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**SEC Rules for Electronic Delivery of Proxy Materials:
The Notice and Access Model**

The SEC issued rules in January of 2007, effective July 1, 2007, to provide issuers, other soliciting persons, and intermediaries with a means to provide shareholders with Internet access to proxy materials and annual reports.¹ The rules are designed to reduce costs associated with printing and mailing proxy materials and annual reports, and in a way that minimizes the risk of a shareholder executing a proxy without having access to proxy materials, and maximizes the ease of shareholder and beneficial owner access to proxy materials.² Issuers will likely be required, under recently announced universal, or mandatory, e-proxy rules, to provide shareholders the option of accessing materials on the Internet; but issuers may send paper copies in addition to complying with the notice and access model.³ Issuers wishing to use the notice and access rules

¹ Internet Availability of Proxy Materials, Release No. 34-55146, IC-27671; File No. S7-10-05 RIN 3235-AJ47 (Jan. 22, 2007) [72 FR 4,148] available at <http://www.sec.gov/rules/final/2007/34-55146.pdf> (the "Adopting Release"); Internet Availability of Proxy Materials, 72 Fed. Reg. 4,148 (January 29, 2007) (to be codified at 17 C.F.R. pts. 240, 249, 274). The rules do not apply to business combination transactions.

² For materials available on the Internet that are not related to proxy solicitation, the issuer may send a Notice revised to reflect the fact that it is not soliciting proxies. 17 C.F.R. § 240.14c-2(d).

³ Raymond A. Be, Opening Statement of the Division of Corporation Finance at the SEC Open Meeting, <http://www.sec.gov/news/speech/2007/spch062007rab.htm> (the "Opening Statement"). The Opening Statement announces an adopting release amending the notice and access rules which will require issuers to offer proxy materials on the Internet, but permit a soliciting person to either follow the notice and access rules as they are, or to follow the rules and also send a complete, paper copy set of proxy materials to shareholders. Issuers sending both a Notice and paper copies need not respond to shareholder requests for paper copies.

are advised to review their proxy timetables carefully in light of the extended notice period required by the rules.

In order to use the notice and access model, an issuer or other soliciting person must send to all shareholders and beneficial owners a Notice of Internet Availability of Proxy Materials (“Notice”), written in plain English. All materials applicable to the proxy solicitation must be made available on the issuer’s Web site, free of charge, by the time the Notice is sent, and must remain on the Web site through the meeting date; a link to EDGAR is not sufficient.⁴

I. Issuers

- 1) The issuer must send the Notice 40 calendar days⁵ before the shareholder meeting date.⁶ The issuer must mail the Notice, or, if a shareholder has already affirmatively consented to electronic delivery, can e-mail the Notice. The requirements for the Notice are set forth in Schedule A.
- 2) A means by which a shareholder can execute a proxy, such as by phone, must be available on the issuer’s Web site as of the time the Notice is first sent.⁷ The means to execute the proxy can be on the Web site, but cannot be on the Notice, because then it is not clear that the shareholder will have had access to proxy materials when he executes the proxy.⁸

⁴ 17 C.F.R. § 240.14a-16(b)(1)-(3). Proxy materials must be available in a form both printer friendly and readable on the screen, which may require making materials available in more than one form, for example, in both PDF and HTML; if special software is required to read materials, the Web site must include a link to free software. 17 C.F.R. § 240.14a-16(c).

The issuer’s Web site must be useable in a way that does not infringe on the anonymity of the person using the site. 17 C.F.R. § 240.14a-16(b). The issuer cannot use shareholder e-mails for any other purpose than receiving requests for or sending out proxy materials or disclose shareholder e-mails to anyone other than an employee or agent to the extent necessary to send a copy of proxy materials. 17 C.F.R. § 240.14a-16(k).

⁵ The first day is the day the Notice is sent. The 40th day is the day before the meeting date, so in effect, the Notice must be sent 41 days before the meeting.

⁶ 17 C.F.R. § 240.14a-16(a)(1). If there is no meeting, the Notice must be sent 40 calendar days or more prior to the date the votes, consents or authorizations may be used to effect the corporate action. 17 C.F.R. § 240.14a-16(a)(1).

⁷ 17 C.F.R. § 240.14a-16(b)(4).

⁸ 17 C.F.R. § 240.14a-16(d)(7).

