

# The SEC Adopts New Rules Requiring Shareholder Access to Electronic Proxy Materials

On July 26, 2007, the Securities and Exchange Commission ("SEC") adopted final rules for mandatory shareholder access to electronic proxy materials. These new rules follow the adoption in January 2007 of rules that allow companies to furnish proxy materials to shareholders on a voluntary basis through a "notice and access" model using the Internet. The prior voluntary rules took effect for proxy solicitations commencing on or after July 1, 2007.

The new rules are mandatory, but allow companies to elect to comply with the new rules either through the notice and access model established by the January rules or through what the SEC calls a full set delivery option which is similar to current paper delivery. A company may also use a combination of the full set delivery option and the notice and access option, by providing a full set of the proxy materials to some shareholders while sending a notice of Internet availability of the proxy materials under the notice and access model to other shareholders. The new rules do not apply to proxy solicitations in connection with business combination transactions.

The new rules take effect for large accelerated filers (generally companies with a public float of at least \$700 million) for proxy solicitations commencing on or after January 1, 2008. Other public companies and other soliciting persons may comply with the new rules for proxy solicitations commencing on or after January 1, 2008, and must comply with the new rules for proxy solicitations commencing on or after January 1, 2009.

Under the full set delivery option, a company must (1) send a notice of Internet availability of its proxy materials with its mailing of its regular paper proxy materials (which can either be a separate notice or can be included in the proxy statement and proxy card) and (2) post its proxy materials on a publicly accessible web site (other than the SEC's EDGAR site) no later than the date the notice is first sent to shareholders.

Under the full set delivery option, if a company provides a separate notice of Internet availability, it must be in plain English. If a company includes the notice in the proxy statement and proxy card, the SEC noted that information provided in the proxy statement does not need to be repeated in the proxy card, and recommended the proxy statement contain the information relevant to both

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record holders and beneficial owners (street name holders) and the proxy card be limited to information relevant to record holders to avoid confusion. Information required in the notice includes: (1) a statement in bold that the proxy materials are available at an identified web site; (2) the date, time and location of the meeting; (3) a clear and impartial identification of each separate matter subject to a vote; (4) a list of the materials being made available at the specified web site; (5) any control or identification number that a shareholder needs to access his or her proxy card and (6) information about attending the shareholder meeting and voting in person.

The company must include all proxy materials, including subsequent additional soliciting materials, on the web site no later than the date such materials are first sent to shareholders or made public. The materials must be presented on the web site in a format or formats convenient for both reading online and printing on paper. The proxy materials must remain on the web site through the conclusion of the shareholders meeting. Companies using the full set delivery option do not need to provide a proxy card or other means to vote online since the delivery of the full set of the proxy materials satisfies this requirement.

The new rules also require that the web site on which the proxy materials are posted be maintained in a manner which does not infringe on the anonymity of a person accessing the web site. For example, a company must refrain from installing "cookies" or other tracking features on the web site, which may require segregating those pages from the rest of the company's regular web site or creating a new web site. The SEC did note that a company is not required to turn off the web site's connection log that automatically tracks numerical IP addresses that connect to the web site, but a company should not take any action to attempt to find out more about the persons accessing the web site. In addition, a company should not use any e-mail address provided by a shareholder to request an electronic copy of the proxy materials for any purpose other than delivering those materials.

The notice and access model remains basically unchanged from the voluntary model adopted by the SEC in January 2007. The full set delivery model differs from the notice and access model as follows:

- The notice and access model does not provide for delivery of paper copies of the proxy materials unless requested by a shareholder, while the full set delivery model provides for delivery of paper copies of the proxy statement, annual report to shareholders and other proxy materials.

- Under the full set delivery model, because shareholders will not need extra time to request paper or e-mail copies, the company will not need to send a notice at least 40 days before the meeting date, while under the notice and access model, a notice must go out at least 40 days before the meeting date and then the company must wait at least ten days before sending a proxy card.
- Under the full set delivery model, the company does not need to provide a means of voting other than the paper proxy card (such as online or telephone voting).
- Under the full set delivery model, the company does not need to provide a legend undertaking to send paper or e-mail copies of the proxy materials at least three business days after request.

Soliciting persons other than the company must also comply with the new rules by soliciting proxies pursuant to the notice and access model, the full set delivery model or a combination of the two.

Intermediaries such as brokers and banks must also prepare and send their own notices for beneficial shareholders. The effective result of the new rules is that an intermediary must send notices and create web sites for all issuers for which securities are held by the intermediary's customers, rather than only for issuers who elect to follow the notice and access model under the voluntary system.

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