

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL AND STATE)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES
- WHITE COLLAR CRIME

## SEC ADOPTS INTERNET PROXY RULES

By *Dionne M. Rousseau* and *E. Ansley Seaver*

### Introduction

Effective March 30, 2007, the Securities and Exchange Commission (the "SEC") has adopted new rules that will allow companies to furnish proxy materials (proxy statements, proxy cards and annual reports) to shareholders through a "notice and access" procedure using the Internet. (Click [here](#) to link to the SEC's release regarding the final rules.) The new procedure is designed to reduce the expense incurred by issuers in complying with the proxy rules and to provide persons other than the issuer with a more cost-effective means of undertaking their own proxy solicitations. Although the new rules became effective on March 30, 2007, the notice and access procedure may not be used prior to July 1, 2007. Issuers are not required to use the new notice and access model -- the new rules do not affect the availability of any existing method of furnishing proxy materials. However, the SEC has proposed to require the use of the model in the future. (Click [here](#) to link to the SEC's release regarding the proposed rules.) The new rules do not apply to business combination transactions.

As issuers wind up their 2007 proxy seasons, they will want to start focusing on these new rules early in preparation for their 2008 proxy seasons. Issuers desiring to take advantage of the new rules may find that they affect the timing of preparations for the 2008 shareholders meeting. For example, the notice and access rules require issuers to send a notice to shareholders at least 40 calendar days prior to the shareholder meeting, which is likely to be earlier than usual for some companies.

While the SEC believes that the rules will decrease printing and mailing costs, issuers using the new model may still incur significant costs and may lose the advantage of lower rates associated with bulk printing and mailing. For example, at least one paper notice must be sent to shareholders. A proxy card cannot accompany the initial notice, so if issuers want to send a paper proxy card, another mailing will be required. In addition, issuers are required to satisfy shareholder requests for paper copies for one year after the shareholder meeting date. Therefore, issuers face the risk of overestimating or underestimating the number of paper copies of proxy materials they will need in order to respond to shareholder requests. The SEC does note that issuers could mitigate this risk by sending a shareholder a communication before the proxy season to determine whether the shareholder wishes to receive paper or e-mail copies or will access the materials via the Internet. Issuers will want to consult with their investor relations professionals, technology departments, transfer agent, intermediaries and proxy solicitation firms to determine the details of how the new procedures

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

APPELLATE LITIGATION

AVIATION

BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESTATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

WHITE COLLAR CRIME

would be implemented and whether the new procedures are likely to result in cost savings to them.

## Overview of the New Rules - Issuers

Under the new rules, an issuer will be permitted (but not required) to furnish proxy materials to shareholders by posting them on an Internet website and mailing a "Notice of Internet Availability of Proxy Materials" (the "Notice") to shareholders at least 40 calendar days prior to the meeting, informing them of the availability of the materials on the website. (The Notice could be sent electronically to shareholders who have previously provided affirmative consent pursuant to outstanding SEC guidance on electronic delivery.) A proxy card may not accompany the Notice, but the issuer may mail a paper proxy card accompanied by another copy of the Notice 10 days or more after mailing the original Notice. An issuer must post the proxy card on the website, along with its proxy statement and annual report to shareholders, no later than the time the Notice is first sent to shareholders. The issuer must also concurrently provide shareholders with at least one method of casting a proxy vote on the website, such as including a link to vote on-line or by posting a telephone number. The materials must remain on the website and be accessible to shareholders through the conclusion of the shareholder meeting.

Any shareholder may ask to receive paper or e-mail copies of the proxy materials from the issuer. If the issuer receives such a request, it must send a copy of the materials to the shareholder via first class mail or other reasonably prompt means of delivery, or e-mail if requested, within three business days, even if the request is made after the date of the meeting. The issuer is obligated to provide these copies until one year after the meeting

No person may send a Notice to shareholders before July 1, 2007. Therefore, the procedure may not be used for meetings scheduled before August 10, 2007, because of the 40-day deadline.