- 3) An issuer may still send a proxy card. The proxy card may not be mailed to a shareholder, however, until 10 days after the Notice is sent, unless it is accompanied or preceded by a proxy statement and annual report.⁹
- 4) A shareholder or intermediary may request copies of proxy materials. An issuer has three business days from the receipt of a shareholder or intermediary's request to send proxy materials, either by first class U.S. mail for a paper copy, or by e-mail if so requested. The issuer must provide materials for one year after the meeting date to which the materials relate.¹⁰
- 5) A shareholder has the option of making a permanent election as to the method that proxy materials or annual reports are delivered.¹¹ The issuer or intermediary must maintain records of such elections and abide by the shareholder's election until notified otherwise.¹²
- 6) When an issuer wishes to make proxy statements or annual reports available to beneficial owners, the issuer must provide an intermediary with all the required Notice information, and with sufficient time to permit the intermediary to prepare its own Notice to send to beneficial owners 40 calendar days prior to the meeting date.¹³
- 7) The Notice is considered soliciting material and must be filed with the SEC no later than the date of mailing.¹⁴

II. Other soliciting persons

In order to reduce the costs of proxy contests, persons other than the issuer wishing to undertake their own proxy solicitation may use the notice and access model.¹⁵ Under current rules, issuers must either provide a shareholder contact list to a requesting shareholder or send

⁹ 17 C.F.R. § 240.14a-16(h). This is to allow a shareholder some time to either view materials online or request paper copies.

¹⁰ 17 C.F.R. § 240.14a-16(j)(3).

¹¹ 17 C.F.R. § 240.14a-16(j)(4).

¹² 17 C.F.R. §§ 240.14a-16(j)(4), 240.14b-1(d)(4)(iii).

¹³ 17 C.F.R. § 240.14a-16(a)(2). No specific date is provided in the rules for what would be "sufficient" time, but at least five business days may be required.

¹⁴ 17 C.F.R. §240.14a-16(i).

¹⁵ 17 C.F.R. § 240.14a-16(l).

the soliciting shareholder's proxy materials on his or her behalf.¹⁶ When an issuer decides to send materials on the soliciting person's behalf, the issuer must abide by the soliciting person's choice whether or not to use the notice and access model.¹⁷ If a soliciting person chooses to rely on notice and access, the issuer must send the soliciting person's Notice with reasonable promptness after receipt from the soliciting person, and forward proxy cards ten days or more later, also with reasonable promptness.¹⁸ Intermediaries must similarly send proxy materials to beneficial owners on behalf of the soliciting person.¹⁹

A soliciting person other than the issuer is subject to similar requirements under notice and access as the issuer:²⁰

- 1) The soliciting person must send its Notice by the later of 40 calendar days prior to the shareholder meeting date or the date the votes, consents, or authorizations may be used to effect the corporate action, or 10 calendar days after the date that the registrant first sent its proxy statement or Notice to shareholders.²¹
- 2) The soliciting person may not send a proxy card until 10 days after sending a Notice, and it must be accompanied either by a copy of the proxy statement or by another copy of the Notice.²²
- 3) The soliciting person may limit his or her proxy solicitations to a select group of shareholders. However, the soliciting person, not the issuer, must provide paper or e-mail copies of proxy materials upon request of shareholders. Accordingly, the soliciting person is therefore required to provide copies of proxy materials only to those whom it has sent a Notice.²³

¹⁶ 17 C.F.R. § 240.14a-7. This does not apply when the issuer is soliciting proxies in connection with a going-private transaction or a roll-up transaction.

¹⁷ Adopting Release at 48.

¹⁸ Id.

¹⁹ Id. at 49; 17 C.F.R. § 240.14b-1.

²⁰ See Schedule B for notice contents. The notice and access model is a non-exclusive alternative to other soliciting methods.

²¹ 17 C.F.R. § 240.14a-16(*I*)(2).

²² Adopting Release at 44; 17 C.F.R. § 240.14a-16 (*I*)(1).

²³ 17 C.F.R. § 240.14a-16(*I*)(1).

