

**MEMORANDUM****January 2009****To: Clients****From: The Nelson Law Firm, LLC****Re: Internet Distribution of Proxy Materials**

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The Securities and Exchange Commission ("SEC") amended the proxy rules to require Internet distribution of proxy materials (the "e-proxy" rules). These new rules apply to all proxy solicitations other than certain solicitations involving business combinations or cash consideration transactions. The new e-proxy rules went into effect for large accelerated filers<sup>1</sup> on January 1, 2008. For all other companies, these rules go into effect on January 1, 2009. This memorandum summarizes these new e-proxy rules. For more information relating to any of the matters discussed in this memorandum, please contact Scott M. Dubowsky ([smdubowsky@nelsonlf.com](mailto:smdubowsky@nelsonlf.com)) or Beth N. Lowson ([bnlowson@nelsonlf.com](mailto:bnlowson@nelsonlf.com)) of The Nelson Law Firm, LLC.

**Summary of New E-Proxy Rules**

Under the SEC's new e-proxy rules, companies and other soliciting persons now have the option to distribute proxy materials in one of two ways:

- (1) "Notice Only" procedures; and
- (2) "Full Set Delivery" procedures.

Under the "Notice Only" option, companies would not distribute printed copies of their proxy materials to shareholders, but would post their proxy materials, including their proxy statement, proxy card and annual report, on a publicly available Internet website (other than the SEC's EDGAR site) and send a notice to shareholders informing them of the electronic availability of the materials. Under this option, a company must respond to shareholder requests for copies.

Alternatively, companies may elect to continue to follow a more traditional approach and choose the "Full Set Delivery" option. Under this option, companies would continue to

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<sup>1</sup> To be considered a "large accelerated filer," a company must meet the criteria set forth in Rule 12b-2 under the Securities Exchange Act of 1934, including having a market capitalization of at least \$700 million.

deliver printed copies to shareholders (or e-mail copies, if that shareholder has so elected previously). However, companies that elect this option must also post those materials on a publicly available Internet website, and must include a notice to shareholders or statements in the proxy materials informing them of the Internet availability of the materials. Under the Full Set Delivery option, a company need not respond to requests for copies.

A company does not have to choose one option or the other as the exclusive means for providing proxy materials to shareholders. Rather, a company may use one method with respect to some shareholders, and the other method with respect to the other shareholders.

Any separate notice that is prepared under either the Notice Only option or the Full Set Delivery option (referred to herein as a “Notice”) must be filed with the SEC no later than the day that the Notice is sent to shareholders.

### **“Notice Only” Option: Sending a Notice Without Sending Any Proxy Materials**

Companies using the Notice Only option must post their proxy materials on a website and send a notice regarding the Internet availability of proxy materials (“Notice”) to shareholders<sup>2</sup> at least 40 calendar days prior to the meeting date. Companies must provide such information to brokers, banks and other intermediaries even further in advance of the meeting date so that the intermediaries can prepare and send notices to the beneficial owners within the requisite time period. Intermediaries (banks, brokers, etc.) are required to send out the notice and post access to the proxy materials no later than (i) 40 calendar days prior to the meeting or (ii) with respect to soliciting persons other than the company, 10 calendar days after the date that the Company first sends its proxy or notice to shareholders.

*Requirements of the Notice.* The Notice must be written in plain English and must contain the following information, and no additional information, except as required by state law:

1. 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 [insert meeting date].**

- a) **This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage**

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<sup>2</sup> Companies with multiple shareholders at the same address may “household” the notice and other proxy materials in accordance with Exchange Act Rule 14a-3(e), regardless of which delivery option they choose to follow.

