

## **SEC Proposes Amendments to Rules Requiring Internet Availability of Proxy Materials**

On October 14, 2009, the Securities and Exchange Commission (“SEC”) proposed amendments to its rules requiring internet availability of proxy materials.<sup>1</sup> The proposals would amend the proxy rules under the Securities Exchange Act of 1934 (the “Exchange Act”) in an effort to improve the notice and access model for furnishing proxy materials to shareholders. In the background to the proposed amendments, the SEC describes concerns that the notice and access model may lead to shareholder confusion and reduced participation by individual shareholders in proxy solicitations. The proposed amendments would:

- provide additional flexibility regarding the format of the Notice of Internet Availability of Proxy Materials that is sent to shareholders;
- clarify the requirement to identify, in the Notice of Internet Availability, the matters to be acted on at the shareholders’ meeting;
- permit soliciting persons to include, with the Notice of Internet Availability, materials explaining the process of receiving and reviewing proxy materials and voting (but not materials designed to persuade shareholders to vote in a particular manner, change the method of delivery of proxy materials, or explain the basis for sending only a Notice of Internet Availability to shareholders, instead of sending a full set of proxy materials); and
- revise the timeframe for delivering a Notice of Internet Availability to shareholders when a soliciting person other than the issuer relies on the notice-only option.

### **I. Flexibility in the Format of the Notice of Internet Availability of Proxy Materials**

The proposed amendments would provide issuers and other soliciting persons additional flexibility in formatting and drafting the Notice of Internet Availability of Proxy Materials. Rule 14a-16(d) under the Exchange Act currently requires that the Notice include a detailed legend that the SEC indicates may seem like “boilerplate language” to shareholders. The proposals reduce the mandatory legend to state: “Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]” and require that the information in the Notice address the following topics, without specifying the exact language:

1. an indication that the Notice presents only an overview of the complete proxy materials;
2. the Internet address where the proxy materials are available;
3. instructions for requesting a paper or e-mail copy of the proxy materials;
4. the date, time, and location of the meeting, or earliest effective date for action by written consent;
5. a clear, impartial identification of each matter to be acted on and the soliciting person’s recommendations, if any, regarding those matters, but no supporting statements;
6. a list of the materials being made available at the specified Internet site;

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<sup>1</sup> SEC Release No. 34-60825 (Oct. 14, 2009) (the “Proposing Release”), published at 74 Fed. Reg. 53954 (Oct. 21, 2009), available at <http://www.sec.gov/rules/proposed/2009/33-9073fr.pdf>. The SEC’s rules regarding internet availability of proxy materials are discussed in our memoranda: “E-Proxy Rules: Update,” dated December 11, 2008, available at <http://www.cahill.com/news/memoranda/000131>, and “SEC Rules for Electronic Delivery of Proxy Materials: The Notice and Access Model,” dated July 13, 2007, available at <http://www.cahill.com/news/memoranda/000044>.

7. a toll-free telephone number, an e-mail address, and an Internet address where the security holder can request a copy of the proxy materials;
8. any control or identification numbers needed to access the security holder's form of proxy (the proxy card or equivalent);
9. instructions on how to access the form of proxy, without enabling a security holder to execute a proxy without having access to the proxy statement and, if required, the annual report; and
10. information on how to obtain directions to be able to attend the meeting and vote in person.

The information identified in the first three points is currently included in the mandatory legend under Rule 14a-16(d). The proposed amendments would allow that information to be disclosed in a more flexible manner, which is intended to allow more effective explanation of the Notice and guidance for shareholders to access the proxy materials and vote their shares.

## **II. Clarifying Requirement to Identify Matters to be Acted On**

The SEC notes that some companies have interpreted Rule 14a-16(d) to require that identifying the matters to be acted on in the Notice of Internet Availability must comply with the requirements for the proxy card under Rule 14a-4. The Proposing Release clarifies that Rule 14a-16(d) allows more flexibility in the design of the Notice and that the Notice need not directly mirror the proxy card.

Additionally, the Proposing Release requests comment on whether additional rulemaking is advisable to avoid the potential for investors to confuse the Notice of Internet Availability for a proxy card or voting instruction form, including a possible prohibition against including voting recommendations in the Notice or requiring identification of matters to be voted on by topic rather than identifying the specific matters as they appear on the proxy card, so that the Notice looks less like a proxy card or voting instruction form.

## **III. Permitting Explanatory Materials with Notice of Internet Availability of Proxy Materials**

If a company or other soliciting person uses the notice-only method of proxy material delivery, Rule 14a-16(f) strictly limits the types of materials that may accompany the Notice of Internet Availability. Under the notice-only method, companies other than registered investment companies must send the Notice separately from other shareholder communications and may not accompany the Notice with any other materials other than a preaddressed, postage-paid reply card for requesting a copy of the proxy materials and a copy of a notice of shareholder meeting required by state law. Accordingly, a soliciting person may not include additional materials to explain why the shareholder is receiving only a Notice instead of the proxy materials.

