

## SECURITIES ALERT

### E-PROXY IS HERE – WHAT COMPANIES NEED TO KNOW



The SEC's "e-proxy" rules, which took effect July 1, 2007, have many companies wondering what they need to do now. This notice and access method, commonly known as "e-proxy," allows companies and other soliciting persons to disseminate proxy materials<sup>1</sup> by posting such materials on an Internet Web site and sending shareholders a notice of the availability of the materials. This method of proxy solicitation is available for any solicitation except those related to business combination transactions.

Although companies may voluntarily utilize the notice and access method for delivery of proxy materials for shareholder meetings held on or after August 10, 2007, the SEC released final rules on July 26, 2007, making e-proxy mandatory in the future. This new mandate will apply to "large accelerated filers," not including investment companies, beginning January 1, 2008, and will apply to the remainder of reporting companies, including investment companies, beginning January 1, 2009. Under these new rules, companies will have two options for providing proxy materials to shareholders: (1) the "notice only" option and (2) the "full set delivery" option. Under the notice only option, a company must comply with the requirements discussed below, which are the same requirements as currently provided under the voluntary notice and access method. These requirements include, among other things, sending all shareholders a Notice of Internet Availability of Proxy Materials (Notice) at least 40 days before the meeting date, posting the proxy materials on an Internet Web site and sending copies of the proxy materials to shareholders upon request, free of charge. Under the full set delivery option, a company can still use the traditional means of proxy delivery by sending a full set of proxy materials to shareholders, with the only additional requirements being that the information required in the Notice must either be provided in the proxy materials or in a separate Notice that accompanies the full set of proxy materials, and the company must post the proxy materials on an Internet Web site in the manner described in this client alert no later than the date the Notice was first sent to shareholders, which date does not have to be at least 40 days prior to the shareholder meeting date.

<sup>1</sup> Proxy materials include notices of shareholder meetings, Schedule 14A proxy statements and consent solicitation statements, forms of proxy (i.e. proxy cards), Schedule 14C information statements, annual reports to security holders, additional soliciting materials, and any amendments to such materials that are required to be furnished to shareholders.

Because implementing either of these options will require additional planning and coordination by companies, this client alert sets forth actions companies need to take or consider to comply with the new methods of proxy distribution.

## **NOTICE OF INTERNET AVAILABILITY OF PROXY MATERIALS**

The notice only option requires a company to send a Notice to all shareholders at least 40 calendar days in advance of the shareholder meeting date or the date of the corporate action.<sup>2</sup> Companies choosing the full set delivery option must either include the information required in the Notice in the proxy materials or send a separate Notice that accompanies the full set of proxy materials, but do not need to comply with the 40-day deadline. Companies must also file the Notice with the SEC as additional soliciting material no later than the date on which it is first sent or given to shareholders. The Notice must be in plain English and include the following information:

- A prominent legend in boldfaced type that states—  
  
**“Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert 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.**<sup>3</sup>
  - **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site 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 [Insert a date] to facilitate timely delivery.”**<sup>4</sup>
- the date, time and location of the meeting or, if 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 company’s recommendations, if any, regarding those matters, but no supporting statements
- a list of the materials being made available at the specified Web site
- (1) a toll-free 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<sup>5</sup>

<sup>2</sup> To calculate the 40-day period, the first day of the period is the day that the company sends the Notice and the 40th day is the day prior to the meeting or date of the company action. Because these rules require the Notice to be sent at least 40 days in advance of the shareholder meeting date, and the definitive proxy materials must also be filed and posted to the Web site at or prior to the time the Notice is sent, companies need to revise their annual meeting/proxy statement timelines to make sure the timelines account for this 40-day period.

<sup>3</sup> The language in this bullet point does not need to be included in the Notice if the company is using the full set delivery option.

<sup>4</sup> The language in this bullet point does not need to be included in the Notice if the company is using the full set delivery option.

<sup>5</sup> The language in this bullet point does not need to be included in the Notice if the company is using the full set delivery option.

- 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<sup>6,7</sup> and
- information about attending the shareholder meeting and voting in person.

The Notice may only include the information set forth above, and under the notice only option may not be accompanied by any other shareholder communication, not even a proxy card. In contrast, a company relying on the full set delivery option must deliver a full set of proxy materials along with the Notice. Notwithstanding the foregoing, any state law mandated notice of shareholder meeting can either be included in or accompany the Notice. The Notice may also include a warning to shareholders advising them that no personal information other than identification or control numbers is necessary to execute the proxy. Further, a pre-addressed, postage-paid reply card for requesting a copy of the proxy materials may accompany the Notice.

The e-proxy rules allow a company to “household” the Notice, thereby allowing a company to send a single copy of the Notice to one or more shareholders residing at the same address. However, a company must provide separate identification and control numbers, if it uses such numbers, to each account at the shared address and must allow each householded account to execute separate proxies. Alternatively, a company may send separate Notices for each householded account in a single envelope.

