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A Client Alert from Paul Hastings

SEC Adopts Rules Mandating Internet Delivery of Proxy Materials

From the Investment Management Practice Group

SUMMARY

The Securities and Exchange Commission (the “**Commission**”) has adopted amendments to the proxy rules under the Securities Exchange Act of 1934 (the “**Exchange Act**”) requiring issuers and other soliciting persons to furnish proxy materials to shareholders by posting these materials on a publicly accessible Internet Website (other than the Commission’s EDGAR Website) (a “**Website**”) and notifying shareholders of the availability of the proxy materials on the Website and how to access those materials (the “**Mandated E-Proxy Rules**”).¹ As discussed below, intermediaries must also follow this model when furnishing an issuer’s proxy materials to beneficial owners. The Mandated E-Proxy Rules follow the Commission’s adoption earlier this year of rules establishing a voluntary “notice and access” model of proxy delivery (the “**Voluntary E-Proxy Rules**”) which permit (but do not require) issuers and other soliciting persons to provide proxy materials electronically beginning on July 1, 2007.² The Mandated E-Proxy Rules do not apply to proxy solicitations related to business combination transactions.

Under the Mandated E-Proxy Rules, issuers and other soliciting persons have two options to satisfy the new requirement for electronic posting of proxy materials. The first option, dubbed the “notice only option,” follows almost identically the regime established by the Voluntary E-Proxy Rules and allows issuers and other soliciting persons³ to satisfy their delivery obligations under the proxy rules by posting proxy materials on a publicly accessible Website and sending a Notice of Internet Availability of Proxy Materials (“**Notice**”) to shareholders at least 40 days before the shareholders meeting or corporate action informing them of the availability of such materials and how to access the

materials. Under the second option, dubbed the “full set delivery option,” the issuer must deliver the Notice to shareholders in paper format along with a full set of paper proxy materials, including the proxy statement and proxy card. In addition, the proxy materials must be posted on a Website. Issuers may use one or both options in the same solicitation, targeting the “notice only option” for certain types of shareholders and the “full set delivery option” for other types of shareholders. The use of a particular option is not binding for future solicitations. Importantly, the Mandated E-Proxy Rules do not require any issuer to establish an Internet voting platform. Actual voting may still be conducted through paper ballots or telephonically, as discussed further below.

The Mandated E-Proxy Rules have a tiered system of compliance dates. Large accelerated filers (as defined in the Exchange Act), other than registered investment companies, must comply with the Mandated E-Proxy Rules by January 1, 2008. Registered investment companies, persons other than issuers, and issuers that are not large accelerated filers must comply by January 1, 2009 (although they may choose to voluntarily comply beginning on January 1, 2008).⁴

MATERIALS THAT MUST BE PROVIDED ELECTRONICALLY UNDER THE MANDATORY E-PROXY RULES

Under the Mandated E-Proxy Rules, the following materials (“**Proxy Materials**”) must be posted on a Website, regardless of which option is chosen:

- notices of shareholder meetings;
- schedule 14A proxy statements and consent solicitation statements;
- proxy cards;

- schedule 14C information statements;
- annual reports to shareholders;
- additional soliciting materials; and
- any amendments to such materials.

THE “NOTICE ONLY OPTION” FOR ISSUERS

The Notice

Issuers relying on the “notice only option” must post their Proxy Materials on a Website and must send the Notice to shareholders to inform them of the electronic availability of the Proxy Materials at least 40 calendar days prior to the date of the scheduled shareholder meeting (or, if no meeting is to be held, the date by which votes, consents or authorizations must be submitted).⁵ The Notice must be sent by regular mail unless the issuer already has a shareholder’s consent to transmit all communications electronically.⁶ No other materials may accompany the Notice, except for any notice or materials required by state corporation law.⁷ If an issuer follows this option, it must respond to shareholder requests for paper copies of Proxy Materials. As discussed further below, the notice only option **does not** permit a proxy card to accompany the initial Notice.

The Notice must contain the following information in plain English:

- a prominent boldface-type legend;⁸
- the date, time and location of the meeting or corporate action;
- a clear and impartial description of each separate matter to be voted on at the meeting, without supporting statements;
- the Internet web address for locating the Proxy Materials and a list of the materials made available at that address;
- a toll-free number, e-mail address or Internet web address that shareholders may use to request paper or e-mail copies of the Proxy Materials for both the meeting in question and for all future meetings;
- instructions on how to access the proxy card electronically or by telephone, including any control/identification numbers, **provided, however,** that such instructions may not

permit a shareholder to execute a proxy without also having access to the appropriate Proxy Materials;⁹ and

- information on how to obtain directions to be able to attend the meeting and vote in person.

