination whether to rely on the model for subsequent meetings. Similarly, a shareholder that does not request a paper or e-mail copy of the proxy materials for one meeting is not bound by that decision with respect to any other shareholder meeting. Each time an issuer relies on this model, it must comply anew with all of the requirements under the model including delivery of the Notice and the 40 day notice period. A shareholder is permitted, however, to make a single election to receive a paper or e-mail copy of the proxy materials on a continual basis.

State Law Notices

The rules are not intended to affect any applicable state law requirement concerning the delivery of any document related to a shareholder meeting or proxy solicitation. To the extent state law requires a notice of shareholder meeting and proxy materials to be delivered by a particular means, the rules do not alter those requirements.

Additional Soliciting Materials

New Rule 14a-16 and revised Rules 14c-2 and 14c-3 require an issuer to post any additional soliciting materials required to be filed under Rule 14a-6(b) on the same web site where proxy materials are posted no later than the day on which the additional soliciting materials are first sent to shareholders or made public.

Requests for Copies of Proxy Materials

Rule 14a-16(j) mandates that issuers and other soliciting persons deliver a copy of the proxy statement, annual report to security holders (if applicable) and proxy card to a requesting shareholder within three days of receiving the request, even if the request is made after the date of the shareholder meeting or corporate action to which the proxy materials relate. However, the issuer is only obligated to provide copies of the proxy materials for one year after the conclusion of the meeting or corporate action to which the materials relate.

The Role of Intermediaries

The proxy rules include four specific rules, Exchange Act Rule 14a-13, Rule 14b-1, Rule 14b-2 and Rule 14c-7 referred to collectively as the "shareholder communications rules" that impose obligations on issuers, broker-dealers and other intermediaries to ensure that beneficial owners receive proxy materials and participate in the shareholder voting process. These rules require issuers to send their proxy materials to intermediaries for forwarding to beneficial owners.

The rules revise these shareholder communications rules to require intermediaries to furnish proxy materials, including a Notice, to beneficial owners using the notice and access model upon request by the issuer. If an issuer does not elect to follow this model, an intermediary could, on its own initiative, continue

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to rely on any other permitted method of furnishing proxy materials to beneficial owners, but could not follow the notice and access model on its own initiative.

An issuer or soliciting person relying on the notice and access model must provide the intermediary with all the information necessary to prepare the Notice in sufficient time for the intermediary to prepare and send its Notice to beneficial owners at least 40 days prior to the meeting date. The intermediary's Notice will generally contain the same information as an issuer's Notice with certain revisions to reflect the differences between registered holders and beneficial owners. The Intermediary's Notice must meet the same plain English requirements and contain substantially the same bold-face legend and general information as the issuer's Notice as well as additional information applicable only to beneficial owners.

The intermediary may choose whether to direct beneficial owners to the issuer's web site or its own site to access the proxy disclosure materials. If it directs beneficial owners to its own site, access to the site must be free of charge and may not compromise a beneficial owner's anonymity. If it directs beneficial owners to the issuer's web site, the intermediary must inform the owners that they can submit voting instructions to the intermediary, but cannot execute a proxy directly in favor of the issuer unless the intermediary has executed a proxy in favor of the beneficial owner.

The intermediary's Notice must not include a means, such as a telephone number, which would enable the beneficial owner to provide voting instructions without having access to the proxy statement and annual report. A telephone number a beneficial owner can use to provide voting instructions may be provided on the web site on which the request for voting instructions is posted (as well as on a paper request for voting instructions sent to shareholders ten days or more after the intermediary's Notice was sent). Like an issuer, the intermediary cannot include a request for voting instructions with its Notice. However, at the issuer's request, the intermediary will be required to send a paper copy of the request for voting instructions to the beneficial owners, provided that ten days have passed since the intermediary's Notice was first sent. A copy of the intermediary's Notice, or a copy of the proxy statement, must accompany the request for voting instructions.

