

**MEMO# 20826**

January 29, 2007

# **SEC Adopts Rules Permitting Use of Internet to Furnish Proxy Materials; Proposes to Require that Proxy Materials be Made Available on the Internet**

[20826]

January 29, 2007

TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 4-07

SEC RULES COMMITTEE No. 10-07

SMALL FUNDS COMMITTEE No. 3-07 RE: SEC ADOPTS RULES PERMITTING USE OF INTERNET TO FURNISH PROXY MATERIALS; PROPOSES TO REQUIRE THAT PROXY MATERIALS BE MADE AVAILABLE ON THE INTERNET

The Securities and Exchange Commission has adopted amendments to the proxy rules under the Securities and Exchange Act of 1934 that permit issuers and other soliciting persons to furnish proxy materials to shareholders electronically through a “notice and access” model. [\[1\]](#) Effective July 1, 2007, issuers may satisfy their obligations under the proxy rules by posting proxy materials on a specified, publicly-accessible Internet Web site (other than the Commission’s EDGAR Web site) and providing shareholders with a notice that informs them that the materials are available and explains how to access them.

In a companion release, the Commission proposed further amendments to the proxy rules that would require issuers and other soliciting persons to make proxy materials available to shareholders on the Internet. [\[2\]](#) The adopted and proposed rule amendments are summarized below.

Comments on the proposed amendments are due no later than March 30, 2007. The Institute will hold a conference call on Monday, February 5, 2006 at 3:00 p.m., EST to discuss the proposed amendments. The dial-in number for the call is 877/939-1568, and the passcode is 67219. If you plan to participate on the call, please send an email to Suzy Richardson at [srichardson@ici.org](mailto:srichardson@ici.org). If you are unable to participate on the call, please provide your comments before the call to Mara Shreck at 202/326.5923 or [mshreck@ici.org](mailto:mshreck@ici.org).

## **Final Rule Amendments: Internet Availability of Proxy Materials**

The newly adopted rule amendments allow issuers to satisfy their obligations under the SEC's proxy rules through the "notice and access" model described below. The model is not available for proxy materials related to a business combination transaction. [\[3\]](#)

### *Notice of Internet Availability of Proxy Materials*

The amendments permit issuers choosing to rely on the "notice and access" model to send a Notice of Internet Availability of Proxy Materials ("Notice") to shareholders, and post the proxy materials [\[4\]](#) on a publicly accessible Web site on or before the time that shareholders receive the Notice. The proxy materials must remain accessible on the Web site free of charge through the conclusion of the shareholder meeting to which the proxy materials relate. Issuers must also make copies of the proxy material available to shareholders on request, free of charge. Issuers are permitted to "household" the Notice, i.e., send a single copy of the Notice to one or more shareholders residing at the same address, if all of the householding conditions in Exchange Act Rule 14a-3(e) are satisfied.

The amendments require the Notice to contain a specified legend and other prescribed information related to the shareholder meeting to be held (or, as appropriate, the corporate action to be taken). Among other things, the Notice must include a toll-free phone number, email address, and Web site address where a shareholder can request a copy of the proxy materials for all meetings [\[5\]](#) and for the particular meeting to which the notice relates. Certain optional items may also be included. In addition, unless prohibited by state law, the Notice may be combined with a state law meeting notice, in which case information required to be provided by state law may also be included. No other information may be included in the Notice. [\[6\]](#) The Notice constitutes additional soliciting material that must be filed with the Commission pursuant to Exchange Act Rule 14a-6(b) no later than the date it is first sent or given to shareholders.

### *Mechanics of the Proposed "Notice and Access" Model*

#### Timing of Notice and Proxy Card

In a change from the original proposal, [\[7\]](#) the Notice may not be accompanied by a proxy card or any other materials, other than a state law notice. In connection with this change,

the Notice must be sent 40 or more calendar days in advance of the date of the shareholder meeting date or, if no meeting is to be held, the date that consents or authorizations may be used to effect the corporate actions, [8] rather than 30 days as initially proposed. The issuer may send a proxy card 10 calendar days or more after sending the Notice. [9] The proxy card must be accompanied by either the proxy statement and annual report or a copy of the Notice.

#### Posting of Materials to the Internet

All proxy materials to be furnished through the “notice and access” model, except additional soliciting materials, must be posted on a specified Internet Web site (other than the Commission’s EDGAR Web site) by the time the issuer sends the Notice to shareholders. [10] Additional soliciting materials used after the Notice is sent must be posted on the Web site no later than the day on which those materials are first sent or given to shareholders. As noted above, the materials would have to remain on the Web site and be accessible to shareholders through the time of the related shareholder meeting, at no charge to the shareholder. The Notice must clearly identify the Internet Web site address at which the materials are available and be specific enough to lead shareholders directly to the proxy materials. In addition, the final rules require that the materials be presented on the Web site in a format, or formats, convenient for both printing and viewing online.

