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The SEC's New Universal E-Proxy Rules

The SEC has published final rules requiring that companies and soliciting persons offer the notice and access method of distribution for all proxy solicitations (other than with respect to business combinations) (the “universal e-proxy rules”). After the new rules go into effect, companies and other soliciting persons may elect to use either a notice only or a full set delivery option to distribute proxy materials to shareholders. Under both options, companies and other soliciting persons must deliver to shareholders a Notice of Internet Availability of Proxy Materials in the form specified by the SEC (the “Notice”) and post proxy materials on a publicly accessible website. Under the full set delivery option, companies and other soliciting persons may also initially provide paper or e-mail copies of proxy materials in addition to the Notice and website posting. Companies and soliciting persons do not have to choose one option as the exclusive means for providing proxy materials to shareholders. Instead, they may use one option for some shareholders and the other option for other shareholders.

Large accelerated filers (other than registered investment companies) must comply with the universal e-proxy rules for solicitations commencing on or after January 1, 2008. Registered investment companies, soliciting persons other than the company and non-large accelerated filers (i) may comply with these rules for solicitations commencing on or after January 1, 2008, and (ii) must comply with these rules for solicitations commencing on or after January 1, 2009. To view the final universal e-proxy rules, see <http://sec.gov/rules/final/2007/34-56135.pdf>.

The Notice Only Option

Companies and other soliciting persons who choose the notice only option will follow the same process that was approved by the SEC earlier this year when it adopted the voluntary version of these e-proxy requirements. The only differences between the existing e-proxy procedure and the new notice only option under the universal e-proxy rules are certain technical clarifications made by the SEC based on comments received to date, including the following:

- The requirement that the Notice include a “clear and impartial identification of each separate matter intended to be acted on and the soliciting person’s recommendation regarding those matters” is not a requirement that a recommendation be made for every matter, but only that disclosure is required where the company or other soliciting person chooses to make a recommendation; and

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- Requests for paper copies of proxy materials received after the end of a shareholder meeting need not be fulfilled via first-class mail or within three business days.

For more detail on the notice only option, see Exhibit A.

Full Set Delivery Option

For companies wishing to initially furnish a full set of proxy materials in paper to shareholders under the full set delivery option, the only new obligations that these rules add to the current paper or e-mail delivery process are requirements to post the proxy materials on a website and include a Notice with (or incorporate the Notice into) the full sets of materials. The requirements for the Notice and website posting are the same as those in the notice only option except as follows:

- A company may accompany the Notice with a copy of the proxy statement, annual report (if required by Rule 14a-3(b)) and a proxy card;
- A company need not prepare a separate Notice if it incorporates all of the Notice information into the proxy statement and proxy card;
- Because shareholders will not need extra time to request paper or e-mail copies, the company need not send the Notice and full set of proxy materials at least 40 days before the meeting date. Also, because under current rules the company does not have to post proxy materials on the specified website until the date that they are sent to shareholders, the company would also not be required to post the materials on a public website at least 40 days before the meeting date if they are not sent then;
- Because the company already has provided shareholders with a full set of proxy materials, it need not provide the shareholder with copies of proxy materials upon request;
- Because the full set of proxy materials includes a proxy card or request for voting instructions, the company need not provide another means for voting at the time the Notice is provided unless it chooses to do so; and
- The company need not include the part of the prescribed legend relating to shareholder requests for copies of the documents and instructions on how to request a copy of the proxy materials in its notice of internet availability.

Other soliciting persons and intermediaries follow a similar process as companies when using the full set delivery option.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum may be directed to John C. Kennedy (212) 373-3025 or Raphael M. Russo (212) 373-3309.

