

**From PLI's Online Program**

*Shareholder Communications in an Electronic World 2007:  
E-proxy and Other Developments*

**#15967**

Client Advisory / September 2007

## Internet Proxy Solicitation: Shareholder Choice Means Companies Must Prepare Early

By Matthew C. Dallett and Brendan J. Radigan

Shareholders may soon choose to receive proxy solicitations via the Internet. Since July 2007, companies and others soliciting votes have been *permitted* to post proxy materials on an Internet website instead of distributing them by mail. New SEC rules will *require* website posting.<sup>1</sup> Bigger U.S. companies (“large accelerated filers”) must comply with the new rules for solicitations commencing on or after January 1, 2008.<sup>2</sup> All others must comply beginning January 1, 2009.

This should prompt creative use of the Internet’s dynamic communication techniques and present new opportunities for corporate investor relations. However, companies must start planning their annual meetings sooner to make the necessary arrangements. Earlier Audit Committee and Board approval of the proxy materials may be required. Companies should begin evaluating the options and making decisions.

This new SEC requirement is intended to reduce the cost of proxy solicitations, although it may not do so initially. We expect that it will also facilitate proxy contests over director elections and other shareholder proposals and may result in more effective opposition to management proposals.

The requirements of the new rules are outlined below. Companies not required to comply in 2008 may embrace Internet distribution voluntarily. Even companies that do not adopt the so-called “Notice and Access” model early may be forced to accommodate it, since shareholders and others soliciting proxies may use that model.

### Overview of the Process

All companies and other solicitors subject to the new rules must post proxy materials on a website and send a notice of availability to shareholders. They may rely primarily on that approach – the “Notice and Access”

model – or they may also mail hard copies as in the past – the “Full Set” model. They may combine the models, using different approaches for different shareholders. Companies that e-mail proxy materials to consenting shareholders may continue to do so as well. Sticking with the Full Set model will avoid some of the uncertainties and new costs of the Notice and Access model, but it would mean giving up the potential benefits.

**All Solicitations.** All companies subject to the new rules must:

- Send shareholders a Notice of Internet Availability of Proxy Materials in the form prescribed by Rule 14a-16 (the “Notice”) and
- Post a complete set of proxy materials (proxy statement, proxy card and annual report, if required) on the Internet no later than the date the Notice is first sent.
  - The materials must meet the formatting requirements and comply with the privacy protections described in “*Preparing for Your Shareholder Meeting – Website Requirements*” below.

**The Full Set Model.** Apart from the mandatory website posting, the Full Set model follows traditional practice. Under this approach, a company delivers a full set of proxy materials by mail or e-mail. (Direct e-mail delivery of the Notice or any other required materials requires the shareholder’s prior consent.) The Notice may be incorporated into the proxy statement and proxy card instead of being sent separately. The Notice and proxy materials need not be sent by any particular deadline, although they will need to be provided to street name holders further in advance of mailing than before. Follow-on proxy cards may be sent out without any other materials. Shareholders are not entitled to request additional copies of the proxy materials, although this doesn’t affect the obligation to deliver a copy of Form 10-K upon request.

**The Notice and Access Model.** For most solicitations, a company may decide not to deliver proxy materials except to shareholders who explicitly request them. (The Notice and Access model may not be used for solicitations related to mergers and other business combinations.)

Under this approach, the Notice must be sent to shareholders and filed with the SEC at least 40 days before the shareholder meeting.

The initial Notice may not be accompanied by any materials other than any required State law meeting notice and a postcard for requesting a copy of the proxy materials. (Providing a postcard seems to be unnecessarily cumbersome, since the Notice must provide a telephone number, e-mail address and Internet website for the same purpose.)

The initial Notice may not include a proxy card or a telephone number to vote a proxy. However, shareholders must be given a method to execute proxies immediately. This may be satisfied through an electronic voting platform, a toll-free telephone number appearing on the website, or a proxy card that can be downloaded or printed from the website. This ensures that shareholders have had an opportunity to view the proxy materials before voting.