#### Period of Reliance and Request for Paper Copies

Reliance on the “notice and access” model is effective only with respect to a particular meeting. Thus, an issuer may decide whether to use the model for subsequent meetings. Each time that an issuer chooses to rely on the model for a shareholder meeting, it must comply anew with all of the model’s requirements, including delivery of the Notice and the 40-day notice period. As noted above, however, the final rule amendments allow a shareholder to make a single election to receive a paper or e-mail copy of the proxy materials on a continuing basis in the future.

Upon receipt of a request from a shareholder for a copy of the proxy materials, an issuer must send the materials (in paper or by email, as requested) to the shareholder within three business days after receiving the request. [11] The obligation to provide copies of the proxy materials upon request continues to apply up until one year after the conclusion of the meeting or corporate action to which the materials relate.

#### Additional Soliciting Materials

Issuers relying on the “notice and access” model must post any additional soliciting materials on the same Web site as the proxy materials no later than the day on which the additional soliciting materials are first sent to shareholders or made public. Beyond this posting, issuers may decide which additional means, if any, would be most effective for disseminating these materials (e.g., direct mailing, email, newspaper publication, etc.).

## *The Role of Intermediaries*

As the Commission had proposed, an intermediary may follow the “notice and access” model only if the issuer requests it to do so and, in such cases, must follow that model. [\[12\]](#)

In contrast to the original proposal, which allowed an intermediary to forward the issuer’s Notice to beneficial owners, the final amendments require the intermediary to prepare and send its own Notice. The Notice must be sent at least 40 days before the meeting date. [\[13\]](#) The amendments require an intermediary’s Notice to contain certain information, which is generally the same as an issuer’s notice, with certain revisions to reflect the differences between registered holders and beneficial owners.

An intermediary may choose whether its Notice will direct beneficial owners to the issuer’s Web site or its own to access the proxy materials. [\[14\]](#) In a change from the original proposal, however, an intermediary’s Notice must direct beneficial owners to request paper or email copies, if desired, from the intermediary, rather than from the issuer. Like issuers, intermediaries must provide these copies in a timely fashion. [\[15\]](#) Intermediaries must also provide beneficial owners with the option to permanently elect to receive paper or email copies of proxy materials; for intermediaries, however, such elections would apply to all securities held in the beneficial owner’s account.

Regardless of whether an intermediary’s Notice directs beneficial owners to the issuer’s Web site or its own to access proxy materials, the Notice must contain instructions on how to access the request for voting instructions. At the issuer’s request, an intermediary must also send a copy of the request for voting instructions to beneficial owners, provided that 10 days have passed since the intermediary’s Notice was sent. The request for voting instructions must be accompanied by a copy of the Notice or the proxy statement.

## *Use of “Notice and Access” Model by Soliciting Persons Other Than the Issuer*

Soliciting persons other than the issuer may follow essentially the same “notice and access” process as an issuer. The Adopting Release notes a few key differences.

First, consistent with existing rules, under the “notice and access” model a soliciting person other than the issuer may choose to selectively solicit shareholders, such as those who have not requested paper copies of the proxy materials. However, contrary to the original proposal, they may not condition their solicitation on a shareholder’s willingness to access the proxy materials on a Web site. Thus, the new rules require a soliciting person other than an issuer to provide a paper or email copy of the proxy statement to any requesting shareholder to whom it has sent a notice.

A soliciting person other than the issuer must send its Notice out by the later of 40 calendar days prior to the meeting, or 10 calendar days after the issuer first sends out its proxy statement or Notice to shareholders. The content of a Notice from a soliciting person other than the issuer may be different from the content of an issuer's Notice, in particular if a solicitation is launched before the issuer has sent its own proxy statement or Notice, or if the solicitation only addresses certain of the agenda items. The new rules address the required information for a Notice by a soliciting person other than the issuer.

Existing rules require that issuers either provide a shareholder list to a requesting shareholder, or send the shareholder's proxy materials on the shareholder's behalf. The amendments further require that, if the issuer is providing its shareholder list to a soliciting person, the issuer must also identify which shareholders have permanently requested paper copies of proxy materials. Unlike the proposal, however, based on privacy concerns issuers are not required to provide all information about shareholders regarding electronic delivery. Finally, intermediaries are obligated to send proxy materials on behalf of soliciting persons other than the issuer.

#### *Request for Comment*

The Commission has requested comments on its revised Paperwork Reduction Act burden estimate for the amendments. Comments are due by March 30, 2007.

#### **Proposed Rule Amendments: Universal Internet Availability of Proxy Materials**

The Commission has proposed amendments to the proxy rules that would require issuers and other soliciting persons to make proxy materials available to shareholders on the Internet. The proposed amendments would require use of the "notice and access" model described above for furnishing proxy materials, but would not permit use of the model for business transaction combinations. The Commission is considering making the requirements effective for large accelerated filers other than registered investment companies on January 1, 2008, and for all other issuers, including registered investment companies, on January 1, 2009.

Under the proposed amendments, a full set of proxy materials could accompany the Notice that is sent to shareholders and beneficial owners. Thus, an issuer or other soliciting person that wants to furnish paper copies of the materials in the first instance may do so in a single delivery with the Notice. [\[16\]](#) Further, under the proposed amendments, if an issuer chose to send a full set of proxy materials with the Notice, it would not be required to comply with the 40-day deadline for sending the Notice. Similarly, a soliciting person could begin its solicitation after the later of 40 calendar days or 10 calendar days after the issuer first sends its proxy materials, so long as the Notice was accompanied by a full set of proxy materials.

