

Internet Delivery of Proxy Materials: SEC Adopts New E-Proxy Rules

By Edwin J. Lukas

Introduction

Following its relatively recent publication of the voluntary e-proxy rules governing the distribution of proxy materials to shareholders,¹ the Securities and Exchange Commission (SEC) approved additional amendments to the proxy rules that require issuers and other soliciting persons to make proxy materials available on the Internet.² Upon the effectiveness of the new amendments, issuers and others who solicit shareholders may select one of two alternative methods for delivering proxy materials. The first method, or the so-called “notice only” option,³ enables issuers and others to furnish the proxy materials in electronic form, provided certain requirements discussed below are satisfied. The second method, known as the “full set delivery” option,⁴ generally allows issuers and others to follow the current practice of proxy distribution by furnishing a full set of the proxy materials in paper form, provided the materials are posted on the Internet. Issuers and others may, however, adopt different methods of delivery for different groups of shareholders.

The new rules will be phased in over a two-year period. Large accelerated filers must comply with the new requirements on January 1, 2008.⁵ All other issuers, registered investment companies, and other soliciting persons must comply with the new rules on January 1, 2009, although they may elect to comply with the rules beginning on January 1, 2008.⁶

Notice Only Method

The “notice only” method of delivery allows issuers and others to furnish proxy materials⁷ to shareholders by following specific content and procedural requirements, including:

- Sending to shareholders a Notice of the Internet Availability of Proxy Materials (a “Notice”) that discloses certain specified information;⁸
- Posting the proxy materials on an Internet site specified in the Notice;⁹ and
- Furnishing paper copies of the proxy materials to shareholders within three days of receiving a request for the same.¹⁰ Issuers and others may not utilize the notice only option in connection with business combination transactions.

Contents of the Notice

The e-proxy rules specify the contents of a Notice sent to shareholders in connection with a shareholders meeting.¹¹ A Notice must be written in plain English,¹² and when an issuer or soliciting person adopts the notice only method of delivery, it must include the following in clear and understandable terms:

- A legend in boldface type that states as follows:

Important Notice Regarding the Availability of Proxy Materials for the Meeting to be Held on [insert meeting date].

▪ **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.**

▪ **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [insert website address].**

▪ **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 meeting or, if corporate action is to be taken by written consent, the earliest date on which such action may be effected;

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- A clear and “impartial” identification of each matter intended to be acted on and the issuer’s recommendations regarding those matters, but with no supporting statements;
- A list of the materials being made available at the specified Web site;
- A toll-free telephone number, an e-mail address, and an Internet Web site address where shareholders can request a copy of the proxy materials “for all meetings” and for the particular meeting to which the Notice relates;
- Any identification numbers that are required in order for a shareholder to access the proxy card;
- Instructions on how to access the proxy card, provided that the instructions do not enable a shareholder to execute a proxy card without having access to the proxy statement and annual report; and
- Information for obtaining directions to the meeting and voting in person.¹³

The Notice may not contain any additional information, except for notice of the meeting as required by state law and a reply card enabling shareholders to request paper copies of the proxy materials.¹⁴ Issuers may also disclose to shareholders that no personal information other than the identification or control number is needed in order to execute a proxy. No other shareholder communications may accompany the Notice.

The contents of a soliciting shareholder’s Notice may differ somewhat from the contents of an issuer’s Notice. Shareholders must only include in their Notice those meeting agenda items known by them at the time their Notice is sent to the other shareholders. Further, a shareholder soliciting proxies in opposition to an issuer’s solicitation must indicate clearly in the Notice whether execution of the proxy card furnished by the soliciting person will invalidate a proxy or vote previously delivered or made by a shareholder.

Logistics of Sending the Notice

Issuers following the notice only method must send the Notice to shareholders not less than 40 calendar days before the date of the shareholder meeting or the date that shareholder action will occur if there is no meeting.¹⁵ The Notice may be sent by mail or e-mail provided, in the case of e-mail delivery, the issuer satisfies the existing requirements associated with electronic delivery of shareholder communications.¹⁶ Issuers that send

a Notice by mail are permitted to “household” the Notice by sending a single copy to numerous shareholders residing at the same address, subject to satisfaction of the existing requirements associated with householding written communications.¹⁷ Issuers are not permitted to household a Notice sent electronically and must send a separate e-mail to each shareholder. Since the Notice constitutes additional soliciting material under the proxy rules, issuers must file the Notice with the SEC not later than the date on which it is first sent to shareholders.

