

## SEC Adopts Mandatory Internet Availability of Proxy Materials and Annual Reports

The SEC recently adopted final rules that will require proxy materials and annual reports to be posted on a publicly available website.<sup>1</sup> Companies will have the option to disseminate these materials either through a “notice only” option by sending shareholders a notice of an Internet posting of these materials or through a “full set delivery” option, which involves delivery of traditional materials in paper form, together with information about the Internet availability of those materials. As a result, companies that wish to continue to distribute paper proxy materials will need to make only minor modifications to their existing practices.

Companies that are “large accelerated filers” must comply with the final rules with respect to proxy solicitations commencing on or after January 1, 2008. Companies that are not large accelerated filers, registered investment companies and persons soliciting in opposition to a company’s board of directors must comply with the final rules with respect to proxy solicitations commencing on or after January 1, 2009 (and may voluntarily comply on or after January 1, 2008). The final rules do not apply to proxy solicitations in connection with business combination transactions.

### Notice Only Option — The Internet Notice

A company utilizing the notice only option will be required to send a “Notice of Internet Availability of Proxy Materials” (the “Internet Notice”) in plain English to all shareholders no later than 40 calendar days in advance of a meeting date. If action is to be taken by written consent, the Internet Notice must be sent no later than 40 calendar days prior to the date the consents may be used to effect the corporate action. The company’s Internet Notice, which must be filed with the SEC as additional soliciting material, is required to include:

- A prominent legend in bold-face type (using the language specified in the final rules) encouraging shareholders to access and review the proxy materials before voting;
- The date, time and location of the shareholders’ meeting or, if action is to be taken by written consent, the earliest day on which the consents may be used to effect the corporate action;
- A clear and impartial identification of each separate matter to be acted on and the company’s recommendations regarding those matters, to the extent the company makes such a recommendation (but no statements supporting the recommendations);
- A list of the proxy materials being made available (which may include the annual report to shareholders) and the website address at which those materials may be found;

*If you have any questions regarding the matters discussed in this memorandum, please call your usual contact at Skadden, Arps.*

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<sup>1</sup> The final rules are set forth in SEC Release No. 34-56135 and are available at <http://sec.gov/rules/final/2007/34-56135.pdf>.

- A toll-free telephone number, an e-mail address and an Internet website where a shareholder may request a paper or e-mail copy of the proxy materials (at no charge) for the particular meeting as well as for future meetings, and a date by which that request should be made to facilitate timely delivery of the materials;
- Instructions on how to access the form of proxy (provided that the instructions do not enable a shareholder to execute a proxy without having access to the proxy statement and, if required, annual report), including any control or identification numbers needed to access the form of proxy; and
- Information on how to obtain directions so that the shareholder may attend the meeting and vote in person.

The Internet Notice may be combined into a single document with any notice of meeting required under state corporate law, but may not be combined with any other document. The Internet Notice also may include a statement that no personal information other than the identification or control number provided is necessary to execute a proxy.

The Internet Notice may be sent together with any notice of meeting required under state corporate law (if the two notices are not combined) and with a pre-addressed, postage-paid reply card requesting a paper or e-mail copy of the proxy materials, but otherwise may not be accompanied by any other types of shareholder communication, including a proxy card. A company may send a proxy card to shareholders ten or more calendar days after it sends the initial Internet Notice, and that proxy card must be accompanied by another copy of the Internet Notice. However, a company may send a proxy card to shareholders fewer than ten calendar days after it sends the initial Internet Notice if the proxy card is accompanied, or has been preceded, by a copy of the proxy statement and annual report (if required) through the same delivery medium as the proxy card (*i.e.*, paper or e-mail).

The rules allow a company to “household” the Internet Notice (*i.e.*, send one notice to one or more shareholders residing at the same address). However, because each household account must be able to execute a separate proxy (as is currently required), a company must provide separate identification or control numbers, if such numbers are used, for each account at the shared address. Alternatively, a company may send separate Internet Notices for each household account in a single envelope.

