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## SECURITIES LAW UPDATE

NEWSLETTER OF THE CAPITAL MARKETS PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

### E-Proxy Update

[Tatiana Small](#)

#### Introduction

As of January 1, 2009, all companies subject to the proxy rules under the Securities Exchange Act of 1934 must comply with the E-proxy rules in connection with the solicitation and mailing of proxy statements. Under the E-proxy rules, issuers are provided with two primary options for conducting their proxy solicitations: the (i) "notice only" option and the (ii) "full set delivery" option. Issuers may also choose a hybrid of these options, because they are not mutually exclusive.

In all cases, however, issuers and other soliciting persons must (i) post their proxy materials (including the proxy statement, proxy card, the "glossy" annual report, and any other soliciting materials) on an Internet web site, which may not be the SEC's IDEA site, and (ii) provide shareholders with written notice of the availability of the materials on the Internet (the "Notice").

We discuss below these two options and certain considerations for issuers that may be in the process of selecting the optimal method of soliciting a proxy from their shareholders.

#### "Notice Only"

Under the "notice only" option, an issuer's proxy materials must be posted on an Internet web site on or before the date the issuer sends the Notice to shareholders informing them of the availability of the proxy materials on the Internet. The Notice must be sent at least 40 calendar days before the shareholders' meeting, or if no meeting is to be held, at least 40 calendar days before the date a corporate action is taken by consent or authorization of shareholders without a

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meeting. Securities Exchange Act Rules 14a-16 details the information that must be included in Notice.

In addition, shareholders must be provided with a means of executing a proxy, such as an electronic voting platform, a toll-free telephone number, or a printable or downloadable proxy card from the Internet web site. An issuer may not send a paper or an e-mail proxy card to a shareholder until at least 10 calendar days after the Notice was sent to the shareholder. Under the "notice only" option, issuers must still send out a full set of all proxy materials within three business days of a shareholder's request for the hard-copy version.

### **"Full Set Delivery"**

Under the "full set delivery" option, an issuer follows traditional procedures of providing proxy materials to its shareholders. However, companies implementing the "full set delivery" option are also required to post a copy of proxy materials on the Internet and send the Notice. The proxy materials mailed to shareholders either must be accompanied by the Notice or must incorporate all the information required to appear in the Notice. In contrast to "notice only," issuers do not need to provide shareholders with a means of executing a proxy other than a physical proxy card. In addition, issuers do not need to comply with the 40-day notice period required under the "notice only" option.

### **Hybrid**

An issuer does not have to choose one option or the other as the exclusive means of providing proxy materials to shareholders. Rather, an issuer may use the "notice only" option to provide proxy materials to some shareholders and the "full set delivery" option to provide proxy materials to other shareholders. For example, an issuer may initially send out the Notice to all shareholders and then a second mailing of a full set of proxy materials to selected retail shareholders. Issuers should analyze the composition of their shareholder base and consider the matters to be voted on at the meeting to determine whether the hybrid option is desirable.

### **Choosing the Delivery Option**

Issuers may have the opportunity to save money on printing and postage costs and to reduce the use of paper under the "notice only" option. However, any anticipated cost savings may be offset by the costs of printing and mailing full sets of proxy materials to shareholders who request them after

programs.

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receiving the initial Notice under the "notice only" option. According to a report by Broadridge Financial Services, Inc., only 1.05% of shareholders who received the Notice under the "notice only" option requested a full set of proxy materials.<sup>1</sup> Although this statistic implies that the costs of printing proxy materials under the "notice only" option will be reduced because a small percentage of shareholders are likely to request a printed set of proxy materials, issuers must consider the nature of the proxy solicitation and costs of printing additional materials, if needed.

Because of the 40-day advance notice requirement of the "notice only" option, issuers must also consider the E-proxy timing requirements when deciding to implement the "notice only" option. Issuers should create a target date for sending out the Notice of 5 to 10 days ahead of the 40-day deadline to avoid rush fees or other last-minute costs or issues.

Issuers that choose the "notice only" option over the "full set delivery" option should consider the possible decline in retail stockholder votes by those retail shareholders who are not familiar or comfortable with use of the Internet. According to Broadridge, the percentage of retail shares voted dropped from 34.28% in 2007 to 16.57% in 2008 for companies that instituted the "notice only" option in 2008.<sup>2</sup> This could be problematic for companies that rely on retail stockholders to meet quorum requirements or to achieve sufficient support for proposals.

Issuers should consider whether matters proposed for a vote at annual meetings are routine or nonroutine. For nonroutine matters, a decline in the number of votes as a result of implementing the "notice only" option could be problematic, especially if the matter requires a higher threshold of voting support. For example, amendments to an issuer's charter documents typically require at least a majority of outstanding shares to approve.

### **California State Law Considerations**

Public companies incorporated in California are reminded that the California General Corporation Law requires the affirmative vote of a majority of the shares represented and voting at a duly held meeting at which a quorum is present, which shares voting in favor must at least represent a majority of the required quorum, on any particular matter presented to the shareholders. Assuming that with "notice only" the voting percentage of retail shareholders is lower than with the "full set delivery" option, then meeting California's threshold for affirmative votes may be of

heightened concern for nonroutine matters for which a large number of broker nonvotes may be expected.

## Conclusion

There is no one-size-fits-all model. Issuers should conduct a cost-benefit analysis to determine the option that best suits them. In conducting this analysis, issuers should consider the profile of its shareholder base, whether shareholders will be voting on routine or nonroutine proposals, and the 40-day notice required by the "notice only" option. In the course of completing an analysis, issuers should consult their law firm and financial printer.

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<sup>1</sup>Broadridge Financial Services, Inc., *Notice & Access: Statistical Overview of Use with Beneficial Shareholders* (June 30, 2008), available at <http://www.broadridge.com/notice-and-access/index.asp>.

<sup>2</sup>*Id.*

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