The Notice must inform shareholders how to request delivery of the proxy materials in hard copy or by e-mail. They may do so at

*(continued on next page)*

<sup>1</sup> The new requirements appear principally in SEC Rule 14a-16. The adopting releases are Nos. 34-56135, “Shareholder Choice Regarding Proxy Materials” (July 26, 2007), and 34-55146, “Internet Availability of Proxy Materials” (January 22, 2007), which may be found at <http://www.sec.gov/rules/final.shtml>.

<sup>2</sup> A “large accelerated filer” is an issuer that: (i) has an aggregate public equity float of \$700 million or more; (ii) has been subject to the reporting requirements of the Securities Exchange Act for at least twelve calendar months; and (iii) has filed at least one Form 10-K.

any time until one year after the meeting. The company or other solicitor would be required to comply within three business days if the request is made before the meeting. The Notice must also give the shareholder the option to request hard copy or e-mail delivery of proxy materials for all future meetings.

For follow-on solicitations, the company may send a proxy card with another copy of the Notice ten days after sending the initial Notice (or earlier if accompanied or preceded by a copy of the other proxy materials).

### **Responsibilities of Street Name Holders.**

The company may direct brokers and other “intermediaries” holding shares in street name to follow the Notice and Access model in furnishing proxy materials to beneficial owners. Otherwise, an intermediary may rely on any other permitted method, but it may not follow Notice and Access on its own initiative.

An intermediary must prepare and send its own Notice, modified as appropriate for beneficial owners, at the same time as the company’s Notice is sent. Intermediaries that are brokers must also describe the rules relating to broker discretionary voting.

An intermediary must maintain a website at which beneficial owners may provide their voting instructions. The intermediary’s website may provide free access to the company’s proxy materials or the intermediary may direct beneficial owners to the company’s or a third party’s website for that purpose. If it directs beneficial owners to the company’s website under the Notice and Access model, the intermediary must inform them that their voting instructions must be provided to the intermediary, not directly to the company, unless the intermediary has executed a proxy in favor of the beneficial owners. (I.e., beneficial owners cannot hotlink from the company’s proxy materials directly to its electronic voting platform. Since, as a practical matter, they may not be able to toggle back to the intermediary’s voting instruction form either, providing access to the company’s site may be counterproductive.)

Beneficial owners must request paper or e-mail copies of the proxy materials from the intermediary rather than the company. The process of obtaining the materials from the company, if necessary, and forwarding them to the requestor must then meet a tight schedule.

**Solicitations by Others.** Shareholders and others soliciting proxies (typically in opposition to management) may use the Notice and Access or Full Set models, or both, in generally the same manner as companies. These “other soliciting persons” will likely find creative ways to make use of the Internet’s features to mount effective, flexible campaigns. Companies’ IR departments will need to be equally creative in response. On the other hand, the longer notice deadlines may deter shareholder use of Notice and Access.

Some differences from the requirements applicable to companies are:

- As under current rules, an other soliciting person need not solicit all shareholders. E.g., it may choose to limit Notices to those shareholders who have not already requested only hard copy (or it may select recipients on any other basis).
  - However, once it has sent a Notice to a shareholder, it must comply with any request from the shareholder for hard copies or e-mail delivery of its materials.
- The deadline for an other soliciting person to send its Notice is the later of 40 days before the meeting or ten days after the company first sends out its proxy statement or Notice.
- Since an other soliciting person may begin before the company makes its proxy materials public, and thus before the full meeting agenda is known, the other soliciting person’s Notice need only include known agenda items.
- The other soliciting person’s Notice must state whether a shareholder submitting a proxy card for only some agenda items would revoke any proxies previously granted for other items.

If the company provides its shareholder list to the other soliciting person, as it may elect to do under existing Rule 14a-7, it must identify those shareholders who have requested hard copy delivery, but (due to privacy concerns) it may not identify those who have requested e-mail delivery. If the company instead elects to send out the other soliciting person’s materials, it must comply with any use of the Notice and Access model by the solicitor.

## **Preparing for Your Shareholder Meeting**

**Choosing the Model.** It is probably worth repeating that only domestic “large accelerated filers” must comply with the website posting and Notice requirements – and choose between the Full Set and Notice and Access models – in 2008. Other companies may adopt Notice and Access voluntarily or stick with their traditional methods until the 2009 solicitation.