## WEB SITE POSTING OF PROXY MATERIALS

Both options require companies to post all proxy materials, other than additional soliciting materials<sup>8</sup>, on a publicly accessible Web site as specified in the Notice no later than the time at which the Notice is sent to shareholders. This ensures that the materials are electronically available at the time shareholders receive the Notice. A company must keep the proxy materials accessible on the Web site, at no charge to shareholders, through the time of the shareholder meeting. The Web site address must be specific enough to take the person directly to the proxy materials, not merely to a home page that would require shareholders to browse the Web site to find the materials. The Web site address cannot be the SEC’s EDGAR Web site.

The electronically posted proxy materials must be substantially identical to the paper copies of the proxy materials and must be presented on the Web site in a format, or formats, convenient for both printing and viewing online. In that regard, a company may need to provide proxy materials in two formats. For reading the proxy materials online, the SEC is looking for a readily searchable format, such as HTML. For printing the proxy materials, the format should be substantially identical to the paper version of the materials, such as PDF. If a shareholder needs additional software to view the document, the Web site must also contain a link enabling the shareholder to obtain the software free of charge. Companies should make an effort to produce a user-friendly Web site for their shareholders, as the experience shareholders have the first time they use this process will likely determine whether they will use it in the future.

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<sup>6</sup> For example, a company cannot include in the Notice a telephone number through which a shareholder can place a proxy vote because it would enable the shareholder to execute a proxy without having access to the proxy materials.

<sup>7</sup> The language in this bullet point does not need to be included in the Notice if the company is using the full set delivery option.

<sup>8</sup> Additional soliciting materials used after the Notice is sent must be posted on the Web site no later than the day on which such materials are first sent or given to shareholders or made public.

A company needs to maintain the Web site on which the proxy materials are posted in a manner that does not infringe on the anonymity of the shareholder accessing the Web site. For example, the Web site may not track the identity of persons accessing the site to view the proxy materials, and cannot require the installation of “cookies” or other software that might collect information about the person. Companies need to determine what, if any, tracking tools are being used on their Web site to make sure they do not run afoul of these new rules.

### **DISTRIBUTION OF PROXY CARD**

Under the notice only option, a company is not permitted to furnish the proxy card with the initial Notice. But a company must provide shareholders with a method to execute proxies as of the time the Notice is first sent to shareholders. A company can satisfy this requirement through a variety of methods, including providing an electronic voting platform, a toll-free telephone number for voting<sup>9</sup>, or a printable or downloadable proxy card on the Web site. This provides a shareholder who accesses proxy materials on the Web site the ability to execute a proxy as soon as he or she is able to electronically access the proxy statement. Under the full set delivery option, a proxy card or request for voting instructions will be included in the full set of proxy materials so companies need not provide another means for voting at the time the Notice is sent unless they choose to do so.

A company choosing the notice only option may also choose to send a proxy card to shareholders 10 calendar days or more after sending the Notice. If a company chooses to send a proxy card, a proxy statement and annual report need not accompany the proxy card provided a copy of the Notice is included with the proxy card, thereby allowing shareholders to access the specified Web site without referring to the earlier Notice.

### **REQUESTS FOR COPIES OF PROXY MATERIALS**

Upon request by a shareholder, a company choosing the notice only option must deliver a copy of the proxy materials, in paper or by e-mail, as requested, to the shareholder within three business days after receiving the request.<sup>10</sup> Companies 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 and must maintain records of those elections. The rules obligate companies to provide copies of the proxy materials for one year after the conclusion of the shareholder meeting or corporate action to which the materials relate. If a paper copy is requested, a company must use first-class mail or another reasonably prompt means of delivery.<sup>10</sup> To minimize the burden on shareholders, once a shareholder has elected to receive proxy materials in paper or e-mail format, a company is required to deliver all materials to that shareholder in such format unless the shareholder subsequently revokes that election. Companies relying on the full set delivery option are not required to provide paper or e-mail copies of proxy materials upon request because such materials would already have been provided to shareholders.

### **ROLE OF INTERMEDIARIES**

Because many shareholders beneficially own shares that are held of record by brokers, banks and other intermediaries, the new rules allow companies to require intermediaries to also utilize this new method for proxy distribution. In doing so, companies must provide intermediaries with all information necessary for them to prepare and send their own Notice. A company complying with the notice only option must provide the information to the intermediary in

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<sup>9</sup> If a telephone number for executing a proxy is provided, the number may appear on the Web site, but not in the Notice because it would enable a shareholder to execute a proxy without having access to the proxy statement.

<sup>10</sup> With respect to requests for copies received after the conclusion of the shareholder meeting, a company is not required to use first-class mail or respond within three business days.

sufficient time for the intermediary to prepare and send the Notice and post the proxy materials on the Web site at least 40 calendar days before the meeting.<sup>11</sup> Under the full set delivery option, a company need only provide the information to the intermediary in sufficient time for the intermediary to prepare and send the Notice along with the full set of proxy materials provided by the company. The intermediary's Notice must generally contain the same information as the company's Notice, with certain revisions to reflect the difference between registered holders and beneficial owners.

