SEC Adopts New Rules Regarding Internet Availability of Proxy Materials

By Seth I. Rubin

Effective July 1, 2007, proxy statements will officially enter the Internet Age. This is because the Securities and Exchange Commission has recently adopted amendments to its proxy rules that allow companies to furnish proxy materials to stockholders through a "notice and access" model using the Internet. The SEC has also proposed rule changes which would mandate compliance with the new model for all future proxy solicitations which do not relate to a business combination.

The underlying purpose of the recently adopted rules is to reduce printing and mailing costs for those companies that adopt the new model of communication and to promote more efficient communication among companies and their stockholders. Since these rules provide merely an alternative method of proxy delivery, those companies that wish to continue using existing delivery methods may do so.

Under the new rules, a company choosing to follow the new notice and access model must post its proxy materials on an Internet website and send to stockholders, at least 40 days prior to the meeting date, a Notice of Internet Availability of Proxy Materials. A proxy card may not accompany the Notice but a paper proxy card may be sent with another copy of the Notice 10 days or more after the initial Notice has been sent. The Notice, whether sent electronically or in paper, must also comply with the following requirements: (1) it must be written in plain English; and (2) it must contain a prominent legend advising stockholders of certain required information, including: (a) the date, time and location of the meeting; (b) the website address where proxy materials are available (not just the home page, but the actual page where materials appear); (c) a toll-free number, e-mail address and website that stockholders may use to request paper or e-mail copies of the proxy materials; and (d) a clear and impartial identification of each of the matters to be considered at the meeting. Proxy materials that may be posted online include notices of stockholder meetings, proxy statements, proxy cards, annual reports, additional soliciting material, and amendments to these materials.

In order to assure that all stockholders are afforded the opportunity to vote, the new rules also continue to impose obligations on third party intermediaries such as brokers, dealers and others who exercise fiduciary powers. Under the new rules, intermediaries are only permitted to follow the notice and access model if a company requests them to do so. Moreover, if a company makes such a request, the intermediaries are required to comply, following a process for distributing proxy materials that is similar to that required of companies.

A company, or an intermediary, must send its stockholders a copy of the proxy materials within three business days following a stockholder request. (Intermediaries are permitted to charge the company for the cost of sending the proxy materials to a stockholder.) Stockholders are also permitted to make a permanent election to receive all future proxy solicitations by the issuer in paper or via e-mail.

Interestingly, the new proxy rules also permit a third party undertaking a proxy solicitation – in the context of a proxy fight, for example – to avail itself of the notice and access model. The third party requirements regarding the use of this model mirror substantially the requirements of the company and its intermediaries, described above.

Companies that want to follow the notice and access model will have to wait until July 1, 2007 – no company can comply with the model before this date. In addition, the new proposal from the SEC, which would mandate the notice and access model for all solicitations not related to business combinations, appears unlikely to become effective prior to 2008. This mandatory model would operate in much the same way as the voluntary model, although a Notice under the mandatory model could be accompanied by a full set of proxy materials, including the proxy statement, annual report and proxy card. Even if enacted, this proposal would still entitle stockholders to receive paper copies of proxy materials upon request.

All in all, these latest changes by the SEC are a welcome opportunity for companies looking to cut costs without losing touch with stockholders. While it remains to be seen whether mandatory compliance with the notice and access model is necessary or desirable, companies should be encouraged to work with the notice and access model to see if it is a functional way of communicating with stockholders.

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