Issuers adopting this method of delivery have a few alternatives when deciding how and when to furnish proxy cards to shareholders. The first option is to rely on the form of proxy card posted on the Internet site and provide shareholders with a way to execute a proxy as soon as shareholders are able to access electronically the proxy materials. Issuers may provide any number of means of executing a proxy in this manner, including a link from the designated Internet site to an e-voting platform or a telephone number disclosed on the form of proxy card for telephone voting. The Notice itself, however, may not include any reference to a telephone number for telephone voting.¹⁸

The second option is to send shareholders a paper copy of the proxy card (the form of which must also be posted on the Internet site at the time the Notice is first sent to shareholders). If an issuer chooses to send a paper copy of the proxy card, it must wait ten calendar days after sending the Notice before sending the proxy card, which must also be accompanied by a copy of the Notice. The ten-day period is designed to give shareholders adequate time to review the proxy materials online or request paper copies of them before executing a proxy. An issuer may elect to send the proxy card before expiration of the ten-day period, provided the proxy card is accompanied by copies of the proxy statement and annual report. Issuers opting to send paper copies of the proxy card must still comply with the requirement that the Internet site designated in the Notice provide a means of executing a proxy at the time the Notice is first sent to shareholders.

Internet Posting of Proxy Materials

Issuers adopting the notice only method must post all of the proxy materials, including the annual report, proxy statement, and proxy card, on the designated Internet site by

the time the issuer sends the Notice to shareholders.¹⁹ Any additional soliciting materials used after the Notice is sent must be posted on the Internet site not later than the day on which those materials are first sent to shareholders. The proxy materials must remain on the Internet site and be accessible by shareholders and the public through the conclusion of the shareholders meeting or corporate action. Issuers may not rely on the SEC's EDGAR Web site as the location for posting the proxy materials.²⁰ Importantly, the Internet Web site may not infringe on the anonymity of shareholders and the public accessing the site. In this regard, the Internet site may not utilize cookies or other tracking software that may reveal the identity of such persons.

The Notice must clearly identify the Internet site where the proxy materials are posted, and shareholders must be lead directly to them. An issuer may not simply direct shareholders to the issuer's home page or another general section of a Web site, thereby requiring shareholders to browse or search for the proxy materials.

Provision of Paper Copies

Upon receipt of a request from a shareholder for a copy of the proxy materials, issuers and others following the notice only method must send a copy (by first-class mail or e-mail, as requested) of the materials to the shareholder within three business days after receiving the request.²¹ Issuers and others remain obligated to send proxy materials in response to a shareholder's request for a period of one year following conclusion of the shareholders meeting or other action.²² Shareholders may permanently elect to receive paper copies of all proxy materials in order to avoid having to make the request on a continuing basis.

Full Set Delivery Method

The "full set delivery" method is nearly the same as the current model of proxy distribution; that is, issuers and others mail physical copies of the proxy materials to shareholders. There are, however, a few additional requirements: First, the issuer or other soliciting person must either (a) include the Notice as a separate card or document with the paper copies of the proxy materials or (b) incorporate the substantive provisions of the Notice into the proxy statement; and second, the proxy materials must be posted on an Internet Web site not later than the date the materials are first mailed to shareholders.²³

Issuers and others relying on the full set delivery method may omit from the Notice certain information that is required to be provided in connection with the notice only method.²⁴ Furthermore, unlike the notice only method, the full set delivery method does not require that the Notice be sent at least 40 days in advance of the shareholders meeting.

Financial Intermediaries

Financial intermediaries, including brokers, banks, and other nominees play an important role in the proxy solicitation process by facilitating communications between an issuer and its beneficial owners. Intermediaries and issuers participating in the e-proxy process will be required to communicate and collaborate in new ways.

Intermediaries must generally follow the method of proxy delivery selected by the issuer. Under the notice only method, intermediaries must prepare and send their own Notice to beneficial owners not less than 40 days before the meeting date or corporate action. The Notice must generally contain the same information as the issuer's Notice,²⁵ and issuers must provide their own Notice and proxy materials to intermediaries in sufficient time for intermediaries to prepare their Notice. Intermediaries must wait ten calendar days after sending their Notice before delivering a voting instruction form to the issuer's beneficial owners.²⁶ In the event that a beneficial owner desires a paper copy of the issuer's proxy materials, the beneficial owner must request the materials from the intermediary. Upon its receipt of such a request from a beneficial owner, the intermediary must forward the request to the issuer within three business days. Intermediaries must then forward the materials to the requesting beneficial owner within three days after receiving the materials from the issuer.

Under the full set delivery method, intermediaries must forward the proxy materials to beneficial owners within five days of receipt from the issuer or its agent.²⁷ Also, intermediaries must either prepare a separate Notice and include it with the proxy materials or incorporate any information required in the Notice, but not provided by the issuer in its proxy statement, in its request for voting instructions.