III. The intermediary's role²⁴

When an issuer wishes to make proxy statements or annual reports available to beneficial owners, the issuer must provide an intermediary with all the information required to be in the issuer's Notice.²⁵ The intermediary must establish a Web site at which beneficial owners are able to access requests for voting instructions.²⁶ The intermediary must prepare and deliver its own Notice to its beneficial owners after receiving the meeting information from the issuer or other soliciting person in keeping with their respective deadlines.²⁷ The intermediary's Notice will contain the same information as an issuer's Notice, with changes that reflect the differences between registered holders and beneficial owners.²⁸

- 1) Upon receipt of a request from the issuer or other soliciting person, an intermediary must send to beneficial owners a copy of the request for voting instructions, accompanied by a copy of the intermediary's Notice, 10 calendar days or more after the broker or dealer sends its Notice.²⁹
- 2) Upon receipt of a request for a copy of soliciting materials from a beneficial owner, the intermediary must:

²⁴ See Schedule C for notice contents. An intermediary requesting voting instructions from a beneficial owner may follow the notice and access model only if the issuer requests that it do so, and in such cases, must follow notice and access. Adopting Release at 34; 17 C.F.R. § 240.14b-1(d). Although the rules divide Notice instructions for intermediaries into broker or dealer rules in one category, and banks and other entities with fiduciary duties to shareholders into another, the Notice rules are the same for both. 17 C.F.R. § 240.14b-1, b-2. Accordingly, although the rules are divided between sections 17 C.F.R. § 240.14b-1 and 14b-2, all cites will be to 14b-1.

²⁵ 17 C.F.R. § 240.14a-16(a)(2). Aside from the Notice requirements, an intermediary shall forward any proxy materials, information statement, or annual report received from the issuer to the beneficial owners within five business days after receipt of the proxy materials. 17 C.F.R. § 240.14b-1 (b)(2). Intermediaries may charge the issuer or other soliciting person for costs incurred in forwarding proxy materials to requesting beneficial owners. 17 C.F.R. § 240.14b-1 (c)(2)(i); see Adopting Release at 40 n.118 (an intermediary may charge an issuer or other soliciting person for the cost of forwarding materials).

The intermediary may household materials pursuant to householding rules if requested to do so by the issuer, or as long as the issuer does not object.

²⁶ 17 C.F.R. § 240.14b-1(d)(2). An intermediary may also, if it chooses, establish a Web site, in accordance with the Web site requirements applicable to issuers, at which beneficial owners are able to access the proxy statement and other soliciting materials, but can also choose to direct beneficial owners to the issuer's Web site.

²⁷ 17 C.F.R. § 240.14b-1(d)(1).

²⁸ 17 C.F.R. § 240.14b-1(d)(1), (e).

²⁹ 17 C.F.R. § 240.14b-1(d)(3).

- a) request a copy of the soliciting materials from the issuer or other soliciting person, in the form requested by the beneficial owner, within three business days after receiving the beneficial owner's request;
- b) forward a copy of the soliciting materials to the beneficial owner, within three business days after receiving the materials from the issuer or other soliciting person; and
- c) maintain records of shareholder requests to receive paper or e-mail copies of the proxy materials in connection with future proxy solicitations, and provide copies in the requested format until otherwise notified.³⁰

IV. Householding

- 1) When one or more shareholders live at the same residence, the issuer can send just one paper Notice to the household, or multiple Notices in one envelope to a single address, as long as the issuer satisfies other householding rules.³¹
- 2) If the Notice is sent via e-mail, however, the Notice must be separately e-mailed to each shareholder.³² Similarly, the issuer must supply a way for each shareholder of a household to separately execute his or her proxy, and accordingly must provide separate identification or control numbers to each account at the shared address, as required by the current householding rule.³³
- 3) There is no need to resolicit permission to household shareholders if they have given consent in the past.³⁴

³⁰ 17 C.F.R. § 240.14b-1(d)(4)(i)-(iii).

³¹ 17 C.F.R. § 240.14a-7(a)(2)(i). With respect to the Notices, § 240.14a-3 provides additional guidelines for when an issuer will be considered to have delivered a Notice, including how to address the Notice to the shareholders, for example, by putting each name on the envelope, or naming them as a group, but not by putting only one shareholder's name on the envelope. Consent to householding must be by affirmative writing; and the issuer must send a shareholder a notice 60 days or more before the issuer begins to rely on a household delivery scheme that materials will be sent to the household as opposed to each individual, providing a means for a shareholder to opt for individual delivery. If the issuer receives no response from the shareholder within 60 days after sending such a notice, the issuer may household materials.

³² Adopting Release at 19 n.60.

³³ 17 C.F.R. § 240.14a-3(e)(1)(i)(D).

³⁴ Adopting Release at 19-20.