The proposed amendments would permit a registered investment company to send its prospectus and/or report to shareholders together with the Notice, with or without the proxy statement and form of proxy. Without such express permission, registered investment companies would be required to deliver both their prospectuses and shareholder reports separately from the Notice.

### *Request for Comment*

The Proposing Release requests comment on a number of issues relating to requiring universal Internet availability of proxy materials, including the general advantages and disadvantages to investors, issuers, and other soliciting persons; the costs; and whether various aspects of the optional “notice and access” model ought to be modified. With respect to investment companies in particular, the Proposing Release requests comment on: i) whether investment companies or certain types of investment companies, such as closed-end funds or business development companies, should be excluded; and ii) what compliance dates would be appropriate for mutual funds, business development companies, and other investment companies.

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### **endnotes**

[1] See Internet Availability of Proxy Materials, SEC Release Nos. 34-55146 and IC-27671 (Jan. 22, 2007), 72 Fed. Reg. 4148 (Jan. 29, 2007) (“Adopting Release”), available at <http://www.sec.gov/rules/final/2007/34-55146.pdf>. The Commission’s proposal does not affect an issuer’s ability to use any other existing method of furnishing proxy materials.

[2] See Universal Internet Availability of Proxy Materials, SEC Release Nos. 34-55147 and IC-27672 (Jan. 22, 2007), 72 Fed. Reg. 4176 (Jan. 29, 2007) (“Proposing Release”), available at <http://www.sec.gov/rules/proposed/2007/34-55147.pdf>.

[3] The Commission acknowledged the ICI’s comment that the model should be extended to such transactions. The Adopting Release states that “[t]he Commission desires to gain more experience with the notice and access model before extending it to business combination transactions,” and that it will consider extending the model at a later date.

[4] The proxy materials include: (i) notices of shareholder meetings; (ii) Schedule 14A proxy statements and consent solicitation statements; (iii) proxy cards; (iv) Schedule 14C information statements; (v) annual shareholder reports; (vi) additional soliciting materials; and (vii) any amendments to such materials that are required to be furnished to shareholders. The Adopting Release notes that the requirement to furnish annual shareholder reports in Exchange Act Rules 14a-3 and 14c-3 does not apply to registered investment companies, and that the amendments do not apply to the requirement for every registered investment company, at least semi-annually, to transmit reports to shareholders under Section 30(e) of the Investment Company Act of 1940.

[5] This permanent election to receive paper copies was not included in the original proposal. It is revocable at any time by the shareholder.

[6] The Adopting Release makes clear that a Notice may not include a means, such as a telephone number, that would enable a shareholder to execute a proxy without assurances that the shareholder had access to the proxy materials. By contrast, a telephone number may be listed on the Web site on which the proxy materials reside, because access to such a Web site would indicate that the shareholder had access to the proxy materials.

[7] See Internet Availability of Proxy Materials, SEC Release Nos. 34-52926 and IC-27182 (Dec. 15, 2005), 70 Fed. Reg. 74598 (Dec. 15, 2005), available at <http://www.sec.gov/rules/proposed/34-52926.pdf>; see also [Memorandum](#) to Closed-End Investment Company Members No. 68-05, Compliance Members No. 32-05, SEC Rules Members No. 134-05 and Small Funds Members No. 106-05 [19524], dated December 22, 2005.

[8] The Adopting Release notes that the Notice may be sent electronically to shareholders who have previously provided affirmative consent, or other evidence to show delivery, pursuant to the Commission's earlier guidance on electronic delivery.

[9] An issuer may send a proxy card before the end of the 10-day period if it is accompanied by the proxy statement and annual report.

[10] Issuers are still required to file their proxy materials on the Commission's EDGAR system, and to submit copies of their annual shareholder reports to the Commission. These requirements must be met by the time the materials are posted on the Web site.

[11] Based on concerns expressed by the Institute and other commenters, the Commission extended the response time in the final rules from two business days to three business days.

[12] If an intermediary is not requested to follow the "notice and access" model, it may, on its own initiative, continue to rely on any other permitted method of furnishing proxy materials to beneficial owners, including the electronic delivery of proxy materials by affirmative consent.

[13] The Adopting Release explains that an issuer must provide the intermediary with the information necessary to create a Notice in a timely fashion. However, based on the understanding that issuers, intermediaries and agents currently coordinate a similar exchange of information to enable intermediaries to prepare and print requests for voting instructions, no specific timeframe was established for the delivery of the necessary information.

[14] If an intermediary directs beneficial owners to the issuer's Web site, the intermediary must explain that the beneficial owners may 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.

[15] Upon receiving such a request, the intermediary must in turn request a copy from the issuer within three business days, and must forward the materials to the beneficial owner within three business days after receipt from the issuer.

[16] The Proposing Release makes clear that a full set of materials must be provided; an

issuer or other soliciting person could not choose to send only certain materials, such as a proxy card, with the Notice.

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