If an issuer chooses to follow the notice and access procedure, the Notice must be written in "plain English" and include the following information in clear and understandable terms:

- A prominent legend in bold-face type that states:

**Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [meeting date]**

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

APPELLATE LITIGATION

AVIATION

BANKRUPTCY, RESTRUCTURING &  
CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, &  
EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL  
SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE,  
DEVELOPMENT & FINANCE

TAX (INTERNATIONAL,  
FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESTATES &  
PERSONAL PLANNING

VENTURE CAPITAL &  
EMERGING COMPANIES

WHITE COLLAR CRIME

**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.**

**The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [website address].**

**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 [date] to facilitate timely delivery.**

- The date, time and location of the meeting;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer's recommendations regarding those matters, without supporting statements;
- A list of the materials being made available at the specified website;
- A toll-free telephone number, an e-mail address and an Internet website address where the shareholder can request a copy of the proxy materials for the particular meeting to which the Notice relates and for future meetings (issuers must maintain records of requests to receive materials in paper or via e-mail for future solicitations and must continue to provide copies as requested until the shareholder revokes the request);
- Any control or identification numbers that the shareholder needs to access his or her proxy card;
- Instructions on 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 statement and annual report; and

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL AND STATE)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES
- WHITE COLLAR CRIME

The materials must be presented on the website in a format or formats convenient for both reading online and printing on paper. The SEC notes that under technology commonly in use today, this may require posting two different formats. First, the materials should be posted in a format substantially identical to the paper version. In addition, the materials must also be presented in a readily searchable format. To the extent a shareholder may need additional software to view the document, the website must contain a link to enable the shareholder to obtain the software free of charge. The Internet website address provided must be specific enough to lead shareholders directly to the proxy materials and cannot be the SEC's EDGAR website.

### **Intermediaries**

For most issuers, many shares are held of record by intermediaries, i.e. banks, brokers and others who hold shares on behalf of beneficial owners. Often these intermediaries hire an agent such as Automatic Data Processing to manage the voting process for them. An intermediary may use the notice and access procedure only if the issuer requests that it do so, and, if the issuer makes such a request, the intermediary must use the procedure. The rules for intermediaries are designed to work with, and are similar to, the rules for issuers. For example, after receiving the meeting information from the issuer, the intermediary must prepare and send its own notice (similar to the issuer's Notice) to beneficial owners at least 40 days before the meeting date. The new rules require an issuer relying on the notice and access model to provide its intermediaries with all the information they require in sufficient time for the intermediary to prepare and send its notice on time.

### **Soliciting Persons Other than the Issuer**

The new rules treat issuers and other soliciting persons similarly in most respects. However, as is the case under current proxy rules, unlike issuers, soliciting persons other than issuers may limit their solicitations to persons from whom they hope to obtain a proxy and are not required to send a proxy statement or information statement to all shareholders. The soliciting person's notice must be sent by the later of (1) 40 calendar days prior to the meeting, or (2) 10 calendar days after the issuer first sends out its proxy statement or Notice to shareholders. A soliciting person must send a paper or e-mail copy of the proxy statement to any requesting shareholder to whom it has sent a notice.

### **Proposed "Universal" Notice and Access Rules**

Contemporaneously with adopting the new voluntary notice and access proxy model, the SEC also proposed to amend the proxy rules to *require* that



**E\*ZINES**

**April 2007 Vol. 64**

**Corporate and Securities**

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**ADMIRALTY & MARITIME**

**ANTITRUST & TRADE REGULATION**

**APPELLATE LITIGATION**

**AVIATION**

**BANKRUPTCY, RESTRUCTURING &  
CREDITORS-DEBTORS RIGHTS**

**BUSINESS & COMMERCIAL LITIGATION**

**CLASS ACTION DEFENSE**

**COMMERCIAL LENDING & FINANCE**

**CONSTRUCTION**

**CORPORATE & SECURITIES**

**EMPLOYEE BENEFITS, ERISA, &  
EXECUTIVE COMPENSATION**

**ENERGY**

**ENVIRONMENTAL & TOXIC TORTS**

**GAMING**

**GOVERNMENT RELATIONS**

**HEALTH CARE**

**INSURANCE, BANKING & FINANCIAL  
SERVICES**

**INTELLECTUAL PROPERTY**

**INTERNATIONAL**

**LABOR & EMPLOYMENT**

**MERGERS & ACQUISITIONS**

**PRODUCTS LIABILITY**

**PROFESSIONAL LIABILITY**

**PROJECT DEVELOPMENT & FINANCE**

**PUBLIC FINANCE**

**REAL ESTATE: LAND USE,  
DEVELOPMENT & FINANCE**

**TAX (INTERNATIONAL,  
FEDERAL AND STATE)**

**TELECOMMUNICATIONS & UTILITIES**

**TRUSTS, ESTATES &  
PERSONAL PLANNING**

**VENTURE CAPITAL &  
EMERGING COMPANIES**

**WHITE COLLAR CRIME**

issuers use the model. This “universal” notice and access model could become effective as early as January 1, 2008, for large accelerated filers and on January 1, 2009, for all other issuers. Issuers will want to stay tuned for further developments on this proposal.

*Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:*

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- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL AND STATE)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES
- WHITE COLLAR CRIME