- 4) An issuer must provide instructions and contact information to a shareholder who wishes to receive one copy of materials for the household or to discontinue householding.³⁵

V. **Conclusion**

The Notice and access model represents an attempt by the SEC to take further advantage of widespread Internet use in order to reduce costs in connection with shareholder meetings. It is unclear how these rules will impact an issuer's costs or affect voter turnout. Issuers will have to review their proxy timetables carefully in order to use these rules, as proxy materials are required to be available on the issuer's Web site at least 40 calendar days prior to the meeting, which is the latest date the Notice can be sent to shareholders.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at 212-701-3323 or jschuster@cahill.com.

³⁵ 17 C.F.R. §240.14a-3(e)(2)(ii).

Notice Content Requirements for Issuers

The Notice must contain a legend, prominent and in bold-face type, reading:

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 shareholders] [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.**

And the following information:

- The date, time, 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;
- 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;
- a list of the materials available at the specified Web site;
- a toll-free number, an e-mail address, and a Web site address where the shareholder can request a copy of the proxy materials for all meetings and for the particular meeting to which the Notice relates;
- any control/identification numbers that the shareholder needs to access his or her proxy card;
- instructions on how to access the proxy card, provided that the instructions do not enable a shareholder to execute a proxy without having access to the proxy statement and annual report;

- information on how to attend the meeting and vote in person; and
- any state law meeting notice requirements if applicable.

The Notice cannot be incorporated into any other document; it cannot be accompanied by either excerpts of proxy statements or a proxy card. It may, however, be accompanied by a pre-addressed, postage-paid reply card for requesting a copy of the proxy materials. It may also contain an alert to shareholders, as a protective measure, that no other personal information besides identification or control numbers must be revealed in order to execute a proxy.

Timetable applicable to issuers

Date/triggering event	Event/response event
40+ days before meeting, providing “sufficient time” to allow an intermediary to meet the 40 day deadline	Issuer sends intermediaries materials to create and send a Notice to beneficial owners
At least 40 days before meeting	Issuer sends Notice to shareholders; the Notice must be filed pursuant to 14a-6(b) no later than the date it is first sent to shareholders
Issuer sends Notice to shareholders	Issuer has all proxy materials specified in Notice available on Web site; provide means to execute proxy to shareholders
Fewer than 10 days after sending Notice	Issuer may send a proxy card if it is either accompanied by or preceded by proxy materials
10 days after sending Notice	Issuer may send proxy card accompanied by a Notice
Shareholder or intermediary requests copy of proxy materials	Issuer sends materials within three business days

Soliciting Person's Notice Requirements

The contents of the non-issuer soliciting person's Notice must follow the requirements applicable to issuers and include the same mandatory language from Schedule A, and:

- must state on the Notice that there may be additional agenda items of which the soliciting person is not aware, and therefore the shareholder cannot direct a vote for those items on the soliciting person's proxy card provided at that time;
- must state, if the form of proxy does not contain all matters intended to be acted upon, whether execution of the form of proxy will invalidate a shareholder's prior vote on matters not presented on the form of proxy; and
- must provide, if the soliciting person may not be aware of all the items on the registrant-issuer's agenda, a clear and impartial identification of each separate matter on the agenda to the extent known by the soliciting person at the time the soliciting person is required to provide copies of proxy materials.

Intermediary's Notice

The contents of the intermediary's Notice:

- Shall include the same information, as it relates to beneficial owners, as required by an issuer, using the same mandatory language from Schedule A, provided the intermediary provides its own or its agent's toll-free number, e-mail address, and Web site; and
- shall include a brief description, if applicable, of the rules that permit the intermediary to vote the securities if the beneficial owner does not return his or her voting instructions.
- The intermediary's Notice can direct a beneficial owner to either the issuer's Web site or its own Web site for access to proxy materials; but
 - if it sends the beneficial owners to the issuer's site, then it must inform the beneficial 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 provide instructions on how a beneficial owner can request a copy of the proxy materials from the intermediary, rather than from the issuer.
 - The intermediary's Notice must clarify that a permanent election to receive copies of the proxy materials in paper or e-mail will apply to all securities in the beneficial owner's account.
 - The intermediary must accordingly maintain records of the beneficial owners' method of delivery preferences, and adhere to them until otherwise notified.
- The intermediary's Notice need be applicable only to the means beneficial owners can use to provide voting instructions.
 - Similar to the issuer's notice to shareholders, the Notice cannot include a request for voting instructions, nor may it include a means, such as a phone number, which would enable a beneficial owner to provide voting instructions without having access to the proxy statement and annual report. And while the means to provide voting instructions can be on the Web site as of the time the Notice is sent, a paper request for voting instructions cannot be sent until 10 days after the intermediary sends the Notice.