

ADVISORY

SULLIVAN & WORCESTER CORPORATE ADVISORY

Electronic "Delivery" of Proxy Statements Approved by SEC

Printing Costs to Decrease, But Will Shareholders Still Vote?

Soon to be gone are the days of shareholders receiving large envelopes with glossy annual reports and proxy statements printed on flimsy paper. The Securities and Exchange Commission recently adopted amendments to its proxy rules to provide a "Notice and Access" model, which will be permitted beginning July 1, 2007. Public companies, intermediaries and persons soliciting in opposition to a company will be able to satisfy proxy delivery obligations without the need to mail mountains of paper, by making proxy materials electronically available and sending only a hard copy notice about their internet location. The model is meant to be a cost efficient method for soliciting proxies and making proxy information available to shareholders, but it is unclear whether these savings will materialize. While this model initially will be optional, the SEC has proposed the Notice and Access model as the default delivery method, though paper delivery would still be allowed as a back-up.¹

NOTICE AND ACCESS MODEL

Absent state laws to the contrary, the Notice and Access model allows companies to satisfy their requirement to provide proxy statements, proxy cards and annual reports to shareholders via a publicly accessible internet website. Companies utilizing this model must send a plain English Notice of Internet Availability of Proxy Materials to all shareholders at least 40 days prior to the applicable shareholder meeting or corporate action for which the votes are to be used. The notice must direct the shareholder to the specific website, which cannot be the SEC's EDGAR website. The notice must also be filed with the SEC and must include:

- The time, location and date of meeting;
- Clear and impartial identification of the separate matters to be considered at meeting and the company's recommendations;
- A list of available materials on a publicly accessible and specified website;
- Instructions as to how to attend the meeting and vote in person;
- A website, toll-free phone number and e-mail address where shareholders may request free copies of the proxy materials (via e-mail or paper); and

¹The Notice and Access model will not yet be available with respect to proxy materials relating to business combinations.

IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

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- A prominent legend encouraging shareholders to access and review the proxy materials prior to the meeting date, and their right to request a copy of the materials.

The website listing must be specific enough to lead shareholders directly to the proxy materials without having to browse. The proxy materials must be searchable and printable and must remain accessible to shareholders through the time of the shareholder meeting. Companies must ensure that no personal information other than an identification or control number is necessary to access and execute a proxy. The website must provide shareholders with the ability to vote, but not infringe on the anonymity of shareholders who access it. Companies will need to review their website terms and conditions to make sure they don't inadvertently misuse shareholder information.

The notice must be sent separately from the proxy card, any additional soliciting materials and other shareholder communications, though it may cover any required state law notice of the meeting. A hard copy of the proxy card may only be sent ten days after the initial notice is sent to shareholders.

While the new rules allow companies to post their materials on an internet website, a shareholder retains the right to request or indicate a preference for an e-mail or paper copy of the proxy materials prior to voting. This request or preference for a paper or e-mail copy of the proxy materials will also automatically be applicable to subsequent meetings. The proxy materials must be sent to the shareholder within 3 business days of any request. In addition, while shareholders are advised to request proxy materials in sufficient time to receive and review them, companies must insert a date in the notice by which a shareholder should request a copy of the proxy materials to ensure timely delivery.

INTERMEDIARIES

The SEC rules provide that the Notice and Access model is available to the banks, brokers and other intermediaries that frequently hold shares on behalf of other beneficial owners, but only if the company utilizes this model. The company must provide the intermediary with all the information necessary to prepare its own similar notice to forward to beneficial owners. The intermediary

must send the notice at least 40 days before the meeting date and inform the beneficial owner to return the voting instructions to the intermediary and not the company. Similar to restrictions on company proxy cards, intermediaries may not include a hard copy request for voting instructions until at least 10 days after the notice is sent. The intermediary may direct beneficial owners to either its own site or the company's website to access proxy materials.

A beneficial owner may request a paper or electronic copy of the proxy materials directly from an intermediary. When such a request is made, the intermediary should request a copy of the proxy materials from the company within 3 business days of the beneficial owner's request. The intermediary must then forward the materials to the shareholder within 3 business days of receipt from the company. In addition, an election to receive paper or electronic copies of materials will be applicable to all securities in a beneficial owner's account, not just to specific companies.

SHAREHOLDERS MAKING THEIR OWN SOLICITATIONS

The Notice and Access model is available to persons soliciting proxy authority in opposition to a company, such as dissident shareholders. However, a non-company solicitor is not obligated to solicit all shareholders; therefore, it does not have to furnish a paper copy of the proxy statement to those from whom it is not seeking a proxy. In addition, a non-company solicitor can choose to solicit only those shareholders who have not requested paper copies of the proxy materials. Nonetheless, a non-company solicitor is obligated to send a paper copy of the proxy materials to any solicited shareholder upon request. A non-company solicitor can also choose to solicit proxy authority only for the agenda items in which it is interested. However, a non-company solicitor must indicate that a shareholder's exercise of his or her proxy authority could revoke any previous proxies granted, including those not on the non-company solicitor's agenda. Any notice must be sent before the later of (1) 40 days prior to the meeting or (2) 10 days after the company first files its proxy solicitation materials.

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POTENTIAL PROBLEMS RAISED BY THE NEW RULES

By permitting electronic delivery of proxies the SEC aims to improve the efficiency of the proxy solicitation process. However, companies will also need to prepare themselves for a possible increase in shareholder solicitations. In addition, because shareholders receiving a notice will need to affirmatively go to a website and type in a (sometimes lengthy) website address, they may be less likely to take the time to vote. This will all occur while the New York Stock Exchange is removing discretion from brokers to vote in director elections without instructions from beneficial owners. As a result, follow-up mailings may be needed by companies once they are permitted to mail paper proxy cards or companies may need to more frequently engage proxy solicitation firms – either of which would offset the costs saved by printing fewer proxy statements and annual reports. Companies also will still need to incur some printing costs to have sufficient quantities of proxies available for requesting shareholders, as well as for marketing purposes such as investor conferences. Lastly, the mandated minimum time frames may cause companies to have to finalize their meeting agendas and proxy materials earlier than in the past. In short, it remains to be seen whether cost savings and efficiencies predicted by the SEC will truly come to pass.

The summary above is meant to describe the major changes affecting the proxy solicitation process. For a more comprehensive discussion of the proxy rule changes that could affect you, please contact the lawyer at Sullivan & Worcester LLP with whom you regularly consult, or the lawyers listed above.