EXHIBIT A**THE NOTICE ONLY OPTION****Content and Delivery of the Notice of Internet Availability of Proxy Materials**

Companies must send a Notice of Internet Availability of Proxy Materials (a “Notice”) to its shareholders at least 40 calendar days before the date of the applicable shareholder meeting or shareholder action, if there is no meeting. The Notice constitutes “other soliciting material” that must be filed with the SEC no later than the date on which it is first sent to shareholders. The information that must be included in the Notice is as follows:

- 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].
 - **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 a 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 the corporate action may be effected;
- Clear and impartial identification of each separate matter intended to be acted on and the soliciting person’s recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified website;
- A toll-free telephone number, e-mail address and Internet website where a shareholder can request paper or e-mail copies of the proxy materials for the current and all future shareholder meetings;

- Control/identification numbers that the shareholder needs to access his or her proxy card;
- 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 related proxy materials. For instance, the Notice may not include a telephone number or any other means that would allow shareholders to execute their proxy without accessing the related proxy materials. Such a telephone number may, however, be included on companies' websites that include access to the proxy materials or on a proxy card that is sent to shareholders ten days after the Notice is initially sent; and
- Information on how to obtain directions to attend the meeting and vote in person.

No additional information or changes are permitted in the Notice other than:

- Information that is required to be included in a notice of shareholder meeting by state law, unless state law prohibits such incorporation or combination;
- Revisions to reflect the fact that the Notice relates to a consent solicitation or an information statement, if that is the case;
- A statement to educate shareholders that no personal information other than the identification or control number is necessary to execute a proxy; and
- Pictures, logos or similar design elements as long as the design is not misleading and the required information is clear.

Plain English principles must be used in drafting the Notice.

So that the Notice will receive proper attention, no materials may accompany the Notice, except for any state-law mandated shareholder meeting notices or a reply card for shareholders to request paper or e-mail copies of proxy materials in lieu of Internet delivery. Companies may not include a form of proxy with the Notice. Ten days after the initial delivery of the Notice, companies may send a proxy card if it is accompanied or preceded by a copy of the proxy statement and annual report or accompanied by another copy of the Notice, in the same medium.

The Notice may be sent by mail or e-mail, subject to certain conditions, including shareholder consent to electronic delivery of such communications. Companies may also "household" the Notice pursuant to the conditions set forth in Rule 14a-3(e), meaning they may send a single copy to members of the same household. Companies do not have to resolicit the consent of shareholders in order to household the Notice.

Internet Posting of Proxy Materials

Companies must post all proxy materials on the website specified in the Notice by the time they first send the Notice to shareholders, which, as discussed above, must be at least 40 calendar days before the date of the applicable shareholder meeting or shareholder action, if there is no meeting. Additional soliciting materials used after the Notice is sent must be posted on the specified website no later than the day on which those materials are first sent to shareholders. Other conditions regarding the posting of these materials include the following:

- The website that companies use to furnish proxy materials electronically:
 - Cannot be the SEC's EDGAR site;
 - Must have a specific enough address (as disclosed in the Notice) to lead shareholders directly to the proxy materials, although it may be a central site with prominent links to the applicable materials; and
 - Must preserve the anonymity of shareholders accessing the proxy materials. So, for instance, other than tracking shareholders for the purpose of validating election results, the identity of shareholders may not be tracked, and companies may not require the installation of any "cookies" or other software that collects information about shareholders.
- The proxy materials posted:
 - Must be publicly accessible, free of charge at the specified website not later than the time that the Notice is sent to shareholders and must remain available through the conclusion of the applicable shareholder meeting or action;
 - Must be substantially identical to the paper version of the materials;
 - Must be presented in a format or formats convenient for both printing and viewing online. If additional software is needed to view the materials, the website must contain a link to obtain the software free of charge; and
 - Must, according to the promulgating release, be presented in a readily searchable format and may incorporate additional user-friendly features, such as hyperlinks to allow shareholders to easily navigate through the document.

Note that existing filing requirements for proxy materials under Rules 14a-6 (for proxy solicitations), 14c-5 (for information statements) and 14c-3 (for annual reports to shareholders) continue to apply. Companies must comply with these requirements by the time they post proxy materials on the applicable website.

