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## New E-Proxy Rules Go Into Effect January 1, 2009

On January 1, 2009 important new e-proxy rules will take effect for proxy solicitations undertaken by all issuers. Prior to January 1, 2009, these rules applied only to large accelerated filers.<sup>[1]</sup> The key features of these new e-proxy rules are highlighted below.

### Background to the Development of the E-Proxy Rules

Issuers whose securities are registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act") are required by Section 14(a) of the Exchange Act to follow the filing and disclosure requirements of the Securities and Exchange Commission ("SEC") proxy rules, unless an exemption is available. On July 26, 2007, the SEC adopted amendments to its proxy rules that require companies and other soliciting parties to make their proxy materials available on the Internet (other than the SEC's EDGAR web site). While these amendments have already taken effect for proxy solicitations made by companies that are considered large accelerated filers under Exchange Act Rule 12b-2, they will now also take effect for proxy solicitations commencing on or after January 1, 2009 for accelerated filers, non-accelerated filers and other soliciting parties (including registered investment companies).

Under the amendments, a company or other party that is soliciting proxies has two options for providing the proxy materials to its shareholders—the "Notice Only" option or the "Full-Set Delivery" option.

### Two Alternative Ways to Comply with the E-Proxy Rules

#### Notice Only Option

Under the "Notice Only" procedure, the issuer must (i) send a Notice of Internet Availability of Proxy Materials ("Notice") to shareholders at least 40 calendar days before the shareholder meeting date, indicating that the issuer's proxy materials are available on a publicly accessible, free-of-charge Internet Web site and explaining how to access those proxy materials, and (ii) post its proxy solicitation materials on that Internet Web site.

#### **Notice Contents**

The Notice must also contain, among other items, in plain English:

- 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 on the specified Web site;
- A toll-free telephone number, an e-mail address, and 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;
- 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; and
- Information about attending the shareholder meeting and voting in person.

If a shareholder requests an electronic or paper copy of the proxy materials, the issuer must provide a copy in the requested medium within three business days after receiving the shareholder request.

#### **Posting Requirements**

An issuer following the "Notice Only" model must post the proxy card on the Web site with the proxy statement and any annual report no later than the time at which the Notice is sent to shareholders so that the documents are electronically available at the time shareholders receive the Notice. In addition, on that Web site the issuer must also provide shareholders with at least one method of executing a proxy vote, which may be an Internet voting platform, telephone number, or downloadable and printable proxy card.

With respect to shares held in record name by intermediaries, the intermediary must participate in the distribution of proxy materials to stockholders by providing its own Notice to beneficial owners at least 40 days before the meeting date. In

addition to the information included in the issuer's Notice, the intermediary's Notice must also include the intermediary's (or its agent's) telephone number, email address and Web site, as well as instructions on how to access the request for voting instructions on the Web site. The intermediary must also respond to requests for written materials and permit beneficial owners to make a permanent election to receive paper or email copies of proxy materials.

### **Full-Set Delivery Option**

The Full-Set Delivery option is similar to the traditional proxy delivery process. Therefore, when meeting the e-proxy rules using this option, an issuer must:

- Send the Notice (for content requirements, see "Notice Content" above) accompanied by a full set of proxy materials, or incorporate all of the information required to appear in the Notice into the proxy statement and proxy card; and
- Post the proxy materials on an accessible Web site no later than the date the Notice was first sent to shareholders.

A separate Notice is not required if the issuer presents all of the information required in the Notice in its proxy statement and proxy card. Issuers choosing the "Full-Set Delivery" approach are not required to send the Notice and a full set of proxy materials at least 40 days before the shareholder meeting date. Intermediaries choosing the "Full-Set Delivery" approach must forward the proxy materials to beneficial owners within 5 business days following receipt of the materials from the issuer.

### **Steps You Should Take to Prepare for the E-Proxy Rules**

January 1<sup>st</sup> is right around the corner. As you prepare for the 2009 proxy season and face the need to comply with the new e-proxy rules, you should consider taking the following steps:

- Decide whether you are going to meet the e-proxy rules using the "Notice Only" option or the "Full-Set Delivery" option. You may wish to consider surveying shareholders to evaluate potential demand for paper copies.
- Evaluate your hosting options for the Web site. For instance, certain vendors are offering Web site hosting services; alternatively, you may prefer to host the site internally.
- If you select the "Notice Only" option, evaluate and revise reporting timelines to ensure adequate time to prepare and mail the Notice, including providing any intermediary with the relevant information in sufficient time for the intermediary to fulfill its responsibilities prior to the shareholder meeting date. For example, for a meeting that is scheduled to be held on May 4, 2009, the issuer should provide all proxy materials to intermediaries by mid-March, and must mail the Notice and post the proxy materials on its Web site no later than March 25, 2009, in order to comply with the 40-day notice requirement.

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Venable's Securities practice group is ready to help you comply with all aspects of the e-proxy rules, from determining the extent to which the rules apply to your situation, to evaluating which option is best suited for you, to helping you to implement the option that you select. Please call Beth Hughes or Roxana Tuculescu for further information or assistance.

1. The term "large accelerated filer" means an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to section 13(a) or 15(d) of the Exchange Act; and (iv) the issuer is not eligible to use the requirements for smaller reporting companies in Regulation S-K (17 C.F.R. § 229.10 et seq.) for its annual and quarterly reports.

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