Under the notice only option, the intermediary must also forward paper or e-mail copies of the proxy materials upon request, permit the beneficial owners to make a permanent election to receive paper or e-mail copies of the proxy materials, keep records of beneficial owner preferences, provide proxy materials in accordance with those preferences and provide a means to access a request for voting instructions for beneficial owners no later than the date the Notice is first sent.

### STATE LAW CONSIDERATIONS FOR NOTICE ONLY OPTION

In addition to the requirements set forth in the e-proxy rules, companies choosing the notice only option also need to ensure that compliance with such rules will not violate applicable state laws or the company's charter documents. For example, certain state laws and charter documents may not allow or provide for electronic delivery of certain documents to shareholders or execution of a proxy via an Internet voting platform or by telephone.<sup>12</sup> In fact, a potential state law conflict relating to the electronic transmission of the annual report may already exist for California corporations and other corporations that either have their principal executive offices in California or regularly hold board meetings in the state.<sup>13</sup> Although the SEC did not intend for the e-proxy rules to contravene any applicable state law requirement for the delivery of a document related to a shareholder meeting or proxy solicitation, companies need to be aware of any potential issues and make any necessary changes before using the notice only option.

### SUMMARY OF DIFFERENCES BETWEEN NOTICE ONLY OPTION AND FULL SET DELIVERY OPTION

Although the requirements for the notice only option and full set delivery option are discussed throughout this alert, the following summary highlights the primary differences between these two options.

- **Notice and Accompanying Documents.** First, the information required in the Notice differs slightly based on which option a company chooses. Under the full set delivery option, certain language relating to requesting copies of the proxy materials and accessing the proxy card does not need to be included. Further, the full set delivery option does not require a company to send a separate Notice if all of the necessary information is included in the proxy statement and proxy card. With respect to accompanying documents, the notice only

<sup>11</sup> Companies need to contact intermediaries to coordinate the proxy solicitation process and determine how many days in advance of the 40-day deadline they will require for the company to provide the information needed for the Notice. The rules require a company to provide the intermediary with the information required to be in the intermediary's Notice in sufficient time for the intermediary to prepare, print and send its Notice by the 40-day deadline. Most intermediaries are currently requiring at least five business days.

<sup>12</sup> Under the full set delivery option, as under the prior proxy rules, companies may also provide for the execution of a proxy via the Internet or by telephone, in addition to paper form, to the extent allowed under applicable state law and the company's charter documents.

<sup>13</sup> California Corporation Code Section 1501(a) requires that the board send an annual report to shareholders not later than 120 days after the close of the fiscal year. Although the statute was amended to permit sending the report by "electronic transmission by the corporation," the definition of "electronic transmission by the corporation" requires the recipient to provide an unrevoked consent and, if sent to an individual, the transmission must satisfy the requirements for consumer consent set forth in the Electronic Signatures in Global and National Commerce Act.

option does not permit a company to accompany the Notice with any other documents, except as discussed above. In contrast, the full set delivery option requires a company to deliver a full set of proxy materials along with the Notice.

- **Request for Copies of Proxy Materials.** Under the notice only option, upon request, a company must deliver to the requesting shareholder a copy of the proxy materials, in paper or by e-mail, as requested, within three business days after receiving the request. Because the company already provides shareholders with a full set of proxy materials under the full set delivery option, the company does not need to provide a shareholder with proxy materials upon request.
- **40-Day Deadline.** Under the notice only option, companies must send a Notice to all shareholders at least 40 calendar days in advance of the shareholder meeting date. A company is therefore also required to have the proxy materials posted on a Web site and filed with the SEC no later than the date on which the Notice is first sent or given to shareholders. Further, a company is required to provide intermediaries the information required in the Notice in sufficient time for the intermediary to prepare, print and send its Notice by the 40-day deadline. Under the full set delivery option, shareholders will receive a full set of proxy materials so will not need extra time to request paper or e-mail copies and therefore the 40-day deadline does not apply.
- **Proxy Card.** Under the notice only option, a company is not permitted to furnish the proxy card with the initial Notice, but must provide shareholders with a method to execute proxies as of the time the Notice is first sent to shareholders. Under the full set delivery option, because a proxy card or request for voting instructions is included in the full set of proxy materials, companies do not need to provide another means for voting at the time the Notice is sent.

## CONCLUSION

Although the e-proxy rules are currently voluntary and will not be mandatory until they are phased in beginning January 1, 2008, it is not too early for companies to begin reviewing their proxy solicitation and annual meeting process so they will be prepared to comply with these new rules. The more time and energy companies spend early in the process on revising their annual meeting timeline to reflect earlier creation of the proxy statement and related documents and adapting their Web site to comply with the new rules in a user-friendly manner, the easier it will be for companies to transition to this new method of proxy distribution. In deciding which option to use, companies should consider the differences between the two options as discussed above, and in particular weigh the potential savings in printing and mailing costs afforded by the notice only option against the burden of having to send the Notice to shareholders at least 40 days prior to the shareholder meeting date

## CONTACT INFORMATION

If you have questions about the SEC's e-proxy rules, please contact:

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