

ALERT

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SEC “Notice and Access” E-Proxy Rules, January 1, 2008 Uncertificated Share Deadline and Proposed Rule 144 and 145 Changes

E-Proxy “Notice and Access” Rules

Earlier this year, the Securities and Exchange Commission (“SEC”) adopted “optional” e-proxy rules, which permit public companies and others to satisfy the SEC’s proxy requirements by using a “notice and access” model. Under the optional rules, which became available for use on July 1, 2007, public companies may post proxy materials on the Internet in lieu of mailing paper copies of the materials to shareholders, unless a shareholder specifically requests paper copies.

In July 2007, the SEC issued new “mandatory” e-proxy rules, which require companies to post their proxy materials on the Internet and permit companies to elect whether to distribute proxy materials electronically or to continue to mail paper copies. The mandatory rules will become effective for large accelerated filers beginning January 1, 2008. Filers who are not large accelerated filers will be required to comply with the mandatory rules beginning January 1, 2009, but may elect to comply as early as January 1, 2008. The new rules do not apply to proxy solicitations in business combinations.

The alternative of distributing proxy materials electronically is expected to provide cost savings for companies that elect that method, at least following the initial transition period, although there is no track record yet to determine how likely or significant those cost savings will be (and some believe costs may actually increase). The new rules also may result in an increase in the number of proxy contests and changes in voting patterns and solicitation strategies, among other consequences.

Optional E-Proxy

Until the mandatory rules take effect, a company may either:

- continue to deliver paper copies of proxy materials as it has in the past; or
- comply with the “notice and access” model.

If a company elects to comply with the “notice and access” model, the company will need to do the following:

- at least 40 days before the meeting:
 - post proxy materials on a website (other than the SEC EDGAR website), together with a means of executing a proxy; and
 - mail to shareholders a “plain English” notice of the Internet availability of proxy materials;
- file the notice with the SEC on the same day it is first mailed; and
- send paper copies of proxy materials to those shareholders who request paper copies.

Under the “notice and access” model, the proxy materials must be available on the website when the shareholder receives the notice. In addition, a means of executing a proxy must be available when the shareholder receives the notice, but the notice may not be accompanied by a proxy card and may not include a number for voting by telephone. The shareholder may vote as soon as the notice is received, but to do so the shareholder must first access the website where the proxy materials are posted. The website may provide various means of voting, including an electronic voting platform, a printable or downloadable proxy card or a number for voting by telephone. The company may not send a proxy card to the shareholder until at least 10 days after mailing the initial notice.

The posted materials must be in a format convenient for both viewing online and for printing on paper. This may mean that the materials will need to be posted in two different formats, such as in HTML as well as in a format, such as PDF, that provides a printed copy substantially identical to the paper version of the materials.

The notice must include the information specified by the SEC rules and may not include any additional information other than information required by state law. The required contents of the notice include the following:

- the date, time and location of the meeting;
- a clear and impartial identification of each separate matter to be acted on at the meeting;
- the issuer’s recommendations, if any, on each matter to be acted upon (but no supporting statements are permitted);
- a list of the materials available on the website;
- the website address, email address and toll-free telephone number shareholders may use to request paper copies of the proxy materials, and, if a shareholder elects to do so, to make an election to receive paper copies for future meetings;
- information on how to access the proxy card;
- any control or identification numbers the shareholder needs to access the proxy card; and
- information on how shareholders may attend the meeting and vote in person.

Although the rule specifies a 40-day notice requirement, the notice and materials probably will need to be prepared at least 50 days in advance. Brokers and other intermediaries who provide proxy materials to beneficial owners must comply with the 40-day notice and posting requirement, so companies will need to provide the notice to the intermediaries sufficiently in advance to allow them to prepare their requests for voting instructions and provide materials to be forwarded to beneficial owners and other intermediaries.

No cookies or other tracking features may be installed on the website on which the proxy materials are posted. Companies also may not use email addresses provided by shareholders for any purpose other than the delivery of proxy materials.

Mandatory E-Proxy

When the mandatory rules become effective, all public companies will be required to send a notice of Internet availability and to post the proxy materials online as discussed above under the optional rules. Companies will still have the choice, however, either to mail paper copies to all shareholders (“full set delivery” option) or to use the notice and access model (“notice only” option). Under the “notice only” option, paper or emailed copies must be provided upon shareholder request. Interestingly, the rules permit a company to use the “notice only” option for some shareholders and the “full set delivery” option for the remaining shareholders.

Under the mandatory rules, the following requirements will apply:

- “full set delivery” option:
 - post materials on a website;
 - send full paper set of proxy materials to shareholders; and
 - send notice of Internet availability to shareholders (notice can be included in proxy statement and no 40-day limit applies); or
- “notice only” option:
 - post proxy materials on a website;
 - send notice of Internet availability to shareholders at least 40 days before the meeting; and
 - mail paper copies or send copies by email upon shareholder request.

January 1, 2008 Deadline for Authorizing Uncertificated Securities

Securities listed on NASDAQ, the New York Stock Exchange and the American Stock Exchange are required to be eligible for a Direct Registration Program by January 1, 2008. To be eligible, issuers must allow investors to hold their securities in book-entry, or “uncertificated,” form. If your company’s articles or by-laws do not permit you to issue uncertificated shares, you will need to amend them prior to the deadline. Another requirement for eligibility to participate in a Direct Registration Program is that a company use a transfer agent that meets the Depository Trust Corporation’s requirements for direct registered securities **Note:** Exchange-listed companies are required to be eligible for a Direct Registration Program by the deadline even if they do not intend to actually participate in a Direct Registration Program.

Significant Changes Proposed for SEC Rule 144

The SEC has issued proposed amendments to Rule 144 that would significantly reduce the Rule 144 holding periods, exclude debt securities from the manner of sale requirements, increase the Form 144 filing thresholds from 500 shares or \$10,000, to 1,000 shares or \$50,000, as well as make other changes. If the amendments are adopted as proposed, the following changes would be made to the Rule 144 requirements applicable to restricted securities of reporting and non-reporting companies:

Reporting Companies:

- the current 1-year holding period would be reduced to 6 months (subject to up to an additional 6-month period for certain hedging activities);
- instead of the current limited resales after a 1-year holding period and the cut-off for non-affiliates following 2 years, once securities have been held for 6 months:
 - affiliates may resell in compliance with the Rule 144 requirements (e.g., current public information, volume limitations, manner of sale restrictions for equity securities and filing of Form 144);
 - non-affiliates (who have not been affiliates for at least 3 months) may resell:
 - until they have held the securities for 1 year, if the current public information requirement is satisfied; and
 - following 1 year, free of all Rule 144 requirements.

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Non-Reporting Companies:

- the current 1-year holding period would remain unchanged;
- following 1 year, affiliates would continue to be required to comply with the Rule 144 requirements (e.g., current public information, volume limitations, manner of sale restrictions for equity securities and filing of Form 144);
- the current 2-year cut-off period before non-affiliates may resell free of all Rule 144 requirements would be reduced to 1 year (assuming non-affiliates have not been affiliates for at least 3 months).

Significant Changes Proposed for SEC Rule 145

The SEC also has proposed to eliminate the Rule 145 resale restrictions, which currently impose resale limitations on affiliates of target companies who receive shares in business combination transactions, other than for shell company transactions (such as reverse IPO's). This would mean that all shares received in an acquisition would be freely tradable so long as the recipient does not become (and was not previously) an affiliate of the acquiring company.

For more information regarding the developments discussed above, you may contact Barnes & Thornburg LLP at the numbers listed below.

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