Shareholder Opt Out of the Notice Only Option

Shareholders may request paper or e-mail copies of proxy materials at any time upon request to the company. Companies must then send copies of such materials free of charge by U.S. first class mail or other reasonably prompt means or by e-mail, as requested, within three business days after receipt of the request, unless such request is received after the end of the relevant meeting, in which case such first class mail and three business day requirements do not apply. A request for paper or e-mail copies of proxy materials will remain in effect until revoked by the shareholders, and companies are required to maintain a record of such requests for all future solicitations.

In the SEC's view, shareholders bear the responsibility to make timely requests for paper or e-mail copies. To assist shareholders in this process, companies must include in the Notice a suggested date by which a copy of the materials should be requested to ensure timely receipt and review of the materials and execution of the proxy or vote. However, notwithstanding such date, shareholders may request paper or e-mail copies of proxy materials at any time for up to one year after the conclusion of the meeting or action to which those materials relate.

To protect shareholders' privacy, companies may not transfer to any person (other than an employee or agent in connection with the distribution of proxy materials) shareholder e-mail addresses collected for the purpose of sending proxy materials, and may not use such e-mail addresses for any purpose other than to send copies of proxy materials.

Finally, to assist companies in gauging how many paper copies of proxy materials will be needed to meet shareholder requests, the proposing release states that issuers may send shareholders a communication before a proxy solicitation to determine their interest in receiving paper copies.

Other Soliciting Persons

The procedures for soliciting persons are substantially similar to those for companies, except as follows:

- Because soliciting persons may choose not to initiate an opposing solicitation until after the company has filed its proxy statement, soliciting persons other than the company may send out their Notices by the later of (i) 40 calendar days before the shareholder meeting or action and (ii) ten calendar days after the company first sends its proxy statement or Notice to shareholders.
- Soliciting persons' Notices need only include those meeting agenda items known by them at the time the Notices are sent to shareholders.
- Soliciting persons' Notices must indicate clearly whether the execution of a proxy on their behalf will invalidate shareholders' earlier vote or proxy.

Soliciting persons may continue to target their proxy solicitations by choosing those shareholders from whom they wish to solicit proxies, and are not required to send proxy materials to the entire shareholder base. Soliciting persons must send copies of the proxy materials to any requesting shareholder to whom they sent a Notice.

When providing shareholder lists to a requesting shareholder, companies must indicate which shareholders have permanently requested paper or e-mail copies of proxy materials, but is not required to disclose shareholders' e-mail addresses.

Intermediaries

Companies and other soliciting persons must provide the intermediary with the information necessary to prepare its own Notice, with sufficient time for the intermediary to send its Notice to beneficial owners (i) at least 40 calendar days before the shareholder meeting or action, for company solicitations, or (ii) the later of 40 calendar days before the shareholder meeting or action and ten calendar days after the date that the company first sends its proxy statement or Notice to shareholders, for solicitations by other persons. Because the SEC anticipates that there will be significant coordination between the intermediaries and companies and soliciting persons in this regard, the SEC did not specify a time frame for timely delivery of information to the intermediary.

The intermediary procedure is substantially similar to that for companies, with changes primarily to reflect the intermediary/beneficial owner relationship, such as the following:

- The form of Notice includes changes to reflect the fact that shareholders are providing voting instructions to the intermediary instead of executing a proxy or voting directly with the company;
- The intermediary may direct beneficial owners to the company's website or to its own website to access the proxy materials; and
- Shareholders may not request paper or e-mail copies of proxy materials directly from the company, but must send the request to the intermediary. Upon receipt of a request from a shareholder for paper or e-mail copies, the intermediary must, within three business days, relay such request to the company. Thereafter, the company has three business days to provide the materials to the intermediary, and the intermediary has another three business days after receipt thereof to provide the materials to the shareholder.

Intermediaries must clarify that a permanent election to receive paper or e-mail copies of proxy materials will apply to all securities in the requesting shareholder's account.