

Corporate Securities Alert—eProxy Rules Are Now Effective for Large Accelerated Filers

JANUARY 16, 2008

Fenwick
FENWICK & WEST LLP

EXECUTIVE SUMMARY

The Securities and Exchange Commission adopted an amendment to its proxy statement rules in July 2007 regarding electronic availability of proxy materials. The goal of the so-called “eProxy rules” is to provide shareholders with the ability to choose the means by which they access proxy materials. Specifically, the amendments:

- Require a company to post its materials on a publicly accessible website and provide shareholders with a notice informing them that the materials are available and explaining how to access those materials
- Provide alternative notice and access models for making the materials available: the “notice only option” and the “full set delivery option”
- Require that intermediaries (banks, brokers, etc.) similarly follow the notice and access model to furnish a company’s materials to beneficial owners
- Allow a company to choose to furnish some proxy materials under the “notice only option” and others under the “full set delivery option”
- Do not apply to a proxy solicitation in connection with business combinations
- Require other soliciting persons to comply with the notice and access rules, subject to the greater discretion available to third parties in selecting those shareholders from whom they will solicit proxies

Large accelerated filers must comply with the amendments for all proxy solicitations beginning on or after January 1, 2008. All other filers and other soliciting persons **may voluntarily comply** with the amendments for proxy solicitations commencing on or after January 1, 2008 and **must comply** with the amendments for all proxy solicitations beginning on or after January 1, 2009. The adopting release can be found on the SEC’s website at <http://www.sec.gov/rules/final/2007/34-56135.pdf>. The amendments are embodied in Rule 14a-16 of the Securities Exchange Act of 1934.

OVERVIEW OF THE NEW EPROXY RULES

Notice and Access Model – Two Methods for Delivery of Proxy Materials. Under the new rules, companies may choose between the two models in delivering proxy materials to their shareholders.

Notice Only Option - Under this model, the company:

- Mails a paper “Notice of Internet Availability of proxy materials” to all shareholders no later than 40 calendar days before the meeting, which must contain the following:
 - A legend encouraging stockholders to access and view proxy materials on the Internet
 - The date, time and place of the meeting
 - A clear and impartial identification of each matter to be acted upon and the company’s recommendations, if any, regarding those matters
 - A list of the proxy materials being made available and the website address for access
 - A toll-free number, email address and website address where a shareholder may request a paper copy of the proxy materials related to all of the company’s future meetings and for the particular meeting to which the proxy materials relate
 - Any control/identification numbers that the shareholder needs to access his/her/its proxy card
 - Instructions on how to access the form of proxy card, provided that such instructions do not enable the shareholder to execute a proxy without access to the proxy statement
 - Information on obtaining directions to attend the meeting and vote in person
 - May also include information required under any applicable state law’s notice provision

- Files the Notice with the SEC as “additional soliciting material” on the same day it first mails the Notice
- Posts its proxy materials (proxy statement, annual report and proxy card or a request for voting instructions) to the Internet on the same day it mails the Notice and maintains the proxy materials on the website through conclusion of the shareholder meeting
- Responds to request for proxy materials. Upon request from a record holder or intermediary, the company must provide a paper copy by U.S. first class mail or other reasonably prompt means of the proxy materials within three business days. The company must respond to requests for materials for one year following the meeting but need not send copies via first class mail and need not respond to such requests within three business days
- May, but is not required to, mail a proxy card (which must be accompanied by another copy of the Notice) ten calendar days or more after the initial mailing of the Notice
- Posts any subsequent additional soliciting materials on the website no later than the date they are first sent to shareholders

In addition, intermediaries must provide a Notice to shareholders, tailored specifically for the beneficial owners, that generally contains the same information as the company’s Notice. The intermediary must also respond to requests for written materials and permit beneficial owners to make a permanent election to receive paper or email copies of proxy materials.

Full Set Delivery Option - Under this model, the company follows substantially the same process as the traditional means for providing proxy materials to shareholders:

- Mails the “Notice of Internet Availability of proxy materials” with a full set of proxy materials. The company need not prepare a separate Notice provided it includes all of the information required in the Notice in the proxy statement or proxy card
- If sending a separate Notice, files the Notice with the SEC as “additional soliciting material” on the same day it mails the Notice

- Posts its proxy materials to the Internet on the same day it mails the Notice and maintains proxy materials on the website through conclusion of the shareholder meeting
- Posts any subsequent additional soliciting materials on the website no later than the date they are first sent to shareholders

Because shareholders do not need additional time to request materials, the company need not mail the Notice at least 40 calendar days before the meeting, as is the case with the Notice Only option. Also, since the company has already provided proxy materials to shareholders, it need not provide copies of materials to the shareholder upon request.

IMPLEMENTATION CONSIDERATIONS

There are several issues that a company should consider when implementing the new eProxy rules.

