

# LEGAL UPDATE

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## **MANDATORY INTERNET PROXY RULES**

In our *Legal Update* dated April 4, 2007, entitled “Internet Availability of Proxy Materials”, we informed readers that the Securities and Exchange Commission (the “Commission”) had adopted amendments to the proxy rules under the Securities Exchange Act of 1934 (the “Act”) to provide a “Notice and Access” model, allowing public companies to satisfy proxy delivery obligations by posting materials on the Internet and providing shareholders with notice of the availability of the materials. When introduced, use of the Notice and Access Model was voluntary; however, the Commission further amended the proxy rules in July 2007 to require public companies (subject to a phase-in period for non-accelerated filers) to post their proxy materials on the Internet. Companies may comply by choosing from two alternatives, the “notice only” option or the “full set” delivery option. This *Legal Update* discusses the Commission’s current requirements for Internet availability of proxy materials.

Large accelerated filers, as defined by Rule 12b-2 of the Act (not including registered investment companies), must comply with the Notice and Access Model for solicitations beginning on or after January 1, 2008. All other issuers (including registered investment companies) and soliciting persons must comply with the model for solicitations beginning on or after January 1, 2009.

### **BACKGROUND**

The Commission adopted the Notice and Access Model in an effort to significantly reduce the printing and mailing costs associated with

furnishing proxy materials to shareholders and to promote the use of the Internet as a reliable and cost-efficient means for issuers (and other soliciting persons such as in the case of shareholder proxy proposals) to make proxy materials available to shareholders. The Notice and Access Model also provides all shareholders with the ability to choose the means by which they access proxy materials, including via paper, e-mail or the Internet, while still affording issuers and other soliciting persons flexibility in determining how to furnish their proxy materials to shareholders and generally improves the efficiency of the proxy process and shareholder communication. For the purposes of this memorandum and as described in the Commission’s final rules, the term “proxy materials” includes proxy statements on Schedule 14A, proxy cards, information statements on Schedule 14C, annual reports to security holders required by Rules 14a-3 and 14c-3 of the Exchange Act, notices of shareholder meetings, additional soliciting materials, and any amendments to such materials.

The Notice and Access Model must be made available for all matters submitted to a vote of shareholders except in conjunction with a proxy solicitation related to a business combination transaction, for which issuers are still required to deliver proxy materials in paper form.

### **PUBLIC COMPANIES AND THE NOTICE AND ACCESS MODEL**

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

The Notice and Access Model as amended in July 2007 provides soliciting parties two options to furnish proxy materials to shareholders: the “notice only” option and the “full set delivery” option.

Under the “notice only” option, as more fully described below, the issuer must comply with the same requirements that the Commission adopted in connection with the Notice and Access Model summarized in our April 4, 2007 Legal Update. If this option is selected, a soliciting party must post its proxy materials on an Internet Web site and send a notice to shareholders informing them of the electronic availability of the proxy materials at least forty (40) days prior to the shareholders meeting. An issuer using this option must then supply proxy materials in paper form to shareholders that request the materials.

Under the “full set delivery” option, a soliciting party must send to shareholders a notice of the Internet availability of proxy materials accompanied by a full set of proxy materials in paper form (or incorporate all of the information required to appear in the notice of the internet availability into the proxy statement and proxy card) and post the proxy materials on a publicly-accessible Web site no later than the date on which the Notice is first sent to shareholders.

An issuer choosing to furnish proxy materials to shareholders via the “notice only” option must send a Notice of Internet Availability of Proxy Materials (the “Notice”) to shareholders clearly indicating that the proxy materials are available and providing an explanation of how to access the materials. An issuer electing the “full set delivery” option may send the Notice, accompanied by a full set of the proxy materials, or, if all of the information otherwise required in the Notice is included in the proxy statement or proxy card, the issuer electing the “full set delivery” option is not required to send a separate Notice. Issuers utilizing the “notice only” option must send the Notice to shareholders forty (40) calendar days or more in advance of the

shareholder meeting or if there is no meeting, forty (40) calendar days or more in advance of the date that written consents or authorizations will effect the corporate actions. Under the “full set delivery” option, because shareholders do not need time to request paper or e-mail copies of the proxy materials, the issuer is not required to send the Notice and the full set of proxy materials at least forty (40) days prior to the shareholders meeting. Instead, proxy materials in paper form must be sent to shareholders within the time periods prescribed in the company’s governing documents.

For issuers using the “notice only” option, in addition to explaining how a shareholder can request the proxy materials, the Notice must also explain how a shareholder can request a paper or email copy of all proxy materials distributed by the issuer under the Notice and Access Model in the future. Issuers using the “full set delivery” option need not provide a means for shareholders to request another set of the proxy materials as paper copies of the materials were furnished as part of the issuer’s initial distribution. The form of the Notice is “other soliciting material” that the issuer must file with the Commission under Rule 14a-6(b) no later than the date that it is first sent or given to shareholders.

