

Mandatory Electronic Posting Of Proxy Materials

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The Securities and Exchange Commission adopted on July 27, 2007, amendments to the proxy rules that require issuers (and other soliciting persons) to post the availability of proxy materials on an Internet website and to provide a notice to shareholders that advises them of the availability of these materials on the Internet. This memorandum discusses the two methods available to issuers for distributing proxy materials, website requirements for proxy material availability on the Internet, and dates for compliance with the new rules.

Methods of Distribution

1. Notice Only Option

Under the "notice only" option, an issuer must post its proxy materials on an Internet website and send shareholders by mail a "Notice of Internet Availability of Proxy Materials."

- The Notice must inform shareholders of the electronic availability of the proxy materials. The SEC's rules provide the wording to be used in the Notice. See Exhibit A.
- The Notice must be sent at least 40 calendar days prior to the date of the shareholders meeting.
- If requested by a shareholder, the issuer must provide paper or email copies to the shareholder at no charge within three days of receiving the request. The issuer must accept requests by email, toll-free telephone and on the website. Paper proxy materials must be sent by first-class mail and not at bulk rates.
- Shareholders must be permitted to make a permanent election to receive paper or email copies of future proxy materials.
- The proxy card cannot be sent to shareholders until ten or more calendar days after the Notice is sent to shareholders. An issuer may choose to accompany the proxy card with the other proxy materials. If the proxy materials do not accompany the proxy card, another Notice must accompany the proxy card.
- The issuer must provide shareholders with a method to execute proxies at the time the Notice is first sent to shareholders. This requirement can be met by providing a toll-free telephone number, an electronic voting platform or a printable or downloadable proxy card on the website.
- The Notice may contain only the information specified by the SEC rules or required by state law.

- The Notice is considered "soliciting material" and must be filed with the SEC no later than the date it is sent to shareholders.

Advantages

- The issuer avoids the expenses of printing and mailing a full set of proxy materials to each shareholder.

Disadvantages

- The number of paper copies, and related expenses, may be difficult to predict.
- Issuers still must prepare and mail a paper Notice to all shareholders.
- Issuers must finalize proxy materials at least 40 days in advance of a shareholders meeting date because the proxy materials must be posted at the same time as the Notice is sent to shareholders. In practice, proxy materials will need to be finalized at least 45 days prior to a shareholders meeting date to allow intermediaries to deliver the Notice to shareholders whose shares are held in street name.
- There may be a decline in voting because shareholders are accustomed to receiving hard-copy proxy materials and voting by returning the proxy card by mail.

2. Full Set Delivery Option

It is important to note that issuers do not have to choose one option or the other as the exclusive means for providing shareholders with proxy materials. The rules allow the issuer to use the notice only option to provide materials to some shareholders and the full set delivery option for other shareholders.

Website Requirements

Third parties, such as proxy processing/tabulating firms and financial printers are offering platforms for issuers to post their proxy materials and translate votes. Because the new electronic delivery rules are new and there is little practicable information on how to comply with the new rules, most companies are choosing to go with a website provider rather than developing their own at this point. The following is a brief summary of the website requirements:

- Websites where proxy materials are posted must be publically accessible but not the SEC's EDGAR website.
- Website address must contain prominent hyperlinks to each of the proxy-related documents.
- Proxy materials must be available at least until the conclusion of the shareholders meeting.
- Proxy materials posted on websites must be in formats convenient for viewing and printing.

- Websites must offer shareholders the ability to execute a proxy card over the Internet, by telephone or by printing and mailing the proxy card.
- Websites must be maintained so as not to compromise the anonymity of shareholders – no cookies or spy-ware that collects personal information about shareholders.
- Websites must contain links, an email address or toll-free number so shareholders can order paper copies of the proxy materials.
- Any additional solicitation materials must be posted on the website no later than the day they are first sent to shareholders. If software is required to read/view the proxy materials, a link to a free download must be available (e.g., Adobe Acrobat Reader).

Compliance Dates

- Large accelerated issuers: on or after January 1, 2008.
- All other issuers (as well as non-issuers who wish to solicit proxies): on or after January 1, 2009.

Issuers can also choose to voluntarily comply with the new rules before being required to do so.

Conclusion

Even though non-accelerated issuers have until January 1, 2009, to comply with the new rules, it is not too early to designate someone in your organization as the "go-to" person for compliance with the new electronic posting rules. We will be glad to assist you in evaluating third party offers for web hosting and in preparing the required Notice discussed in this Memorandum.

EXHIBIT A

Notice Requirements for Notice Only Option

For the notice only option, the notice must contain the following text in bold-face type:

"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.

The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert website address].

If you want to receive a paper or email 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."

In clear and understandable terms, the notice also must include:

- The date, time and location of the meeting;
- A clear and impartial identification of each separate matter intended to be acted on, and the issuer's recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified website;
- How to request a paper copy of the documents for all meetings and for the particular meeting to which the notice relates by providing: (1) a toll-free telephone number; (2) an email address; and (3) an Internet website address where the shareholder can request a paper copy of the proxy materials;
- 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 other proxy materials; and
- Information about attending the shareholder meeting and voting in person.

EXHIBIT B

Notice Requirements for Full Set Delivery Option

For the full set delivery option, the notice must contain the following text in bold-face type:

"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date]. The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [insert website address]."

In clear and understandable terms, the notice also must include:

- The date, time and location of the meeting;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer's recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified website;
- Any control/identification numbers that the shareholder needs to access his or her proxy card; and

- Information about attending the shareholder meeting and voting in person.