Select Notice Only or Full Set Delivery Option: Potentially significant cost savings are available under the Notice Only option. Since the company delivers paper copies of the proxy materials to shareholders only upon request by the shareholder, a company likely will print a substantially smaller number of sets of proxy materials. Given the recent adoption of the rules, it is not known if use of the Notice Only option will have any meaningful impact on shareholder voting and attendance. Some early adopters of the Notice Only model apparently have not noted any meaningful impact, but the effects may vary as institutional and retail investors make up different proportions of the shareholder base.

Allow Shareholder to Make a Permanent Election

Regarding the Receipt of Proxy Materials: As noted above, regardless of which of the two models the company uses for the delivery of proxy materials, it must provide in the Notice a telephone number, email address and website address where a shareholder may elect to receive proxy materials in either paper or email form for future meetings. The company must, of course, maintain a record of these requests and continue to provide proxy materials in the format requested until such time as the shareholder revokes the election.

Determine a Hosting Method – Retain a Vendor or Host Internally: Certain vendors, including Broadridge and some transfer agents, are offering services to host the website on which a company posts its proxy materials. The fees charged to host the websites are not insubstantial and will reduce some of the cost savings of the Notice Only option. The new rules require that the Internet site on which the materials are posted maintain shareholder anonymity (*e.g.*, may not utilize “cookies”) and companies may not use the email addresses provided by shareholders seeking a copy of the proxy materials for any purpose other than the delivery of the materials.

Update Existing Year-End Reporting Timelines: Since the required Notice must be delivered at least 40 days before the annual meeting under the Notice Only model, companies should revise their existing year-end reporting timelines to ensure adequate time to prepare and mail the Notice. In addition, since the proxy materials must be posted to the Internet at the time the company mails the Notice, additional time should be allowed to convert the meeting materials into an electronic format so that they may be timely posted. Finally, companies using the Notice Only model must be sure to provide information to intermediaries on a timely basis so that they can provide notice and access at least 40 days prior to the shareholder meeting.

Review Advance Notice Provision In Bylaws: Many public-company Bylaws contain provisions regarding the dates by which shareholders must deliver notice to the company of their intent to bring matters before an annual meeting. Companies should review their existing Bylaw provisions on this point to ensure the timelines stated in the Bylaws are not inconsistent with the process the company will follow under the new rules.

Assess Compliance with California State Law’s Annual Report Delivery Requirement: Section 1501 of the California Corporations Code requires that any company with more than 100 shareholders deliver an annual report to shareholders within 120 days following the end of the company’s fiscal year. Section 1501 states that it applies to foreign corporations that have their principal executive offices in, or customarily hold meetings of their boards of directors in, California. The California statute does not comport with the new rules with regard to electronic delivery. While Section 1501 allows for electronic delivery of the annual report, under Section 20 of the California Corporations Code delivery by such method

is permissible only if the shareholder has consented in advance to receiving electronic communications from the company. This being the case, in order to comply with Section 1501 a company electing to provide proxy materials by the Notice Only model would have to have received prior consent from its shareholders to the delivery of the annual report in this manner. The Full Set Delivery model does not present this obstacle, as the company will be delivering a full set of paper materials, including the annual report, to its shareholders.

Section 1501(c) states that a company that fails to timely deliver the annual report must provide one to any shareholder who so requests. Further, under Section 2200 of the California Corporations Code, there are monetary penalties for failure to provide the required annual report, which appear to be capped at \$250 per day. Section 1501(f) also provides for an award of attorneys’ fees if the court finds that the company’s failure to comply was “without justification”. We note that Section 1501 of the California Corporations Code does not specifically relate to the requirement to hold an annual meeting, so it appears that non-compliance would not impact the validity of the annual meeting. Companies will need to assess the implications of California’s Section 1501 in determining whether to proceed with the Notice Only model.

For additional information, please contact Dan Winnike, Chair, Corporate Group at dwinnike@fenwick.com, 650.335.7657.

©2008 Fenwick & West LLP. All Rights Reserved.

THIS ALERT IS INTENDED BY FENWICK & WEST LLP TO SUMMARIZE RECENT DEVELOPMENTS IN THE LAW. IT IS NOT INTENDED, AND SHOULD NOT BE REGARDED, AS LEGAL ADVICE. READERS WHO HAVE PARTICULAR QUESTIONS ABOUT THESE ISSUES SHOULD SEEK ADVICE OF COUNSEL. IRS CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT ANY U.S. FEDERAL TAX ADVICE IN THIS COMMUNICATION (INCLUDING ATTACHMENTS) IS NOT INTENDED OR WRITTEN BY FENWICK & WEST LLP TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (I) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE OR (II) PROMOTING, MARKETING, OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.