The intermediary's Notice must provide instructions on how a beneficial owner can request a paper copy of the proxy materials from the intermediary because under the new rules the beneficial owner can no longer request such materials directly from the issuer. If a beneficial owner requests a copy of the materials from the intermediary, the intermediary must then request such a copy from the issuer or other soliciting person within three business days of receiving the request. The intermediary then has to forward the materials to the beneficial owner within three business days after receipt from the issuer. The intermediary is permitted to charge the issuer for costs incurred forwarding proxy materials to beneficial owners. The Notice must also make clear that if a beneficial owner makes a permanent election to receive copies of the proxy materials in paper or via email this will apply to all securities in the beneficial owner's account.

In summary, the Amendments impose the following responsibilities on intermediaries that are requested by an issuer to follow the notice and access model:

- The intermediary must prepare its own Notice and deliver it to its beneficial owners upon receipt of the meeting information from the issuer
- The intermediary must send its Notice to beneficial owners at least 40 days prior to the meeting

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- The intermediary must post its request for voting instructions on a designated web site
- The intermediary must maintain records of beneficial owners who make a permanent election to receive paper or email copies of the proxy materials for all securities held in the beneficial owner's account
- The intermediary must request a copy of the proxy materials from the issuer within three business days after receiving a request from its beneficial owner customer and must forward that copy to that customer within three business days after receiving the copy from the issuer

Soliciting Persons Other Than the Issuer

Under the Amendments, a person other than the issuer who undertakes his own proxy solicitation also can rely on the notice and access model. This would typically occur in the context of a proxy contest between a shareholder and management. Under the new rules, a soliciting person other than the issuer who is relying on the notice and access model follows the same procedures as the issuer. Yet, unlike an issuer, a soliciting person is entitled to selectively solicit shareholder proxies without having to solicit the entire class of shareholders.

Furthermore, revisions to Rule 14a-7 will enable a soliciting person to distinguish between shareholders who have requested paper copies of the proxy materials from those who have not. Under the notice and access model, a soliciting person other than an issuer may choose to send a Notice only to those shareholders who have not requested paper copies of the proxy materials. However, once a Notice has been sent, a soliciting person is required to send a paper or e-mail copy of the proxy statement upon request by the shareholder.

Timeframe

A soliciting person other than an issuer who is following the notice and access model is required to send out his Notice by the later of: 40 calendar days prior to the meeting or ten calendar days after the issuer first sends out its proxy statement or Notice to shareholders.

Content

The content of the Notice sent by a soliciting person other than the issuer can be different from the content of the issuer's Notice. For example, a soliciting person may not have access to the full shareholder meeting agenda and is therefore only required to include known agenda items in its Notice. In addition, there may be circumstances in which a person soliciting proxies in opposition to the issuer may provide a partial proxy card soliciting authority only for the agenda items in which the soliciting person is interested or presenting only a partial slate of directors. Typically this type of proxy would revoke any previously-executed proxy and the shareholder would lose his ability to vote on matters or directors other than those presented on the soliciting person's card. A person soliciting information in opposition must indicate clearly on his Notice whether execution of that card will invalidate the shareholder's earlier vote.

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Shareholder Lists

Under the Amendments, if the issuer is providing its shareholder list to a soliciting person, the issuer is required to indicate which of those shareholders have permanently requested paper copies of the proxy materials. Similarly, if the issuer elects to send the soliciting person's proxy materials, the Amendments require the issuer to refrain from forwarding the other soliciting person's Notice to any shareholder who has made a permanent election to receive paper copies. If the soliciting person requests that the issuer follow the notice and access model, the soliciting person will be responsible for providing the issuer with copies of its Notice for all shareholders to whom it intends to provide a Notice. An issuer cannot decide on its own whether to send a soliciting person's materials in paper or electronically. If the soliciting person wishes to send a proxy card to shareholders ten or more days after it first sends the Notice, the issuer is required to forward the proxy cards in similar fashion.

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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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