In addition, the Mandated E-Proxy Rules permit issuers to “household” the Notice, by sending a single Notice to one or more shareholders living in the same residence, so long as the issuer satisfies all of the requirements in Rule 14a-3(e) and allows each household account to execute separate proxies. The Notice itself must be filed as additional soliciting material under Exchange Act Rule 14a-6(b).

The Website

An issuer must post all Proxy Materials identified in the Notice, and any subsequent additional soliciting material, on the Website address specified in the Notice on or before the date that it sends such material to shareholders or makes it publicly available. The specified Website may not be the Commission’s EDGAR system. The materials must be available free of charge and presented in a manner that is convenient for both reading online and printing on paper and must remain available on that Website through the conclusion of the relevant shareholder meeting. To satisfy privacy concerns, the Website must be maintained in a manner that does not infringe on the anonymity of the person accessing that Website. The Website may not employ cookies or other user-tracking features. The issuer is also prohibited from using any e-mail address provided by a shareholder solely to request a copy of the proxy material for any purpose other than the actual dissemination of those Proxy Materials to the shareholder. The issuer may not disclose these e-mail addresses to any other person other than its employees or agents.

The Proxy Card

The proxy card may not accompany the Notice and may not be sent (by mail or e-mail) until at least 10 calendar days after the Notice has been sent. Proxy Materials need not accompany the proxy card, but if they do not, then another copy of the Notice must accompany the card. If more than one proxy card is sent to a shareholder (a shareholder owning multiple

funds, for example), a separate Notice must accompany each card.

Means to Vote

Under the notice and access model, the issuer must provide shareholders with a method to execute proxies as of the time the Notice is first sent to shareholders. Under the notice only option, an issuer can satisfy this requirement by a variety of methods, including providing an electronic voting platform, a toll-free telephone number for voting, or a printable or downloadable proxy card on the Website. The Mandated E-Proxy Rules do not require an issuer to establish an Internet voting platform.

Other Requirements

If a shareholder asks to receive a copy of Proxy Materials in paper or e-mail form, the issuer must send a copy of the Proxy Materials by first-class mail or e-mail within three business days following receipt of such request, at no cost to the shareholder. The Mandated E-Proxy Rules require an issuer to supply the proxy statement and annual report to requesting shareholders for up to one year following the related meeting, although if the request for the materials is received after the conclusion of the shareholder meeting or corporate action, the issuer need not comply with the first-class mail and three-day delivery requirements. The Mandated E-Proxy Rules also require issuers to provide shareholders with the ability to make a permanent election to receive all future proxies in paper or e-mail form.

THE “FULL SET DELIVERY OPTION” FOR ISSUERS

Under the “full set delivery” option, in addition to sending the full set of paper Proxy Materials to shareholders as would be done under the traditional means of providing Proxy Materials, an issuer must also (i) send a separate Notice or incorporate the Notice into the proxy statement and proxy card, and (ii) post the Proxy Materials on a Website in the same manner that is required under the notice only option. Because shareholders receive the Proxy Materials along with the Notice, and thus will not need extra time to request paper or e-mail copies, the issuer need not send the Notice and Proxy Materials at least 40 days before the date of the shareholder meeting or corporate action.

Notice

Under the full set delivery option, the content of the Notice differs slightly from the Notice to be provided under the notice only option. The Notice must contain the following information in plain English:

- a prominent boldface-type legend;¹⁰
- the date, time and location of the meeting or corporate action;
- a clear and impartial description of each separate matter to be voted on at the meeting, without supporting statements;
- the Internet web address for locating the Proxy Materials and a list of the materials made available at that address;
- any control/identification numbers that the shareholder needs to access a proxy card electronically; and
- information on how to obtain directions to be able to attend the meeting and vote in person.

Like the Notice under the notice only option, the Notice under the full set delivery option may contain only the items discussed above and any other information required by state law, as well as a protective warning to shareholders advising them that no personal information other than the identification or control number is necessary to execute a proxy. There are two key differences in the Notice requirement for the full set delivery option as compared to the notice only option. First, the Notice may be incorporated into the proxy statement or proxy card. There is no requirement to prepare a separate Notice. Second, the contents of the Notice need not provide instructions on how shareholders can request paper or e-mail copies of Proxy Materials because the Proxy Materials were already provided along with the Notice.

The Website

The requirements as to the Website are the same for the full set delivery option as for the notice only option.

