

SEC Amends Proxy Rules To Provide "E-Proxy" Flexibility

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March 19, 2010

Background

In 2007, the Securities and Exchange Commission (the "SEC") established new procedures that enable the use of the Internet as a reliable and cost efficient means for issuers and other soliciting persons to make proxy materials available to shareholders. The notice and access proxy rules require all issuers and other soliciting persons to post proxy materials on an Internet Website and provide a Notice of Internet Availability (the "Notice") to shareholders. These rules also provide issuers and other soliciting persons an option as to whether to send a full set of proxy materials (the "Full Set Delivery Option") to all shareholders or to send shareholders the Notice only (the "Notice-Only Option").

On February 22, 2010, the SEC issued final amendments to rules under the Securities and Exchange Act of 1934 (the "Exchange Act") and the Securities Act of 1933 (the "Securities Act") to clarify and provide additional flexibility regarding the form of the Notice. The amendments are designed to (1) provide additional flexibility regarding the format and content of the Notice, (2) permit issuers and other soliciting persons to better communicate with shareholders by including explanatory materials regarding the reasons for the use of notice and access rules, and the process of receiving and reviewing proxy materials and voting, (3) revise the timeframe for delivering the Notice to shareholders when a soliciting person, other than the issuer, relies on the Notice-Only Option and (4) permit mutual funds to accompany the Notice with a summary prospectus.

As noted in the SEC's adopting release, over 1,300 corporate issuers used the Notice-Only Option for distribution to some portion of their beneficial owners under the notice and access model during the 2009 proxy season. As a result, issuers have experienced significant cost savings relating to printing, postage and processing fees. While issuers have experienced significant cost savings, the SEC noted in its adopting release that certain statistics indicate lower shareholder response to proxy solicitations when issuers use the Notice-Only Option.

The Amendments

A. Revisions to the Notice Requirements and Inclusion of Explanatory Materials

The amendments to Exchange Act Rule 14a-16 provide issuers and other soliciting persons with additional flexibility in formatting and selecting the language to be used in the Notice. Rather than requiring the soliciting person to include a detailed legend that may seem like boiler-plate language to shareholders, the SEC now requires the Notice only to address certain topics. To further mitigate confusion regarding voting, as some shareholders attempted to vote by returning their Notices, and to allow issuers and other soliciting persons to better engage shareholders, Rule 14a-16 now permits

issuers and other soliciting persons to indicate that the Notice is not a form for voting. Issuers may also now provide an explanation of the notice and access model, limited to an explanation of the process of receiving and reviewing proxy materials and voting under the rules and the reasons for the use of the notice and access rules. The material distributed should in no way be designed to influence the manner in which the shareholder chooses to vote or change the method of delivery of proxy materials.

B. Amendment to Notice Deadlines for Soliciting Persons and Other Issuers

The amendments are also designed to improve the workability of the notice and access rules applicable to soliciting persons, other than the issuer, that decide to use the Notice-Only Option. A soliciting person, other than an issuer, is required to file a preliminary proxy statement within 10 calendar days after the issuer files its definitive proxy statement. The soliciting person must also send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the SEC. The rule does not specify a date by which the mailing of the Notice by the soliciting person must precede the shareholder meeting. However, the SEC believes that it would be in the soliciting person's best interest to make the Notice and proxy materials available to shareholders, allowing for sufficient time to review the materials so shareholders can make informed voting decisions.

C. Technical Amendments Relating to Registered Investment Companies

The SEC also adopted technical amendments that permit registered investment companies to provide a summary prospectus along with the Notice. This is consistent with the SEC's previous amendments that permit mutual funds to meet prospectus delivery requirements by providing key information to investors in the form of a summary prospectus.

D. Conforming Changes to the Full Set Delivery Option

The amendments also include technical conforming changes under the Full Set Delivery Option. These changes include the deletion of the reference to legend requirements, as the legend is no longer required under Rule 14-16(d)(1) of the Exchange Act.

Conclusion

The SEC expects the amendments to reduce confusion among shareholders and encourage voter participation. The SEC acknowledged that its proposal of these amendments elicited a wide range of responses from commenters. While some responses fell outside of the scope of the SEC's immediate review of proxy notice and access rules, it signaled that it was considering other ways to comprehensively improve shareholder participation in corporate governance. The final rule takes effect on March 29, 2010.

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