Regardless of the delivery method selected by the issuer, an intermediary's Notice may direct beneficial owners to the issuer's

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Internet site or its own site in order to access the proxy materials. If beneficial owners are directed to the issuer's Internet site, the intermediary must disclose to beneficial owners that they are required to provide voting instructions to the intermediary and may not submit a proxy directly to the issuer.

Conclusion

The e-proxy rules were adopted so that corporations could offer shareholders the benefits and convenience of electronic delivery and reduce the printing and mailing costs associated with paper-based proxy solicitations. While proxy seasons will not be completely paperless, the cost savings for issuers opting for the notice only method are likely to increase over time as shareholders grow accustomed to this means of delivery. Experience with this method will also enable issuers to make increasingly accurate estimates of the number of shareholders who are likely to request paper copies, thereby avoiding the expenses associated with unnecessarily printing materials for future solicitations. Moreover, the e-proxy rules may lead to technological advances that provide a more direct interface between the electronic proxy materials and e-voting platforms, potentially resulting in greater shareholder participation in the voting process.

Dissatisfied shareholders and corporate activists engaging in proxy solicitations will also benefit from the efficiency and affordability of conducting Internet solicitations. A greater number of shareholders may, in fact, be inclined to engage in targeted solicitations opposing an issuer's proxy solicitations. While it remains to be seen whether the amendments result in pervasive shareholder campaigns, proxy contests, and more contentious proxy seasons, the e-proxy rules should nevertheless facilitate greater shareholder participation in corporate governance.

NOTES

1. 72 Fed Reg 4148 (Jan 22, 2007).
2. 72 Fed Reg 42222 (Aug 1, 2007).
3. 17 CFR 240.14a-16(a)-(h).
4. 17 CFR 240.14a-16(n).

5. A "large accelerated filer" is an issuer that (a) has a public float (market value of its common equity held by non-affiliates) of \$700 million or more; (b) has been subject to the reporting requirements of the Securities Exchange Act of 1934 (the "Exchange Act") for at least one year; (c) has filed at least one prior annual report;

and (d) is not eligible to use the "small business issuer" forms. *See* 17 CFR 240.12b-2.

6. 72 Fed Reg 42222.

7. For purposes of the e-proxy rules, "proxy materials" include the following: Notices of shareholders meetings; Schedule 14A proxy statements and consent solicitation statements; proxy cards; Schedule 14C information statements; annual reports to security holders; additional soliciting materials; and any amendments to the foregoing materials that are required to be furnished to shareholders. *See* 17 CFR 240.14a-3.

8. 17 CFR 240.14a-16(a)(1).

9. 17 CFR 240.14a-16(b).

10. 17 CFR 240.14a-16(j)(1).

11. Issuers providing an information statement pursuant to Regulation 14C or soliciting written consents may deviate from the contents specified in the e-proxy rules so that the Notice is appropriate for the subject solicitation.

12. 17 CFR 240.14a-16(g).

13. 17 CFR 240.14a-16(d).

14. The Michigan Business Corporation Act requires Michigan corporations to provide written notice of any shareholders meeting and further authorizes corporations to deliver such notice by electronic transmission with the consent of the shareholder. *See* MCL 450.1404(1), 450.1406a.

15. Soliciting shareholders must send the Notice by the later of 40 calendar days before the shareholders meeting or action, or 10 calendar days after the issuer files its proxy materials with the SEC. 17 CFR 240.14a-16(h)(2).

16. Pursuant to earlier guidance provided by the SEC on electronic delivery, shareholders must provide affirmative consent to electronic delivery or other evidence establishing the same. For the complete text of the interpretative release, see <http://www.sec.gov/rules/interp/34-42728.htm>.

17. 17 CFR 240.14a-3(e) requires, among other things, the issuer's receipt of consent for each shareholder to be included in the household group and an undertaking by the issuer to provide separate copies to each shareholder in the group upon request.

18. 72 Fed Reg 42224.

19. 17 CFR 240.14a-16(b).

20. 17 CFR 240.14a-16(b)(3).

21. 17 CFR 240.14a-16(j)(1).

22. 17 CFR 240.14a-16(j)(3).

23. *See* 17 CFR 240.14a-16(n).

24. 17 CFR 240.14a-16(n)(4).

25. 17 CFR 240.14b-1(e)(1). The intermediary's Notice will refer to a voting instruction form instead of a proxy card. The intermediary must include a toll-free telephone number, e-mail address or Internet site of the intermediary or its agent from which shareholders can request copies of the proxy materials. *Id.*

26. 17 CFR 240.14b-1(d)(4).

27. *See* CFR 240.14b-1(b)(2).



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