The following information must be stated in the Notice 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].**

- 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] [annual report to security holders] [is/are] available at [Web site address].
- If you want to receive a paper copy 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 or, if a corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer’s recommendations regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- (1) A toll-free telephone number; (2) an e-mail address; and (3) an Internet Web site address where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;\*
- Any control/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\*
- Information on how to obtain directions to be able to attend the meeting and vote in person.

**\* Not required for issuers using the “full set delivery” option.**

If the issuer is providing an information statement pursuant to Regulation 14C or is seeking to effect a corporate action by written consent, then the appropriate changes must be made to the required information on the Notice listed above.

Issuers may also include a statement in the Notice advising shareholders that they are not required to provide any personal information besides the identification or control number provided in the Notice, if any, to execute the proxy.

The Notice under the “notice only” option must contain instructions on how to access the proxy card, including any control or identification numbers necessary for the shareholder to execute a proxy. However, the means to execute a proxy, such as a telephone number, that would enable the shareholder to execute a proxy without having access to the proxy statement and annual report may not be included in the Notice, although a telephone number for executing a proxy may be provided on a proxy card sent ten (10) calendar days after the Notice is sent. The Notice under the “full set delivery” option does not contain instructions on how to access the proxy card because the proxy card and other proxy materials are sent to shareholders with the Notice under this option.

## **2. Proxy Card**

As indicated above, under the “notice only” option, a proxy card may not be furnished with the initial Notice for a particular solicitation. However, at the time the Notice is sent, a means for the shareholders to execute a proxy must be available. In order for the other soliciting documents to be electronically available at the time when the shareholders receive the Notice, the proxy card, along with the proxy statement and any annual report, must be posted on the

Internet site no later than the time at which the Notice is sent to the shareholders. An issuer can satisfy the requirement of providing shareholders with a method to execute proxies as of the time the Notice is first sent to shareholders 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 Internet site. The issuer may, but is not required to, send a proxy card to the shareholders ten (10) or more days after sending the initial Notice.

The “notice only” option of the Notice and Access Model does not require that the issuer send a copy of the proxy statement and an annual report, if any, to the shareholders along with the proxy card, but if a proxy card is sent without the proxy statement or any annual report, the proxy card must be accompanied by another copy of the Notice which, without referring to the first Notice sent, specifies the Internet site where the proxy materials are posted.

Under the “full set delivery” option a proxy card will have already been included in the full set of proxy materials initially delivered to the shareholder. However, an issuer relying on the “full set delivery” option may subsequently deliver another copy of the proxy card to shareholders who have not yet returned the card as a reminder for shareholders to vote.

### **3. Posting Proxy Materials on the Internet**

The Internet Web site address identified on the Notice must be specific enough so that shareholders are led directly to the proxy materials and do not have to browse the Web site in order to find them. The Web site used by the issuer to post the proxy materials must be a publicly-accessible Internet Web site that is not the Commission’s EDGAR site. The issuer utilizing the Notice and Access model must post the proxy materials on the specified Web site by the time the Notice is sent to the shareholders, and the materials must remain posted and

accessible on that Web site through the conclusion of the specified meeting or corporate action, at no charge to the shareholder. Furthermore, additional soliciting materials, if any, that are required to be filed under Rule 14a-6(b) must be posted on the same Web site on which the proxy materials are posted no later than the day on which the additional soliciting materials are first sent to the shareholders or are made public.

The electronically-posted proxy materials must be presented in a format that allows the shareholder to either print the documents or easily view them on-line. The Commission recognizes that this may require the documents to be posted in multiple formats, and suggests that issuers post documents in a format that is substantially identical to the paper version of the materials, such as PDF, as well as a format that is easily searchable, such as HTML. If a shareholder requires additional software to view the documents, the Web site must contain a link that allows the shareholder to download the software at no cost.

### **4. Requests for Paper or E-mail Copies of Proxy Materials**

Under the “notice only” option, an issuer must provide paper or e-mail copies at no charge to shareholder requesting such copies and must allow shareholders to make a permanent election to receive paper or e-mail copies of proxy materials distributed in connection with future proxy solicitations. The issuer must provide a toll-free telephone number, e-mail address and Internet web site address as a means by which a shareholder can request a copy of the proxy materials for the particular shareholder meeting referenced in the Notice or make a permanent election to receive copies of the proxy materials on a continuing basis with respect to all meetings. The issuer may include a pre-addressed, postage-paid reply card with the Notice that shareholders can use to request a copy of the proxy materials. If a shareholder requests a paper or e-mail copy

of the proxy statement, annual report, if any, or proxy card, the issuer must send a paper or e-mail copy, as applicable, of those proxy materials within three (3) business days after receiving the request. The issuer must provide a paper or e-mail copy of the proxy materials within three (3) days after receiving the request even if the request is made after the date of the shareholder meeting or corporate action to which the proxy materials pertain, but only up until one year after the conclusion of the relevant meeting or corporate action.