### **Notice Only Option — Website Posting**

All proxy materials to be furnished through the notice only option must be posted to the publicly accessible website specified in the Internet Notice (which cannot be the SEC’s EDGAR website) by the time the company sends the Internet Notice to shareholders (with additional soliciting materials posted to the website on the date those materials are first sent to shareholders or made public).<sup>2</sup>

<sup>2</sup> The requirement to send the Internet Notice no later than 40 days in advance of the meeting date, together with the requirement to have the definitive proxy materials posted to the website by the time the Internet Notice is sent to shareholders and the practical desire to build time into any schedule for unexpected delays, means that companies opting to use the notice only option likely will need more time between the filing of definitive proxy materials and the shareholders’ meeting than called for by many companies’ existing schedules. Moreover, the fact that there are no exceptions to the requirement that the Internet Notice be sent 40 days in advance of the meeting date means that unexpected delays in filing definitive proxy materials (due to SEC review of a preliminary proxy statement or otherwise) and the corresponding delay in sending the Internet Notice could lead companies to abandon plans to use the notice only option in favor of the full set delivery option.

The materials must remain accessible on that website, at no charge to shareholders, through the time of the shareholders' meeting. The website address must be specific enough to take the user directly to the proxy materials, rather than to a home page or another section of the website (*e.g.*, the investor relations page). The posted materials must be substantially identical (including all graphics, charts and tables) to the paper copies of the proxy materials that would be furnished to shareholders, must be presented in a format or formats convenient for both printing and viewing online and must be readily searchable. The SEC notes that, with technology commonly in use today, this may require posting the materials in two different formats.

Except as noted below with respect to additional soliciting materials, a company may elect to use the notice only option for some but not all of its proxy materials and annual report to shareholders. For example, a company could use the notice only alternative to distribute its proxy statement but choose to mail its annual report to shareholders. Additional soliciting materials, however, would be required to be posted on the same website on which the original proxy materials and/or the annual report are posted no later than the day on which the additional soliciting materials are first sent to shareholders or made public.

A company must maintain the website on which proxy materials are posted in a manner that does not infringe on the anonymity of shareholders accessing that website. For example, the website cannot require the installation of any "cookies" or other software that might collect information about the accessing person. As a result, companies will need to review, and potentially modify, the technical settings on their investor relations websites, and may need to create a separate website to comply with the notice only requirements.

### **Notice Only Option — Requests for Proxy Materials and Proxy Card**

Upon request from a shareholder, copies of the proxy materials (in paper or by e-mail, as requested) must be sent within three business days and, if a paper copy is requested, sent by first-class mail or other reasonably prompt means of delivery, if the shareholder request is made on or prior to the date of the company's meeting or action. If the shareholder request is made after the conclusion of the company's meeting or action (until the one-year anniversary of the meeting or action), copies of the proxy materials must still be sent, but are not required to be sent by first-class mail or within three business days. A shareholder's election to receive paper or e-mail copies of proxy materials applies to future meetings until the shareholder revokes that election.

Under the final rules, the proxy card must be accessible on the website at the time the Internet Notice is sent and the company must, on that website, concurrently provide shareholders with at least one method of executing a proxy (*e.g.*, a hyperlink for electronic voting or a telephone number). As noted above, the company may only send the proxy card itself ten calendar days or more after it sends the Internet Notice, unless the proxy card is accompanied, or has been preceded, by a copy of the proxy statement and annual report (if required) through the same delivery medium as the proxy card (*i.e.*, paper or e-mail).

### Notice Only Option — Intermediaries

Under the current proxy rules, companies are required to physically deliver their proxy materials to banks, brokers or other nominees who own “of record” for other shareholders. These “intermediaries” or their agent, generally Broadridge (formerly ADP), then forward the materials to the beneficial owners along with a request for voting instructions. Because the shares are owned of record by the intermediaries, the beneficial owners cannot vote on the company’s proxy card, but rather must instruct their intermediaries as to voting.