In considering whether Notice and Access is the right approach for your company:

- Comparative costs must be analyzed (see “Cost Analysis” below).
- You may want to solicit shareholders in advance to ascertain preferences for hard copy or obtain consent to e-mail delivery.<sup>3</sup>
  - You should consult with Broadridge (formerly ADP) about the preferences expressed by beneficial owners, which Broadridge has been soliciting since the SEC adopted the voluntary model last winter.
- You should analyze the composition of your shareholder base as institutions and technology-oriented investors are expected to respond more positively to Notice and Access.
- You should take into account the items expected to be on the meeting agenda.

Proxy advisory firms have already developed experience with Notice and Access and are aware of the voting tendencies of different shareholder groups. As a result, they are well placed to help companies decide among the various alternatives.

**Timing.** Preparation must start earlier than in prior years. For all companies subject to the new rule, including those taking the Full Set approach:

- Tracking tools that may be used on the company’s current Investor Relations web page will not meet the SEC’s privacy requirements under Rule 14a-16 (described in “Website Requirements” below), so a new web page may need to

*(continued on next page)*

<sup>3</sup> The SEC says that companies may “structure incentives to encourage shareholders to accept electronic delivery or the notice and access model,” so there is room for creativity.

be established – whether in-house or outsourced – and tested.

- An electronic voting platform, if desired, may also be established and tested.
- Additional time will be required to prepare the annual report for posting in searchable form as described under “Website Requirements” below.
- The proxy statement, proxy card and anticipated form of intermediary’s request for voting instructions must be coordinated to make sure that information is properly disclosed to record holders and beneficial owners, respectively.
- Proxy materials (in addition to the new Notice) must be finalized a week or more earlier than in prior years so that intermediaries can prepare their Notices to send at the same time as the company’s.
  - Your Investor Relations department should consider whether website posting of proxy materials (in searchable form) warrants rethinking your traditional presentation.
  - You may need to obtain Audit Committee and Board approvals of the proxy materials earlier than in the past.
- If it is known that proxies will be solicited by a third party, you may want to consider whether coordination is desirable to avoid conflicts on agenda items other than the one in issue.
- Minor changes will be required in the company’s existing householding program.

Companies using Notice and Access must send the initial Notice at least 40 days before the meeting—earlier than proxy materials are typically sent out.

Each step in the solicitation process must be reviewed with the printer, the transfer agent and Broadridge to avoid problems once underway.

**Website Requirements.** Website posting of proxy materials is required whether the company follows the Full Set or the Notice and Access model. The Internet website(s) used by the company (and any intermediary electing to do so) may not be the SEC’s EDGAR site. It must be operational, free of charge, before the initial Notice is sent. The company must maintain the proxy materials on the website until the conclusion of the related shareholder meeting and must post any amendments or supplemental materials it uses in connection with the solicitation no later than the day on which such materials

are first used. Other requirements include:

- The website address given in the Notice must link directly to the proxy materials; shareholders may not be required to browse a site to find them.
- The materials must be presented in a format or formats “convenient for reading online” (i.e., searchable, such as HTML) and for printing on paper. The latter format must be substantially identical to the paper version.
  - This applies to the annual report to shareholders as well as the proxy statement. Companies that prepare a glossy annual report will need to address the additional formatting and related time requirements early in the process.
  - The SEC admonishes companies to consider whether the size of the files used will hinder access by shareholders without broadband connections.
  - If software is required to view the materials, a link to a free download (e.g., Adobe Acrobat) must be provided.
- The website must be maintained “in a manner that does not infringe on the anonymity of” a person accessing it.
  - The site may not track the identity of persons accessing it to view the proxy materials.<sup>4</sup>
  - It may not require the installation of cookies or other software that might collect information about the user.<sup>5</sup>
  - The company may not use the e-mail address of a shareholder requesting proxy materials for any other purpose.
- Since the company must provide the shareholder a means to execute a proxy immediately, using the website for this purpose makes sense.
  - You should pay attention to ease of use. A hotlink that enables the shareholder to toggle from inside the HTML proxy statement to an electronic voting mechanism and back again will increase vote production.

