

# ADVISORY

## SULLIVAN & WORCESTER CORPORATE ADVISORY

### Electronic “Delivery” of Proxy Materials Now Mandatory – Sort of

As described in our February 2007 client advisory [“Electronic ‘Delivery’ of Proxy Statements Approved by SEC”](#), the Securities and Exchange Commission has adopted amendments to its proxy rules to provide a “Notice and Access” model that permits public companies, intermediaries and persons soliciting in opposition to a company to satisfy their proxy delivery obligations without the need to mail hard copies by making proxy materials electronically available and sending only a hard copy notice about their internet location. On July 26, 2007, the SEC further adopted amendments *mandating* the Notice and Access model – or at least some of that model.

Under the revised rules, companies will have two options for providing proxy materials to shareholders: (1) the “notice only” option and (2) the “full set delivery” option. Notably, companies do not have to choose one option or the other as the exclusive means for providing proxy materials to shareholders. Rather, companies can use different methods for different shareholders. The revised rules become mandatory on January 1, 2008 for “large accelerated filers,”<sup>1</sup> excluding investment companies, and will take effect for all other filers on January 1, 2009. Early adoption is also permitted.

#### NOTICE ONLY OPTION

The notice only option will operate in the same way as the optional Notice and Access model adopted earlier in the year. Companies utilizing this model must send a plain English notice to all shareholders at least 40 days prior to the applicable shareholder meeting or corporate action for which the votes are to be used. The notice must be sent separately from the proxy card, any additional soliciting materials and other shareholder communications, though it may cover any required state law notice of the meeting. A hard copy of the proxy card may only be sent ten days after the initial notice is sent to shareholders. The notice must direct the shareholder to a specific website where the proxy materials are located. This website cannot be the SEC’s EDGAR website, but the notice itself must be

<sup>1</sup>A large accelerated filer is a public company that at the end of its fiscal year: (1) has a public float (i.e., voting and non-voting common equity not held by affiliates of the company) of at least \$700 million as of the last day of its most recently completed second fiscal quarter; (2) has been filing periodic reports (e.g., 10-Ks and 10-Qs) under the Securities Exchange Act of 1934 for at least 12 months; (3) has filed at least one annual report; and (4) is not eligible to file 10-K and 10-Q forms applicable to small business issuers.

#### IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

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filed with the SEC. The notice and the website containing the proxy materials will need to contain certain required information and comply with certain technical and privacy-related specifications. Companies must maintain the anonymity of the shareholder accessing the website and may disclose the shareholder's email address only to its agent or to an employee of the company to facilitate delivery of the company's proxy materials to a requesting shareholder. For more information about the required elements and timeframes for the notice only option, see our [February 2007 client advisory](#) referenced above.

### THE FULL SET DELIVERY OPTION

Under the new full set delivery option, a company that does not want to rely only on electronic postings of proxy materials or risk dealing with multiple mailings may continue to mail hard copies of proxy materials, including the proxy card, as it had done before the amended proxy rules, but must, in addition:

- Send and file new notice of the internet availability of proxy materials or, if preferred to avoid an extra document, include the newly required information directly in the proxy materials; and
- post the proxy materials on a publicly accessible website (separate from EDGAR) no later than the date the notice of internet availability is first sent to shareholders.

In addition, the full set delivery option varies from the notice only option in the following ways:

**Notice.** The notice of internet availability for the full set delivery option must include the following information similar to, but shorter in content than, the notice only option:

- A prominent legend in bold-face type legend that states:
  - "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].
- 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;

- 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 not 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.

**No additional copies of proxy materials.** Under the full set delivery option, a company does not have to provide requesting shareholders with copies of the proxy materials or a means to request such copies, as the company will have already provided shareholders with a full hard copy set of proxy materials. In other words, no additional delivery requirements are imposed beyond the initial mailing.

**No 40-day timeline.** If a company sends the full set of proxy materials with the notice, a company does not have to comply with the 40-day advance period required under the notice only option. Current timelines based on charter documents, state law and other concerns would continue to apply.

**Proxy card.** Under the full set delivery option, a proxy card or a request for voting instructions is included in the full set of proxy materials; therefore a company does not need to provide the shareholder with another means for voting on the website or otherwise.

### IMPACT OF FULL SET DELIVERY ON PROXY MATERIALS DELIVERED BY OTHER PARTIES

**Intermediaries.** Intermediaries, which hold shares on behalf of other beneficial owners, must follow whatever delivery option the company follows. As described in our [February 2007 client advisory](#), a company complying with the notice only option must provide an intermediary with all the information necessary for the intermediary to prepare and send its own required notice at least 40 days before the meeting date. If a company is complying with the full set delivery option, the company and intermediary need not comply with

the 40 day deadline. Rather, the company need only provide the intermediary with the appropriate notice information within a sufficient time before the meeting for the intermediary to prepare and send its own notice along with the full set of proxy materials. An intermediary's notice may direct beneficial owners to either its own website or the company's website to access proxy materials. As under current rules, an intermediary must forward the materials to the beneficial owners within five business days of receipt from a company.

***Shareholders Making Their Own Solicitations.***

A soliciting person other than the company may comply with either the notice only option, the full set delivery option or a combination of the two methods. The non-company solicitor is not obligated to solicit every shareholder; therefore, it does not have to furnish proxy materials to shareholders it is not soliciting. A soliciting person's notice must provide a clear and impartial identification of each separate matter to be acted upon at the meeting, to the extent known. The notice must also include a clear statement that there may be additional agenda items that the soliciting person is not aware of, and indicate that the soliciting person cannot direct a vote for those items at that time. If all matters that shareholders will act upon at the meeting are not referenced, the soliciting person's notice must clearly state whether execution of the proxy card would invalidate a shareholder's prior vote using the company's card on matters not presented on the soliciting person's card.

\* \* \*

In short, all companies will at a minimum have to post proxy materials on the internet and mail new notices of the availability of such information. Beyond that, companies will be able to choose how much or how little to engage in electronic "delivery" of proxy materials, decisions that will change over time as companies gain experience and insights with respect to the new model. The summary above is meant to describe the major changes affecting the proxy solicitation process. For a more comprehensive discussion of the proxy rule changes that could affect you, please contact the lawyer at Sullivan & Worcester LLP with whom you regularly consult, or one of the lawyers above.

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