Under the “full set delivery” option, because the issuer already has provided shareholders with a full set of proxy materials, the issuer is not required to provide the shareholder with copies of the proxy materials upon request.

A shareholder’s decision to forego requesting a paper or e-mail copy of the proxy materials for a particular meeting does not bar that shareholder from electing to receive a paper copy for a subsequent meeting. However, shareholders do have the option of making a single election to receive a paper or e-mail copy of proxy materials on a continuing basis without having to make a specific request for each solicitation.

## **5. Use of the Notice and Access Model by Intermediaries and Soliciting Shareholders**

### **Intermediaries**

The Commission’s new rules require that intermediaries between the issuer and beneficial owners, such as banks, associations, and registered brokers and dealers, utilize the Notice and Access Model. The issuer or other soliciting person must provide the intermediary with the information necessary for the intermediary to prepare its own Notice for its customers, the beneficial owners. If the issuer elects to use the “notice only” option, the issuer must provide the intermediary with the relevant information in sufficient time for the intermediary to prepare and send the Notice to the beneficial owners and

post the proxy materials on the Web site forty (40) days before the date of the shareholder meeting. If a soliciting person other than the issuer elects to use the “notice only” option, the intermediary must send the Notice to shareholders by the later of forty (40) calendar days prior to the meeting or ten (10) calendar days after the issuer first sends its proxy materials to investors.

If the issuer elects to use the “full set delivery” option to deliver proxy materials to beneficial owners, the intermediary must either prepare a separate Notice and forward it with the proxy materials, or incorporate any information required in the Notice, but not appearing in the issuer’s proxy statement, in its request for voting instructions.

The requirements for an intermediary’s Notice to beneficial owners are substantially similar to the requirements for the issuer’s Notice that is sent to registered owners, although the appropriate revisions must be made to reflect that the recipients of the Notice are beneficial, not registered, holders.

The intermediary may direct the beneficial owner to the issuer’s Web site or to the intermediary’s Web site to access the proxy materials. Instructions for how to access the request for voting instructions, including any relevant identification or control numbers, must be contained in the intermediary’s Notice, although a means, such as a telephone number, that would allow a beneficial owner to provide voting instructions without having access to the proxy statement may not be included. Ten (10) days after the intermediary’s Notice is sent, the intermediary is required to send a copy of the request for voting instructions to the beneficial owners if such copy is requested, and the instructions must include a copy of the proxy statement.

The intermediary, under the “notice only” option, must inform the beneficial owners of a means of

requesting paper or e-mail copies of proxy materials from the intermediary itself, not from the issuer. Within three (3) business days of receiving a request for a copy of the proxy materials, the intermediary must request a copy from the issuer. Similarly, within three (3) days of receiving the materials from the issuer, the intermediary must forward the materials to the requesting beneficial owner. Under the “full set delivery” option, intermediaries are not required to provide shareholders with a paper copy of proxy materials upon request as paper copies of the materials have already been furnished to the shareholders.

### **Soliciting Shareholders**

Soliciting persons other than the issuer, most likely a shareholder waging a proxy contest, must also employ the Notice and Access Model. Unlike the issuer, a soliciting person does not have to solicit proxies from each shareholder, but can instead target a select group of shareholders, such as shareholders who own a certain percentage of the company or shareholders who have not requested paper copies of proxy materials. If a shareholder to whom the soliciting person other than the issuer sends a Notice pursuant to the “notice only” option requests a

paper or e-mail copy of the proxy statement, the soliciting person must provide it. A soliciting person other than the issuer who utilizes only the “notice only” option of the Notice and Access Model is required to send out its Notice by the later of forty (40) calendar days prior to the meeting or ten (10) calendar days after the issuer first sends out its proxy statement or Notice to the shareholders. This timing requirement and the requirement to furnish paper or email copies of proxy materials to shareholders upon request do not apply to soliciting parties other than the issuer utilizing the “full set delivery” option because shareholders do not need time to request paper or e-mail copies of the proxy materials and paper copies have been furnished to shareholders in the soliciting party’s initial mailing.

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The foregoing is intended to summarize the principal issues relating to the Commission’s final rules regarding the Internet availability of proxy materials under the Securities Exchange Act of 1934. We would be happy to furnish you with the complete text of the Commission’s final rules upon request or answer any questions you may have.

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