

To: Our Clients and Friends

February 23, 2010

SEC Amends E-Proxy Rules to Provide Increased Flexibility

Yesterday, the SEC approved amendments to the notice and access proxy, or “e-proxy,” rules. The amendments will:

- provide increased flexibility for companies regarding the format and content of the notice;
- permit companies and other soliciting persons to accompany the notice with an explanation of the reasons for using the e-proxy and the process of receiving and reviewing proxy materials and voting;
- permit a soliciting person (other than the issuer) to use e-proxy and send its notice by the later of
 - 40 days before the shareholders meeting, or
 - the date on which the soliciting person files its definitive proxy statement if its *preliminary proxy statement* is filed within 10 days of the issuer’s filing of its definitive proxy statement.

The amendments are intended to respond to some of the concerns with the e-proxy system. Although use of the “notice and access” option has reduced costs for many companies, it has also resulted in lower shareholder voting rates, particularly among individual or retail investors.

The amendments are effective 30 days after publication in the Federal Register. The SEC did not address whether companies that mail proxy materials earlier can utilize the amended rules.

The adopting release is available [here](#).

Proxy Delivery Methods

Companies have two options for the delivery of their proxy materials:

- the *full set delivery option*, which allows companies to continue to furnish paper copies of their proxy materials; and
- the *notice and access option*, which allows companies to provide their proxy materials on the internet rather than in paper form.

Companies are generally free to choose either option, although the notice and access option is not available for business combinations. Companies are not required to use the same delivery method for all shareholders; thus, for example, full set delivery may be used for certain shareholders (selected by size of holdings, city location, or otherwise), while notice and access is used for other shareholders.

The SEC is concerned that the use of the notice-only option is reducing voter turnout among retail investors. Since the initial adoption of the e-proxy rules, based on Broadridge May 2009 data, the SEC concluded that the percentage of retail shares voted when companies used the e-proxy method for some of their shareholders is lower than the percentage when companies used full-set delivery. When comparing shareholders in companies that used both options, the SEC concluded that response rates of retail shares voted by shareholders that received notice-only was half that of those who received full set delivery. As to the effect on voting by retail investors, rather than retail shares voted, Broadridge data indicate even lower voting response rates when e-proxy was used. As a result, the SEC approved the proposed amendments.

Amended Notice Requirements

As a result of the amendments, companies will no longer be required to include a specified legend in the form of notice (other than the single line "Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]"). Instead, companies will be required to address certain topics, without exact language specified:

- an indication that the notice is not a form for voting and presents only an overview of the proxy materials, which contain important information and are available on the web or by mail
- encouraging shareholders to access and review the proxy materials before voting
- the website where the proxy materials are available
- instructions on how shareholders can request paper or email copies of proxy materials without charge, including the date by which the request should be made
- an indication that shareholders will not otherwise receive a paper or email copy of proxy materials

The other informational requirements of the notice are unchanged. However, the SEC confirmed its guidance that the notice need not directly mirror the proxy card or comply with proxy card rules, and

need only clearly and impartially identify each separate matter to be considered at the meeting. This allows greater flexibility in the design of the notice.

The SEC expressed the belief that the increased flexibility should discourage the development of boilerplate disclosure, as that was seen as one of the problems under the current rules.

Inclusion of Explanatory Materials with Notice

Companies and other soliciting persons will be permitted to include an accompanying explanation of the reasons for use of the notice and access model and the process of receiving and reviewing the proxy materials and voting. By contrast, materials designed to persuade shareholders to vote in a particular manner or change the method of delivery of proxy materials will not be permitted.

Prior to the amendments, companies were not permitted to include any materials with the notice other than a pre-addressed, pre-paid reply card to request proxy materials and a copy of any notice of a shareholder meeting required by state law.

The SEC declined to specifically require intermediaries to distribute explanatory materials to shareholders, indicating that companies and other soliciting persons are generally required to reimburse them for the reasonable expenses in connection with forwarding materials. The SEC noted that existing rules would already require their distribution if they constituted "other soliciting materials," but did not take a position on the matter.

Amendment to Notice Deadlines for Non-Issuers

The deadline for soliciting persons (other than the issuer) using e-proxy to send the notice have been changed. Previously, the deadline was the later of (a) 40 calendar days before the shareholder meeting to which the proxy materials relate or (b) 10 calendar days after the company first sends proxy materials to shareholders. As a result, SEC comments could delay the timing, thereby limiting a soliciting person's ability to use the notice-only option. As amended, soliciting persons (other than the issuer) must send its *notice to shareholders* no later than the date on which it files its definitive proxy statement with the SEC, provided it files its *preliminary proxy statement* within 10 calendar days after the issuer files its definitive proxy statement.

SEC Investor Education Efforts

Yesterday, the SEC also announced two related initiatives relating to investor participation in corporate elections:

- the publication of a new Investor Alert entitled [New Shareholder Rules for the 2010 Proxy Season](#). The alert provides investors with information related to the recent changes to broker voting rules and the impact of those new rules on proxy voting.
- [a new Spotlight page](#) on the SEC website that provides investors with information on the mechanics of proxy voting, the e-proxy rules, corporate elections and proxy matters generally.

SEC Review of Proxy System

The SEC noted that some commentators had expressed broader concerns with the proxy system and the lack of shareholder participation that were not addressed in the adopting release. In particular, some commentators believe that the amendments do not go far enough, particularly in light of NYSE Rule 452 and the elimination of broker discretionary voting in director elections, and have suggested other reforms, such as:

- Reducing the minimum time before the meeting for the notice from 40 to 30 days
- Allowing companies to send a proxy card and business reply envelope with the notice
- Processing fee structures

The SEC declined to address such broader concerns, but confirmed that it is conducting a comprehensive review and will issue a concept release to seek public comment on these and related issues.

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