

Have you seen your proxy lately?

By Julius J. Brecht¹
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It's a new year and time for another proxy solicitation season! Have you noticed a reduced number of those solicitations for annual meetings arriving in your mail box recently?

A new rule is in place to provide security holders (hereafter for simplicity, referred to as "shareholders") the ability to choose the means by which they access proxy materials for a shareholder meeting. Under the new rule, a registrant under the Securities Exchange Act of 1934 is required to post on the internet its annual report to shareholders and proxy materials for such a meeting.

Other persons soliciting proxies in the context of the registrant must also post their proxy materials on the internet (hereafter, unless the context otherwise requires, such registrants and other soliciting persons are collectively referred to as "issuers"). That is, an issuer must post those materials on an internet website of its choosing and provide its shareholders with notice of that internet availability.

The new rule is designated Rule 14a-16. It was adopted by the United States Securities and Exchange Commission pursuant to the Exchange Act. The rule provides two alternative options for the issuer:

- notice and access
- full set delivery

The form and content of the required notice is set forth in the rule and is referred to as "Notice of Internet Availability of Proxy Materials."

Under the notice and access option, the issuer furnishes proxy materials as an electronic display on a website and does not distribute those materials in paper form to its shareholders. However, a shareholder may nevertheless request receipt of a paper copy at no charge.

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Also, under the notice and access option, the notice must be distributed to shareholders at least 40 days prior to the shareholder meeting. Unless the registrant chooses to follow the full set delivery option, it must provide record holders or respondent banks with all information in the notice in sufficient time for the record holder or respondent banks to prepare, print and send notices to beneficial owners similar to the registrant's notice at least 40 days before the meeting.

The rule also provides that all materials identified in the notice must be publicly accessible, free of charge, at the website address specified in the notice. This accessibility must commence on or before the time that the notice is sent to shareholders. These materials must remain available on that website through the conclusion of the meeting.

Under the rule, all additional soliciting materials sent to shareholders or otherwise made public after the distribution of the notice must also be made publicly accessible on that website. That public accessibility must commence no later than the day on which those materials are first sent to shareholders.

The registrant must also provide shareholders with a means to execute a proxy at the time the notice is distributed to them. This means of access can take the form of voting the proxy via the internet or telephone, subject to further safeguards to the voting process and privacy of individual shareholders.

The rule sets forth specific text that must be a part of the notice. It also requires that the notice include the date, identification of each separate matter on the agenda and the issuer's recommendations, if any, regarding those matters. However, the notice must not include supporting statements. The notice must further list the materials made available on the specified website, and a toll-free telephone number, an email address and internet website where the shareholder can request copies of the proxy statement, annual report and form proxy relating to future shareholder meetings, including the one for which proxies are solicited.

The notice must also include any control or identification number that a shareholder needs to access the shareholder's form proxy and instructions on how to access that proxy. However, those instructions must not enable the shareholder to execute the proxy without having access to the proxy statement and annual report. Finally, the notice must include information on how to obtain directions to enable the shareholder to attend the meeting and vote in person.

The notice must not be incorporated into another document, with one exception. Under the rule, it may be combined with a notice of shareholder meeting required under state law, unless state law prohibits such incorporation.

The rule further requires, with limited exception, that the notice must be sent separate from other types of shareholder communication. One of these exceptions allows the registrant to send a form proxy to a shareholder if at least 10 calendar days have passed since the date the registrant first sent the notice to shareholders. However, in this instance, the form proxy must be accompanied by a copy of the notice. In the alternative, a form proxy may be sent to a shareholder if accompanied or preceded by copies (via the same medium) of the proxy statement and annual report.

A copy of the notice must be filed with the SEC. That filing must be not later than the date the registrant first sends the notice to shareholders.

A person other than a registrant soliciting proxies in the context of the registrant is also subject to the rule, with limited modification of some of its terms. For example, such a person is required to provide copies of its proxy materials only to shareholders to whom the person has sent a notice. The content of that person's notice may be different than that described previously for the registrant. For example, if at the time of filing the person is not aware of all matters on the registrant's agenda for the meeting, the person's notice must provide a clear and impartial identification of each such matter to the extent known by the person.

Under the full set delivery option, an issuer may accompany the notice with a full set of proxy materials. Or, the issuer may in this context deliver the full set of proxy materials without the notice if all of the information required by the notice is incorporated into the proxy statement and the form proxy. In this instance, the rule provides that "full set of proxy materials" includes the proxy statement, annual report and form proxy.

Under the full set delivery option, the rule provides that the issuer need not comply with the previously described 40 day delivery requirement and obligation to provide paper copies of proxy materials. Furthermore, under this option, an issuer need not include in its notice, proxy statement or form proxy certain statements specified for the notice and otherwise need not comply with certain other instructions, both set forth elsewhere in the rule.

In the adopting release for the rule, the SEC describes the background and basis for requirements of the rule. The prudent issuer will review carefully all provisions of the rule and the release before selecting one of the two options to follow in preparing the appropriate notice and proxy materials.

Certain registrants having large market values for their equity common stock (called "large accelerated filers" under the Exchange Act) and persons involved with proxy solicitations pertaining to those filers first became subject to the rule on January 1, 2008. Registrants who are not large accelerated filers and persons involved

with proxy solicitations pertaining to those registrants became subject to the rule on January 1, 2009.

A review of proxy materials filed with the SEC from selected large accelerated filers and other issuers points to advantages some of them see in choosing the notice and access option. Some filers have cited avoidance of costly printing and mailing fees by making proxy materials available for review and by allowing voting via the internet. Others have argued that this option allows the issuer to be more environmentally friendly by avoiding use of natural resources in such printings and distributions.

As more shareholders become comfortable in reviewing corporate information (including proxy materials) on line, the new procedure provided through the rule should promote timely and efficient access to, and less costly preparation and distribution of, that information. That result should also promote a timely informed investing public.

Perhaps at some point in the not too distant future, most investors will, in anticipation of proxy solicitation season, look forward to getting proxy materials on their investments and to voting on shareholder meeting matters, both via the internet. At that time, they may also be relieved in knowing they are no longer subject to the aggravation of receiving voluminous paper proxy materials, choking their mail boxes as in the not-so-good-old-days of the past. Time and advancement of communication technology will tell!