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The Securities and Exchange Commission's New E-Proxy Rules: Background and Practical Suggestions

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Effective July 1, 2007, public companies can satisfy their proxy delivery requirements by posting proxy materials, including annual reports, on a web site and mailing a notice to shareholders advising them that the materials are available and providing them with instructions on how to access them. Although this process is voluntary, on July 26, 2007, the Securities and Exchange Commission ("SEC") adopted amendments to the internet availability of proxy materials rules and regulations ("e-proxy rules") which will impact all public companies, including those that chose not to utilize the new e-proxy process. This article sets forth the basic framework of the e-proxy rules and provides practical suggestions for public companies seeking to implement these new rules.

Background

Generally speaking, these new "mandatory" regulations provide public companies two alternatives to comply with the e-proxy rules. A public company may adopt either:

- the "notice only" process, which mirrors the process associated with the voluntary e-proxy rules that went into effect on July 1, 2007; or

- the "full set delivery" alternative, which entails both posting proxy materials on the internet (with notification) and also sending a full set of proxy materials to shareholders.[1]

If a public company wishes to continue the status quo and furnish a full set of proxy materials in paper to shareholders, the mandatory rules require that the company: (1) post those proxy materials on an internet web site, and (2) include a "Notice of Internet Availability of Proxy Materials" with the full set or incorporate such notice information into its proxy statement and proxy card.

"Notice Only" Alternative

Under the notice only option, a public company must post its proxy materials on an internet web site and send a Notice of Internet Availability of Proxy Materials ("Notice") to shareholders at least 40 calendar days in advance of the shareholder meeting. No materials may accompany this Notice, except for information required by state law or a reply form for shareholders to indicate an election to receive email or paper copies of future proxy materials.

The Notice must be written in plain English and contain the following information:

- the date, time, and location of the meeting;
- a clear and impartial identification of each matter to be acted on and the company's recommendations, if any, regarding each matter (but no supporting statements);
- a list of the materials made available on the web site;
- a toll-free number, an email address, and an internet web site address through which the shareholder can request a copy of the proxy materials;
- any control/identification numbers that the shareholder needs to access a proxy card and instructions as to how to access the proxy card (provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy materials); and
- the prescribed legend in bold-face type.

If requested by a shareholder, a public company must provide a paper or email copy of the proxy materials at no charge and must also permit shareholders to make a permanent election to receive paper or email copies of proxy materials in the future.

Full Set Delivery Alternative

Under the full-set delivery option, a public company may deliver a full set of proxy materials, which consists of the notice, proxy statement, annual report, and proxy card. In addition, the company must also make the proxy materials available on a publicly accessible web site no later than the date the notice is first sent to shareholders. No separate notice is required related to the electronic availability of proxy materials so long as the company incorporates all of the appropriate information into the physically delivered proxy materials. Both the 40 calendar days notice and the requirement to provide the shareholder with copies of the proxy materials upon request (which are required under the notice only option) do not apply to the full-set option.

Compliance Deadlines

Large accelerated filers[2] must comply with the e-proxy rules for any proxy solicitations that take place on or after January 1, 2008. All other public companies (including registered investment

[1] As set forth in the adopting release, the SEC has clarified that public companies need not exclusively choose one alternative or the other and may "use the notice only option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders."

[2] See Rule 12b-2 of the Securities Exchange Act of 1934, as amended, for a definition of "large accelerated filer."

companies) must comply with these rules for any proxy solicitations made on or after January 1, 2009.

Practical E-Proxy Suggestions

Here are some practical suggestions for e-proxy materials:

- Most public companies currently conduct their proxy solicitations in a manner that is substantially compliant with the full set delivery option. Accordingly, some companies may take a wait and see approach to the notice only option and merely make the necessary tweaks to comply with the new rules for the full set delivery option unless the company believes that the advantages (mainly potential cost savings) to the notice only option outweigh any potential uncertainties associated with providing only electronic delivery of the proxy materials.

- Implementing the notice only option requires the combined efforts of the company and several third parties. Given that best practices have not developed yet related to this model, coordination with your transfer agent, web providers and other third-party entities involved in the proxy solicitation process should begin early on in, and continue throughout, the process. Companies should take seriously the integrity and reliability of the voting process for the meeting. For instance, companies may want to perform test procedures with the web site provider hosting the proxy materials and voting for the meeting with respect to the procedures for accessing the proxy materials and completing the electronic voting process. These processes and procedures should be tested several times by the company and the company should make certain that shareholders can easily and simply access the proxy materials and vote electronically.

- Early in the process, the company should alert intermediaries to the extent that it will be utilizing the notice only option. Some intermediaries may miss the Notice because they are expecting the traditional (more voluminous) mailing of the proxy materials. Accordingly, companies should consider ways to alert intermediaries as to their plans for their next annual meeting. In addition, companies must plan to distribute the Notice well in advance of the 40 day deadline to provide each intermediary with all necessary information in sufficient time for the intermediary to prepare and send its notice at least 40 calendar days before the shareholder meeting date.

- Since the introduction of the voluntary e-proxy rules, many commentators have suggested that the biggest downside to utilizing the e-proxy model is the possibility of not getting adequate shareholder participation. The e-proxy rules permit a company to send a paper or email proxy card to a shareholder 10 calendar days after the date it sends the Notice. Companies may still want to send the proxy card because, similar to intermediaries, shareholders may miss the Notice if they are expecting the traditional mailing of the proxy materials. In most cases, a proxy card mailing will serve as a relatively low-cost reminder and help ensure shareholder participation in the annual meeting voting process.

- If a public company utilizes the notice only option it has an obligation to deliver a physical copy of proxy materials to any requesting shareholder. The materials must be sent (by first-class mail or, if requested, by email) within 3 business days following receipt of the request from the shareholder, which is a relatively short time frame. In the first couple of years after implementing the notice only option, it will be difficult for companies to assess how many hard copies of the proxy materials will be requested by shareholders. Accordingly, companies will need to consult with their printer to assess the cost-benefit analysis between pre-printing a large quantity of proxy materials or requesting quick print jobs in the event of unexpected shareholder requests.

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The members of the Snell & Wilmer Business and Finance Group are available to help you as you navigate your way through these rules.

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