Means to Vote

As noted above, the issuer must provide shareholders with a method to execute proxies as of the time the

Notice is first sent to shareholders. Under the full set delivery option, this requirement is satisfied through the initial delivery of the proxy card or request for voting instructions included in the full set of Proxy Materials. It is not necessary to provide an alternate means for shareholder to execute proxies, although an issuer may do so.

IMPACT ON INTERMEDIARIES

Financial intermediaries generally are required to forward Proxy Materials received from issuers to beneficial owners.¹¹ In the case of issuers employing the notice only option, the Mandated E-Proxy Rules require the issuer to provide each intermediary with the information and material necessary to timely comply with the requirements discussed above.¹² Thus, for an issuer that complies with the notice only option, it must provide the relevant information to the intermediary in sufficient time for it to comply with the 40-day requirement. The intermediary must create its own Notice and distribute it to beneficial owners. It may not simply forward the Notice of the issuer. Further, with respect to beneficial owners who receive a Notice under the notice only option, the intermediary generally must fulfill the requirements imposed on the issuer, including forwarding Proxy Materials upon request, providing means to access voting instructions, and permitting the election to receive paper or electronic copies of Proxy Materials. The effective result of these rules for intermediaries is that an intermediary must prepare Notices and create Websites for all issuers for

which securities are held by the intermediary's customers, not only those issuers employing the notice only method.

E-PROXY REQUIREMENTS FOR SOLICITING PERSONS OTHER THAN ISSUERS

In general, shareholders and other persons conducting their own proxy solicitation may rely on the same notice and access mechanism discussed above. However, the Mandated E-Proxy Rules do contain some differences with respect to solicitations by non-issuers. For example, a soliciting person other than an issuer is required to send its Notice by the later of either 40 calendar days before the meeting or 10 calendar days after the issuer first sends out its proxy statement or Notice to shareholders. In addition, a non-issuer soliciting person, unlike the issuer, is not required to solicit all shareholders, and may selectively choose which shareholders to solicit. In particular, non-issuer soliciting persons may limit their solicitation to shareholders who have not previously requested e-mail or paper copies. Like issuers, non-issuer soliciting persons will also be required to supply a paper copy of Proxy Materials in response to such a request by shareholders receiving a non-issuer soliciting person's Notice. Delivery and content requirements for a Notice sent by a non-issuer soliciting person will also vary somewhat from the requirements for an issuer. While an issuer must refer to all agenda items in the Notice, the non-issuer soliciting person is required to refer only to those agenda items of which such person has knowledge.



If you have any questions regarding the amendments to the proxy rules, please do not hesitate to contact any member of our Investment Management Practice Group.

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¹ Release Nos. 34-56135, IC-27911. The Mandated E-Proxy Rules amend a number of Rules under Section 14 of the Exchange Act and related schedules.

² See our *Client Alert* dated February 2007 for a detailed description of the voluntary “notice and access” rules at www.paulhastings.com.

³ Except where the context requires, the term “issuer” includes issuers and other soliciting persons.

⁴ The Mandated E-Proxy Rules also make certain corrective amendments to the Voluntary E-Proxy Rules which are effective on October 1, 2007.

⁵ For purposes of these Rules, the first day is the day the Notice is mailed and the 40th day is the day before the date of the meeting or corporate action.

⁶ The Mandated E-Proxy Rules do not affect prior Commission guidance regarding the electronic delivery of proxy solicitation materials. See Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458] (the “1995 Guidance”). Therefore, issuers may continue to provide electronic delivery of Proxy Materials to shareholders who had previously affirmatively elected to receive such material electronically in accordance with the 1995 Guidance.

⁷ The Notice may also contain a protective warning to shareholders advising them that no personal information other than the identification or control number is necessary to execute a proxy.

⁸ The legend contains mandatory language which informs shareholders of what material is available on the Website, how to access such material, that paper and e-mail copies of such material are available without charge, and a date by which a shareholder should request a paper copy to ensure timely delivery.

⁹ So, for example, the Notice may not contain a telephone number to call to vote shares because there is no assurance that a person voting by telephone has access to the Proxy Materials via the Internet. However, providing an Internet address in the Notice to vote shares is permissible because the Proxy Materials would be accessible at that address. In addition, it is permissible to identify a telephone number on the Website, so long as the telephone number is not on the Notice.

¹⁰ The legend contains mandated language that informs shareholders of what material is available on the Website.

¹¹ See Rules 14a-13, 14b-1, 14b-2 and 14c-7 of the Exchange Act.

¹² Generally, the contents of the Notice required to be distributed by the intermediary are the same as described above in connection with Notices delivered by an issuer, with certain revisions to reflect the difference between registered and beneficial owners.