In an effort to improve shareholder understanding of the notice and access model and increase shareholder participation in proxy voting, the proposed rule amendments would permit issuers and other soliciting persons to accompany the Notice with an explanation of the notice and access model. This exception to the general prohibition on accompanying materials would be limited to explanation of the process of receiving or reviewing the proxy materials and voting. Materials designed to persuade shareholders to vote in a particular manner, change the method of delivery of proxy material, or explain the basis for sending only a Notice to shareholders would not be permitted to accompany the Notice, as under the current rules. The SEC indicates that they anticipate that many issuers will use standardized materials to explain the process of receiving and reviewing the proxy materials and the process of voting.

Although the proposals increase the flexibility permitted for materials accompanying the Notice, they retain the current prohibition against explaining why a soliciting person has decided to use the notice-only method of proxy material delivery, instead of the traditional full set delivery method. Allowing such an explanation could reduce the potential for confusion under the notice and access model, which has included “reports of some shareholders attempting to indicate their voting instructions by returning a marked copy of the Notice” as described in the Proposing Release.

## **IV. Revising Timeframe to Deliver Notice of Internet Availability for Non-Issuer Soliciting Persons Using Notice-Only Option for Proxy Material Delivery**

### **Concerns under Current Rules**

Currently under Rule 14a-16, if a soliciting person other than the issuer chooses to use the notice-only option, the soliciting person must send its Notice to shareholders by the later of:

- 40 calendar days before the shareholder meeting to which the proxy materials relate, or
- 10 calendar days after the issuer first sends its Notice or proxy statement to shareholders.

The 10-day period is intended to allow non-issuer soliciting persons relying on the notice-only option time to respond to an issuer’s mailing of proxy materials while allowing shareholders enough time to request paper copies of the soliciting person’s proxy materials.

The SEC notes that the current 10-day requirement can limit the ability of non-issuer soliciting parties to use the notice-only option because of the interaction of two of the proxy rules. Rule 14a-16(b)(4) requires providing a means to execute a proxy at the time the Notice is first sent to shareholders. Rule 14a-4(f), however, prohibits a person from providing a form of proxy unless it is accompanied or preceded by a definitive proxy statement. The current practice of the staff of the SEC Division of Corporation Finance is to review and comment on proxy materials in contested solicitations. Because comments may remain outstanding at the expiration of the 10-day period, a non-issuer soliciting person may not have finished revising its proxy statement and may not have filed its definitive proxy statement with the SEC by the expiration of the 10-day period, which, due to the interaction of the rules just noted, could prevent a non-issuer soliciting person from using the notice-only option for a proxy contest. This could be a particular concern if that soliciting person’s initial proxy statement filing is made in response to the issuer’s definitive proxy statement filing, which could occur if, for example, the issuer files its proxy statement in definitive form, without a preliminary filing, for an election of directors that is routine and not contested at the time of filing.

### **Proposed Amendments**

To address such situations, the proposed rule amendments would replace the 10 calendar day requirement above with a provision allowing a non-issuer soliciting person relying on the notice-only model to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the SEC, so long as the soliciting person has filed its preliminary proxy statement no later than 10 days after the issuer files its definitive proxy statement. The SEC indicates this time period should allow sufficient time for a soliciting person to prepare its proxy statement and respond to any staff comments, while still permitting use of the notice and access model. The proposed rule does not require mailing the Notice a specific length of time before the meeting. However, the SEC indicates that the soliciting person should make the Notice and proxy materials available to shareholders with sufficient time for shareholders to review the materials and make an informed voting decision.

## V. Conclusion

In addition to the proposals described above, the SEC has requested comment on the notice and access model generally, including the following items:

- has the notice and access model made proxy materials more or less accessible to shareholders;
- what factors have caused reduced shareholder response rates by individual shareholders to proxy solicitations under the notice and access model;
- should the SEC limit an issuer's ability to use the notice-only option if shareholder participation has decreased as a result of using that option;
- should the SEC permit or require that the Notice be accompanied by materials explaining the process of obtaining proxy materials and voting, the benefits of the notice and access model or why a soliciting person has decided to use the notice-only option;
- has the notice and access model reduced or increased the costs of proxy solicitations;
- should the SEC address fees charged by proxy distribution service providers under the notice and access model and, if so, how;
- should the SEC adopt a 30-day deadline for delivery of the Notice, instead of the current requirement for issuers to send the Notice to shareholders at least 40 days prior to the shareholder meeting to which the proxy materials relate;
- should the SEC impose a specific time period by which a soliciting person other than the issuer must send its Notice in connection with the proposed amendments above; and
- should the SEC suspend the notice and access rules until a later date to provide more time for shareholders to understand and prepare for the notice and access model?

Comments on the proposals should be received on or before November 20, 2009, which suggests that final rules could become effective in time to apply to the upcoming proxy season.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com); or Dan Zimmerman at 212.701.3777 or [dzimmerman@cahill.com](mailto:dzimmerman@cahill.com).