

SEC Proposes to Add Flexibility To E-Proxy Rules To Increase Voter Response

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I. Introduction

The number of individual shareholders who vote when they receive only a notice informing them of the availability of proxy materials on the internet is significantly lower than when those shareholders receive a full set of proxy materials, according to recent statistics.¹ In response to this trend, on October 14, 2009, the SEC published proposed amendments and a new rule aimed at increasing shareholder responses to proxy solicitations in connection with the “notice-only” option under the “notice and access model.”²

Under the “notice and access model,” an issuer or other soliciting person, such as persons contesting a proxy solicitation (“contestants”), may choose to provide proxy materials to shareholders under either of two options, the “notice-only option” or the “full set delivery option.” The notice-only option permits the issuer or contestant to send only a “Notice of Internet Availability of Proxy Materials” (“Notice”) to shareholders, while the full set delivery option permits an issuer or contestant to send the traditional full set of proxy materials in paper to shareholders.

Issuers may also choose to send a Notice to all shareholders **and** a full set of proxy materials to certain shareholders, such as institutional holders or

other known large shareholders. Sometimes referred to as the “hybrid” approach, this practice can help mitigate some of the lost voter turnout under the notice-only approach, depending upon an issuer’s shareholder composition. The SEC’s new proposals are designed to improve voter response under the notice-only approach, under which voter response for “retail” and individually held shares, in particular, has declined.

In an effort to remove regulatory impediments that may be reducing shareholder voting, the SEC is proposing amendments designed to:

- increase flexibility with respect to the format of the Notice, including the identification of matters to be acted upon at a shareholders’ meeting; and
- provide a sufficient timeframe for contestants to use the notice-only option.

In addition, the SEC is proposing a new rule that would permit issuers and contestants to include with the Notice explanatory materials regarding the process of receiving and reviewing proxy materials and voting.

This Client Advisory discusses how the proposed revisions and new rule would affect issuers and contestants using the notice-only option.

II. Proposed Amendments

A. SEC Adds Flexibility In The Language To Be Used In The Notice

Background

The SEC's proposed amendments reflect its concern that the specific content requirements for the Notice may not be providing clear guidance for shareholders on the availability of proxy materials and the way in which they may vote their shares. Consequently, the SEC has proposed revisions designed to provide issuers and contestants with additional flexibility in formatting and selecting the language to be used in the Notice.

Currently, Exchange Act Rule 14a-16(d) requires that the Notice include, among other things, (i) a prescribed legend, (ii) an explanation about how a shareholder may request a paper copy, (iii) a statement encouraging shareholders to access and review the proxy materials at a specified Web site address, and (iv) a "clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendations regarding those matters, but no supporting statements."

SEC Proposal

Under the proposed amendments, the Notice would merely need to address certain topics but would not need to include prescribed language. Consequently, issuers and contestants would be free to develop a more effective explanation of the effect of the Notice, as well as provide clearer guidance for shareholders as to how to access the proxy materials online, request a paper copy of the materials and vote their shares. In addition, the SEC is clarifying that the Notice must identify each matter to be considered at the meeting (e.g., election of directors, ratification of auditors; approval of a stock option plan, etc.) but that the Notice need not directly mirror the content on the proxy card and need not adhere to the formatting requirements for disclosure of matters on the proxy card.

B. SEC Permits Explanatory Materials To Accompany The Notice

SEC Proposal

The SEC is also proposing to revise its rules to allow issuers and contestants to accompany the Notice with an explanation of the notice and access model. Currently, Exchange Act Rule 14a-16(f) imposes a strict prohibition on the types of material that may accompany the Notice under the notice-only option. The explanation would be limited to the process of receiving or reviewing the proxy materials and voting and could not include materials designed to persuade shareholders to vote in a particular manner or change the method of delivery. The proposed amendment would also allow mutual funds to satisfy their delivery obligations by accompanying the Notice with a summary prospectus.

C. Request For Comments

The SEC has requested comment on a number of issues in connection with the proposed amendments, including asking whether there are other factors that may have caused the lower shareholder response rates by individual shareholders when the notice-only option is used and whether an issuer should be limited in its ability to use the notice-only option where the issuer has experienced a decrease in shareholder participation.

D. SEC Amends The Notice Deadlines For Soliciting Persons Other Than The Issuer Such As Persons Contesting A Proxy Solicitation

Background

Currently, the ability of soliciting persons other than an issuer, such as contestants, to use the notice-only option is effectively limited by Rule 14a-16. The SEC is proposing an amendment that would provide sufficient time for contestants to use the notice-only option.

Rules 14a-16(l)(2)(i) and (ii) currently provide that a soliciting person such as a contestant must send its Notice by a date that is the later of

- (i) 40 calendar days before the shareholder meeting to which the proxy materials relate; or
- (ii) 10 calendar days after the **issuer** first sends its Notice or proxy statement to shareholders.

The 10-day period was designed to provide contestants, who wished to rely on the notice-only option, time to respond to an issuer's mailing of proxy materials and still allow shareholders receiving a Notice from the contestant enough time to request paper copies of the contestant's proxy materials.

However, Rule 14a-16, as currently written, has the practical effect of limiting a contestant's ability to use the notice-only option. This is because Rule 14a-16(b)(4) requires that shareholders be provided with a means to execute a proxy, e.g., a proxy card, at the time a Notice is first sent to shareholders. Rule 14a-4(f), however, prohibits a person from providing the proxy card unless it is accompanied or preceded, by a definitive proxy statement. Because SEC staff comments may still be outstanding on a preliminary proxy statement more than 10 calendar days after the contestant initially filed the preliminary proxy, contestants may not have filed a definitive proxy statement within the requisite 10 days after the issuer first sends its Notice to shareholders. Consequently the

notice and access rules, combined with current staff review practice, may, in many circumstances, prevent contestants from using the notice-only option.

SEC Proposal

In response to the above, the SEC has proposed to amend Rule 14a-16(l)(2)(ii) to require contestants relying on the notice-only option, to file a preliminary proxy within ten days after the issuer files its definitive proxy statement and to send its Notice to shareholders **no later than** the date on which it files its definitive proxy statement with the SEC. The SEC believes that this proposed time frame would provide sufficient time for contestants to prepare their proxy statement and respond to any staff comments, while still permitting them to use the notice and access model. The proposed rule would **not** specify a period of time before the shareholder meeting by which contestants would need to mail the notice; but they would be required to make the Notice and proxy materials available with sufficient time for shareholders to review the materials and make an informed decision. Among other things, the SEC has requested comment on whether it should impose a specific time period after the filing by which a contestant must send its Notice.

Public comments on the SEC's proposed amendments and new rule are due no later than November 20, 2009.

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- [1] Broadridge Financial Solutions, Inc. Notice & Access, [Statistical Overview of Use with Beneficial Shareholders](#) (as of May 31, 2009).
 - [2] SEC Proposed Rule, [Amendments to Rules Requiring Internet Availability of Proxy Materials](#), Release Nos. 33-9073 and 34-60825.

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