

## Upcoming Amendments to SEC E-Proxy Rules

2010-03-17

Effective March 29, 2010, the SEC's e-proxy rules will be revised to:

- provide additional flexibility regarding the format and content of the Notice of Internet Availability (the "Notice");
- permit issuers and other soliciting persons to include explanatory materials regarding the reasons for using the notice and access model underlying the e-proxy rules and the process for receiving and reviewing proxy materials and voting; and
- revise the timeframe for sending the Notice to shareholders when a soliciting person *other than the company* relies on the notice-only option.

Under the updated rules, the Notice still must include a prominent, bold legend stating **"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [meeting date]."** However, a new requirement to include the following general information in the Notice will replace the rest of the previously prescribed legend:

- an indication that the Notice is not a form for voting;
- an indication that the Notice presents only an overview of the more complete proxy materials, which contain important information and are available by Internet or by mail;
- a statement encouraging security holders to access and review the proxy materials before voting;
- the Internet Web site address where the proxy materials are available; and
- instructions on how security holders may request a paper or email copy of the proxy materials at no charge, including the date by which they should make the request to facilitate timely delivery, and an indication that they will not otherwise receive a paper or email copy.

The remainder of the information currently required in the Notice is unchanged.<sup>1</sup> The revised rules do not specify the exact language or format to be used to present this information. The SEC also confirmed that the Notice does not need to mirror the proxy card.

In adopting the revised rules, the SEC emphasized its intention to move companies and other soliciting parties away from formulaic content in the Notice, stating that the flexibility of the new rules "should discourage the development of boilerplate disclosure, which is one of the problems our amendments are designed to address." In practice, however, given the large number of companies that simply use the form of Notice provided by Broadridge, it is uncertain how much variation in language will develop.

The revised rules will also allow a company or other soliciting person to distribute additional information about the voting process along with the Notice. Previously, the Notice could only be accompanied by a pre-addressed, postage-paid reply card to request a copy of proxy materials or a copy of a notice of meeting required under state law. The new rules expand this exception to permit companies and other soliciting persons to include with the Notice an explanation of the notice and access model and the reasons for the use of such process. The modified rules continue to prohibit accompanying the Notice with any materials designed to persuade security holders to vote in a particular manner.

Finally, the revised rules adjust one of the dates used to determine the deadline for a soliciting person other than the company to send its Notice. Under the original rules, a soliciting person could be required to send its Notice no later than 10 calendar days after the company first sent its proxy materials to shareholders. This timeframe proved to be problematic, however, as it may not provide the soliciting person with adequate time to resolve any SEC comments on its preliminary proxy materials. Under the new rules, the soliciting person will be able to send its Notice on the same date it files definitive proxy materials, as long as it has filed a preliminary proxy statement no later than 10 calendar days after the filing of the company's definitive proxy statement.

The rule changes described above are expected to be just the first step in the SEC's ongoing review of proxy regulations and the voting process. The SEC confirmed in the release that it is conducting a comprehensive review of proxy voting mechanics and the way in which information is conveyed to security holders and is preparing a concept release on these broader issues for public comment.

Concurrent with these rule updates, the SEC added information for shareholders about proxy matters and the e-proxy process to its Web site in a section called "[SEC's Spotlight on Proxy Matters](#)."

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<sup>1</sup> Rule 14a-16(d) requires that the following be included in the Notice:

- 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 soliciting person's recommendations, if any, regarding those matters, but no supporting statements;
  - a list of the materials being made available at the specified Web site;
  - a toll-free telephone number, an email address, and an Internet Web site where the security holder can request a copy of the proxy statement, annual report to security holders, and form of proxy, relating to all of the registrant's future security holder meetings and for the particular meeting to which the proxy materials being furnished relate;
  - any control/identification numbers that the security holder needs to access his or her form of proxy;
  - instructions on how to access the form of proxy, provided that such instructions do not enable a security holder to execute a proxy without having access to the proxy statement and, if required by Rule 14a-3(b), the annual report to security holders; and
  - information on how to obtain directions to be able to attend the meeting and vote in person.
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