**Cost Analysis.** Companies will need to assess the costs of switching from the traditional approach (or the Full Set model for those

subject to the new rule) to Notice and Access. New costs will include those for:

- preparing and sending the company’s Notice (which will not fit on a postcard, given how much information it must carry);
- establishing and hosting a new website, if necessary, or modifying any current use of tracking tools on the company’s IR site to comply with the privacy requirements;
- intermediaries’ costs, including preparing and sending their Notices, which are on the company’s tab;
- Broadridge’s and printers’ additional costs for their services; and
- an electronic voting platform, if desired.

A significant unknown for Notice and Access in the first year will be the shareholder demand for hard copies of the proxy materials. We understand that the experience of Canadian companies, which are already able to follow an Internet model, is that less than 5% of shareholders request hard copy. However, one needs to weigh the costs of a follow-on printing to satisfy unexpected demand against those of printing a reserve initially. This includes making sure that intermediaries have copies of the proxy materials to satisfy requests made by their beneficial owners. One also needs to determine the most efficient way to warehouse copies and fulfill requests—whether in-house, by intermediaries, by the printer, or by Broadridge. Furthermore, although the initial solicitation may be expected to save postage costs, any such shareholder requests must be satisfied by first class mail (if not e-mailed). Accordingly, it may be expected that costs will decline over time as companies gain experience.

In addition to Broadridge (whose offerings and fee structure may be reviewed at <http://www.broadridge.com/notice-and-access/index.asp>), the principal financial printers are gearing up for the new regime and expect to provide dedicated website hosting and electronic voting platforms as well as preparing and filing Notices and other soliciting materials.

*(continued on next page)*

<sup>4</sup> This does not prevent the company from tracking the identity of shareholders voting on an electronic voting platform, e.g., by use of a company-provided control number.

<sup>5</sup> Although the company need not disable the website’s connection log, it may not use the numerical IP addresses collected there to find out more information about the users.

## Conclusion

Large accelerated filers must plan early to comply with the new rule for 2008 as well as to ensure an effective response to any Internet-based shareholder campaign. Since shareholders will come to expect website access and electronic voting, companies should consider putting them in place even if not required. Internet-focused distribution presents novel possibilities for improving investor relations. Companies should take advantage of them.

If you have any questions regarding the matters discussed in this memorandum, or you would like assistance in submitting a comment to the SEC, please contact the Edwards Angell Palmer & Dodge LLP attorney responsible for your affairs or one of the following members of the firm's Securities and Public Company Practice Group:

**Stacie S. Aarestad**  
617.239.0314  
saarestad@eapdlaw.com

**Leslie J. Croland**  
954.667.6129  
lcroland@eapdlaw.com

**Matthew C. Dallett**  
617.239.0303  
mdallett@eapdlaw.com

**Matthew J. Gardella**  
617.239.0789  
mgardella@eapdlaw.com

**Nathaniel S. Gardiner**  
617.239.0293  
ngardiner@eapdlaw.com

**D. Roger Glenn**  
212.912.2753  
dglenn@eapdlaw.com

**William C. Hicks**  
617.239.0435  
whicks@eapdlaw.com

**John G. Igoe**  
561.820.0242  
jigoe@eapdlaw.com

**Stanley Keller**  
617.239.0217  
stanley.keller@eapdlaw.com

**Eugene W. McDermott, Jr.**  
401.276.6471  
emcdermott@eapdlaw.com

**John W. Pickett**  
617.239.0425  
jpickett@eapdlaw.com

**Brendan J. Radigan**  
401.276.6570  
bradigan@eapdlaw.com

**Laura N. Wilkinson**  
401.276.6607  
lwilkinson@eapdlaw.com

ATTORNEY ADVERTISING: The hiring of an attorney is an important decision that should not be based solely on advertisements. Prior results do not guarantee a similar outcome.

Disclosure required under Circular 230: Edwards Angell Palmer & Dodge LLP informs you that any tax advice contained in this communication, including any attachments, was not intended or written to be used, and cannot be used, for the purpose of avoiding federal tax-related penalties, or promoting, marketing or recommending to another party any transaction or matter addressed herein.

The information contained herein is not to be construed as legal advice or opinion. We provide such advice or opinion only after being engaged to do so with respect to particular facts and circumstances. This publication may be considered "advertising material" under the rules of professional conduct governing attorneys in some states.  
© Edwards Angell Palmer & Dodge LLP 2007 *A Delaware Limited Liability Partnership Including Professional Corporations.*