**you to access and review all of the important information contained in the proxy materials before voting.**

- b) The [proxy statement][information statement][annual report to security holders] [is/are] available at [insert website address].**
  - c) 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."**
2. 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;
  3. 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;
  4. A list of the materials being made available at the specified website;
  5. (a) A toll-free telephone number; (b) an e-mail address; and (c) an Internet website 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;
  6. Any control/identification numbers that the shareholder needs to access his or her proxy card (the notice may, but is not required to, include a protective warning to shareholders, advising them that no personal information other than the identification of control number is necessary to execute a proxy);
  7. 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
  8. Information about attending the shareholder meeting and voting in person.

*Design of the Internet Website.* The proxy materials must be publicly accessible, free-of-charge, at the Internet website address specified in the notice on or before the date that the Notice is sent to shareholders. The website may not be the SEC's EDGAR system. The proxy materials must remain available on the website through the conclusion of the shareholder meeting.

The proxy materials presented on the website and must be in a format, or formats, convenient for both reading online and printing in paper. The proxy materials should be

in a searchable format and should be easy to use (possibly containing hyperlinks, etc., to make it easy for a reader to go from one section to another).

Companies must maintain the confidentiality of shareholders using the website. Accordingly, companies cannot install cookies or other tracking features on the website on which the materials are posted. If a company's current website has such tracking features, a company may need to segregate the proxy materials from the rest of the company's website or may need set up a separate website to post their proxy materials. Additionally, a company may not use a shareholder's e-mail address for any purpose other than to send materials to such person.

*Means to Vote.* A company must provide shareholders with a method to execute proxies as of the time that the notice is first sent to shareholders. A company can satisfy this requirement through a variety of methods including providing, on their website, (i) an electronic voting platform, (ii) a toll-free telephone number for voting<sup>3</sup>, or (iii) a printable or downloadable proxy card. A company may, but is not required to, send or e-mail a proxy card (accompanied by another Notice) to shareholders 10 calendar days or more after the date the initial Notice was sent to shareholders (unless the proxy card is preceded or accompanied by a copy of the proxy statement and any annual report, by the same medium).

*Request for Paper or E-mail Copies; Permanent Elections Permitted.* A company must provide paper or e-mail copies at no charge to shareholders requesting such copies, within 3 business days of any request.<sup>4</sup> A company must allow shareholders to make permanent elections to receive paper or e-mail copies of proxy materials distributed in connection with future proxy solicitations, and must maintain records of those elections. Accordingly, a company must provide a toll-free telephone number, e-mail address, and Internet website address as a means by which a shareholder can make such requests or elections. A company may, but is not required to, include a pre-addressed, postage-paid reply card with the notice that shareholders can use to request a copy of the proxy materials.

#### **“Full Set Delivery” Option: Sending a Notice with a Full Set of Proxy Materials**

Under the Full Set Delivery option, a company will follow procedures substantially similar to the traditional means of providing proxy materials. The only difference is that, in

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<sup>3</sup> A toll-free telephone number for voting may not appear on the notice, only on the website, because it would enable a shareholder to execute a proxy without having access to the proxy statement.

<sup>4</sup> The company's obligation to provide the relevant proxy materials upon request continues for one year after the meeting.

addition to sending a full set of the proxy materials to the shareholder,<sup>5</sup> a company must (1) send a Notice regarding the availability of proxy materials on an Internet website or incorporate such information required to appear in the Notice into the proxy statement and proxy card, and (2) post the proxy materials on a publicly accessible Internet website no later than the date the notice was first sent to shareholders (following the same website design requirements as set forth above under the Notice Only option). The Notice that is required to be sent under the Full Set Delivery option is substantially the same as the Notice required by the Notice Only option, except that the Full Set Delivery notice would not include information that applies only to the Notice Only option, such as information on how to request copies of proxy materials. The company need not send the notice and proxy materials at least 40 calendar days prior to the meeting date; however, the company must remember to distribute the proxy materials in compliance with applicable state laws.<sup>6</sup>

### **Considerations in Evaluating Proxy Delivery Options**

In evaluating the proxy delivery options, your company should consider the following issues:

1. ***Cost savings using Notice Only option; additional website development costs.*** Significant cost savings are potentially available under the Notice Only option. Since your company will be obligated to deliver paper copies of proxy materials only upon request, your company will likely be required to print a substantially smaller number of sets of proxy materials, thereby reducing printing and mailing costs, and reducing paper requirements. However, this cost savings will be offset by any fees incurred in creating a website for the posting of the proxy materials which complies with the new e-proxy rules, and/or fees charged by third parties to design, develop and/or host such a website, which may not be insubstantial. (The additional costs associated with the posting of proxy materials on an Internet website will be incurred regardless of which delivery option is used, as Internet posting of proxy materials is now required under either option.)
2. ***Evaluation of year-end timelines.*** As a result of the requirements and choices provided by the new e-proxy rules, companies will need to begin the planning of their annual shareholder meeting earlier. Since the Notice required under the Notice Only option must be delivered 40 days prior to the date of the shareholder meeting, companies should consider revising their existing year-end reporting timelines to ensure that they, or any intermediaries, have

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<sup>5</sup> If a shareholder has previously provided consent to receive proxy materials by e-mail, a company may continue to provide the materials in such manner.

<sup>6</sup> For example, under Delaware law, proxy statements must be distributed to shareholders no fewer than 10 and no more than 60 days prior to the meeting date.

adequate time to prepare and mail the Notice, as well as to ensure adequate time to format and post the materials in a compliant format to a website. Your company should also decide early in the process the extent to which you will hire a third party to design, develop and/or host your proxy materials website.

3. **Review your company's bylaws.** Since many public company bylaws contain provisions regarding the dates by which shareholders must deliver notice to the company of their intent to bring matters before a shareholder meeting, you should review your company's bylaws to ensure that the timelines set forth in your bylaws are not inconsistent with the timelines required by the Notice Only delivery option (if your company elects to utilize such Notice Only option).
4. **Conflicting Legal Requirements.**
  - **Delivery to participants in ERISA-covered defined contribution plans.** The Notice Only option will likely not satisfy the U.S. Department of Labor's requirements for electronic delivery of materials to participants in ERISA-covered defined contribution plans, such as 401(k) plans and employee stock ownership plans. Accordingly, unless the Department of Labor's requirements for electronic disclosure are satisfied, full proxy materials should be mailed to such participants.
  - **State law requirements.** The Notice Only option may not comply with the laws of certain states (including California, Florida, and Delaware). Your company should consult with counsel to assess the implication of any conflicting relevant state law and determine additional steps your company may be required to take if you elect to utilize the Notice Only option.
5. **Assessing the effectiveness of Notice Only method.**
  - **Few companies elected to use the Notice Only method in 2008.** Surveys of the 2008 proxy season suggest that only about 25% of *Fortune 100* companies who commenced their annual proxy solicitation process between Jan. 1, 2008 and May 8, 2008, elected to use the Notice Only option rather than the Full Set Delivery option for some of their shareholders (the number of shareholders the Notice was sent to ranged from "some" to a "majority" of the shareholders).
  - **Decreased retail voting participation rate using Notice Only method.** According to a survey by Broadridge Financial Solutions, Inc. (formerly known as ADP) as of June 30, 2008, 16.57% of retail shareholders who received an e-proxy Notice voted in 2008, as compared to 34.28% of retail shareholders for the same companies who received full proxy materials in

the prior year. According to Broadridge, only 1.05% of shareholders who received an e-proxy Notice requested full proxy materials.

It appears that the Notice Only approach has, to date, had a negative impact on the response rate of retail shareholders. Companies may need to make repeat mailings or hire solicitors to make phone calls to make up for the decreased participation. However, the resultant response rate may be sufficient for some companies. Your company should develop a personalized strategy designed to maximize the potential cost savings of the Notice Only option while minimizing potential reductions in shareholder voting participation, possibly by stratifying your company's proxy mailings (using the Notice Only option for some shareholders and the Full Set Delivery option for other shareholders).