

Alerts and Updates

SEC PROPOSES AMENDING RULES FOR INTERNET AVAILABILITY OF PROXY MATERIALS

October 22, 2009

On October 14, 2009, the U.S. Securities and Exchange Commission (the "SEC") proposed amendments to the proxy rules under the Securities Exchange Act of 1934 that are intended to provide additional flexibility for issuers and other soliciting persons on the content and format of the Notice of Internet Availability of Proxy Materials (the "Notice"). In an effort to improve the clarity of the Notice and to better educate shareholders about the notice and access model, the SEC has proposed a new rule allowing issuers and other soliciting persons to accompany the Notice with an explanation of the process of reviewing and receiving proxy materials and voting. In addition, [SEC Release No. 34-60825](#) (the "Release") provides guidance about the current requirement for the Notice to identify matters to be voted upon at the shareholders' meeting. Furthermore, the SEC has proposed revisions to the Notice delivery deadlines for soliciting persons other than issuers.

Changes to the Notice Requirements

In support of the proposed amendments, the SEC cites reports indicating a decline in shareholder response rates to proxy materials among individual shareholders under the notice and access model, particularly for issuers using the notice-only option.¹ The SEC expressed concern that its rules on the content and format of Notice may be causing confusion among shareholders—thus contributing to the decline.

The proposed amendments would mandate a brief legend in place of the current detailed legend. The amended legend in the Notice would be limited to the line "Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date]." Following this legend, the Notice would address certain specified topics, as are in the current regulation, without specifying the exact language to be used, although it is likely that the new language would track the current language.

In addition, the SEC proposed that issuers and other soliciting persons following the notice-only option would be permitted to include an explanation of the process of receiving and reviewing the proxy materials and voting procedures. Although issuers and other soliciting persons would be permitted to include their own explanations, the SEC anticipates that many issuers would use standardized materials for this purpose. The Release notes that during informal meetings with SEC staff,

issuer representatives, intermediaries and proxy-distribution service providers have expressed interest in developing standardized explanatory materials for inclusion with the Notice. While the Release clarifies that the proposed amendments do not require the inclusion of explanatory materials with the Notice, it encourages issuers and other soliciting persons who use the notice-only option to better inform shareholders about the notice and access process.

Guidance on Identifying Matters for Action at the Shareholders' Meeting

In addition to proposing amendments to the proxy rules, the Release provides guidance about the current requirement that the Notice identify the matters intended to be acted on at the shareholders' meeting.

Rule 14a-16(d)(3) requires the Notice to include a clear and impartial identification of each separate matter to be acted on and the soliciting person's recommendations, if any, regarding those matters. Some issuers have interpreted this rule to require the Notice's compliance with the formatting and content requirements under Exchange Act Rule 14a-4, pertaining to proxy card disclosures of each matter to be voted on at a shareholders' meeting. The Release clarifies that Rule 14a-16(d)(3) provides more flexibility in the design of the Notice than Rule 14a-4 does regarding the proxy card. It provides that identification in the Notice of matters to be acted on at the shareholders' meeting does not have to mirror the proxy card requirements—the Notice may generally identify each matter to be voted on at the meeting (*e.g.*, election of directors; ratification of auditors; approval of stock option plans, etc.).

Proposed Amendments to Notice Deadlines for Soliciting Persons Other Than Issuers

The SEC has also proposed an amendment to the Notice deadlines for soliciting persons other than issuers who utilize the notice-only option. Under current Rule 14a-16, a soliciting person other than an issuer using the notice-only option must send its Notice to shareholders by the later of 40 calendar days before the shareholders' meeting to which the proxy materials relate or 10 calendar days after the issuer first sends its Notice or proxy statement to shareholders. However, under Rules 14a-16(b)(4) and 14a-4(f), a soliciting person cannot send a Notice until it has filed a definitive proxy statement. Consequently, the notice and access rules and current SEC review practice for a contested solicitation may prevent a soliciting person from using the notice-only option if the SEC's review process with respect to a preliminary proxy statement extends beyond 10 calendar days.

The proposed amendment addresses the possibility that a soliciting person other than an issuer would be unable to use the notice-only option where the soliciting person has filed an initial proxy statement in response to the issuer's definitive proxy

statement and the SEC's review process of the initial proxy statement extends beyond 10 calendar days from the date of filing. The proposed amendment would require the soliciting person other than the issuer relying on the notice-only option to file a preliminary proxy statement within 10 days after the issuer files its definitive proxy statement and to send its Notice no later than the date on which it files its definitive proxy statement with the SEC.

The SEC views the notice and access model as significant for both issuers and shareholders and is indicating its goal to improve the process for all participants.

The SEC requests that comments be submitted on or before November 20, 2009.

For Further Information

If you have any questions regarding the proposed amendments to the SEC proxy rules described above, please contact one of the [members](#) of the [Securities Law Practice Group](#) or the lawyer with whom you are regularly in contact.

Note

1. The decline in shareholder response rates for specific matters may become more significant in view of the trend toward the adoption of majority voting standards in director elections as well as recently approved amendments to New York Stock Exchange Rule 452 that eliminated broker discretionary voting for uncontested elections of directors at shareholders' meetings.