A company complying with the notice only option may require an intermediary to send beneficial owners the intermediary’s own version of the Internet Notice, which will direct the beneficial owner to request paper or e-mail copies of the proxy materials from the intermediary rather than the company, if such copies are desired. Delivery of the intermediary’s Internet Notice is subject to the same deadline as an Internet Notice sent by the company — 40 calendar days before the shareholders’ meeting.<sup>3</sup>

Intermediaries may choose to direct beneficial owners to the intermediary’s website to view the proxy materials, in which case the intermediary’s website must contain all of the proxy materials posted on the company’s website. In the alternative, intermediaries may direct beneficial owners to the company’s website, in which case intermediaries must make clear to the beneficial owner that the beneficial owner cannot submit a proxy through the company’s website. Regardless, the intermediary’s Internet Notice must contain instructions on how the beneficial owners may submit voting instructions to the intermediary over the Internet. The intermediary’s Internet Notice also must contain a brief description, if applicable, of the rules that permit the intermediary to vote the shares if the beneficial owner does not provide voting instructions. Finally, intermediaries must allow beneficial owners to elect to receive paper or e-mail copies of proxy materials that will be distributed in the future in reliance on the notice only model with respect to all securities (*i.e.*, not limited to the particular company’s securities) held in the beneficial owner’s account.

### Full Set Delivery Option

The final rules also permit companies to continue to deliver the traditional full set of paper proxy materials, as long as companies also inform shareholders that proxy materials are available on the Internet, and makes them so available.

Companies that choose the full set delivery option must provide shareholders with a document similar to the Internet Notice required to be provided under the notice only option, although this document:

- need not encourage shareholders to access and review the proxy materials available on the Internet before voting;

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<sup>3</sup> The rules require the company to provide the intermediary with the information required to be in the intermediary’s Internet Notice “in sufficient time” for the intermediary to prepare, print and send its Internet Notice at least 40 calendar days before the meeting date. This will likely require significantly more coordination between companies and intermediaries than is currently the case.

- need not contain a toll-free telephone number, an e-mail address and an Internet website where a shareholder may request a paper or e-mail copy of the proxy materials (at no charge) for the particular meeting as well as for future meetings, and a date by which that request should be made to facilitate timely delivery of the materials; and
- need not contain instructions on how to access the form of proxy.

Companies may either set forth the required information in a separate document or may integrate the information into the other proxy materials, and may house proxy materials in a similar manner as permitted under the notice only option.

In addition to providing shareholders with this information, companies must make all proxy materials available on a website in the same manner as in the notice only option. However, unlike under the notice only option, companies utilizing the full set delivery option need not provide shareholders with copies of the proxy materials upon request. Intermediaries must send beneficial owners the intermediary's own version of the Internet Notice, as under the notice only option. In addition, the proxy materials need not be sent at least 40 calendar days in advance of a meeting date (or, if action is to be taken by written consent, 40 calendar days prior to the date the consents may be used to effect the corporate action), and there is no requirement that shareholders be provided with another means for voting other than a proxy card or request for voting instructions.

### **Persons Soliciting in Opposition to the Company**

The final rules provide persons soliciting in opposition to a company's board of directors (a "soliciting person") with the option of utilizing the notice only alternative in generally the same manner as that available to the company. The significant differences are:

- The deadline for a soliciting person to send an Internet Notice is the later of (a) 40 calendar days prior to the meeting (or, if action is to be taken by written consent, 40 calendar days prior to the date the consents may be used to effect the corporate action) or (b) ten calendar days after the company first sends out its proxy statement or Internet Notice;
- Because a soliciting person may launch its solicitation before the company makes its own proxy materials public, and thus before the full meeting agenda is known, the soliciting person's Internet Notice need only include known agenda items; and
- If a soliciting person provides shareholders with a proxy card soliciting proxies for some, but not all, of the agenda items, the soliciting person's Internet Notice must clearly state whether a shareholder submitting a proxy card for only some agenda items would revoke any proxies previously granted, including for items not covered by the soliciting person's proxy card and which the shareholder may not intend to revoke.

The final rules also require companies electing to provide shareholder lists to soliciting persons under Rule 14a-7 to indicate which shareholders have made an election to receive paper copies of proxy materials. However, in this context, companies would not be required under the proxy rules to provide the soliciting person with e-mail addresses of shareholders consenting to e-mail delivery of documents. If, instead, companies elect under Rule 14a-7 to send soliciting persons'

Internet Notices, the rules provide that companies must refrain from sending Internet Notices to shareholders who have elected to receive paper copies of proxy materials, in which case companies would send paper copies of proxy materials to those shareholders if paper copies are provided by soliciting persons. The final rules also make clear that intermediaries must distribute proxy materials on behalf of soliciting persons.

In lieu of complying with the notice only option, soliciting persons may utilize the full set delivery option in the same manner as that available to the company.