

SEC AMENDS E-PROXY RULES

February 25, 2010

Earlier this week, the SEC released a final rule amending its “notice and access” (or “e-proxy”) rules for furnishing proxy materials to shareholders via the Internet.¹ The final rules essentially track the SEC’s October 2009 proposals² to (i) expand the flexibility of the format of the notice of Internet availability of proxy materials (the “notice”); (ii) allow issuers and other soliciting persons to include explanatory materials regarding the reasons for the use of the notice and access rules and the process of receiving and reviewing proxy materials and voting; and (iii) revise the timetable for non-issuer soliciting persons relying on the notice and access method. The new rules will be effective March 29, 2010.

Also this week, as part of its ongoing effort to enhance the proxy disclosure and solicitation process,³ the SEC published a new Investor Alert, “New Shareholder Rules for the 2010 Proxy Season,”⁴ and established a new Spotlight page on its website to provide investors with information about the mechanics of proxy voting, the e-proxy rules, corporate elections and general proxy matters.⁵ The SEC’s actions are intended to encourage greater investor participation in corporate elections in light of recent data indicating that (particularly individual) shareholder participation rates have dropped, especially for companies using the notice-only option. Individual voting participation is especially important this year, due to the SEC’s 2009 elimination of discretionary broker voting for uncontested director elections.⁶ The remainder of this alert highlights the key terms of the SEC’s amended e-proxy rules.

Background

In 2007, the SEC amended its proxy rules to adopt a “notice and access” model that requires all public companies and other soliciting persons to post their proxy materials on an Internet website and furnish a notice

¹ See Release Nos. 33-9108 and 34-61560, “Amendments to Rules Requiring Internet Availability of Proxy Materials,” available at: <http://www.sec.gov/rules/final/2010/33-9108.pdf> (February 22, 2010). Most of the rule changes are reflected in amendments to Rule 14a-16, adopted under the Securities Exchange Act of 1934, as amended.

² Our October client alert discussing the proposed rules may be found at: <http://www.wcsr.com/resources/pdfs/cs102009.pdf> (October 20, 2009).

³ Our client alert regarding the SEC proposal to enhance shareholder access for director nominations may be found at: <http://www.wcsr.com/resources/pdfs/cs052709.pdf> (May 27, 2009). Our client alert regarding amendments to the proxy disclosure rules may be found at: <http://www.wcsr.com/resources/pdfs/cs122109.pdf> (December 21, 2009).

⁴ The Investor Alert is available at: <http://www.sec.gov/investor/alerts/votingrules2010.htm>.

⁵ The Spotlight page is available at: <http://www.sec.gov/spotlight/proxymatters.shtml>.

⁶ Our client alert regarding the SEC’s amendment to New York Stock Exchange Rule 452 to eliminate broker discretionary voting in uncontested director elections may be found at: <http://www.wcsr.com/resources/pdfs/cs070609.pdf> (July 6, 2009).

of the materials' availability on the Internet to shareholders.⁷ Under the notice and access model, a company or other soliciting person may choose to provide proxy materials to shareholders via either of two ways: (i) the "notice-only option" (in which case the notice must include, among other things, the Internet website where shareholders can access the proxy materials and instructions about how to request paper or electronic copies) and (ii) the "full set delivery option" (which permits the company or other soliciting person to send the traditional full set of paper proxy materials accompanied by the notice or to include the information required in the notice in the proxy materials).

Flexibility in Notice Format

Instead of the current rules' strict requirements regarding the content of the notice, the amended rules require that the notice address certain topics, but, in an effort to avoid boilerplate disclosure, the amended rules afford issuers and other soliciting persons flexibility regarding the format of and the language used in the notice. The amended rules require the notice to indicate that it is not a form for voting, although no specific legend to that effect is mandated.

Explanatory Materials

The amended rules also permit issuers and other soliciting persons to accompany the notice with an explanation of the notice and access model. As noted above, the explanation is only permitted to address the process for receiving and reviewing proxy materials and voting and the reasons for using the notice and access rules. It cannot be used to persuade shareholders to vote in a particular manner.

Timeframe for Notice Delivery by Non-Issuers

Under current proxy rules, a soliciting person other than the issuer must send its notice to shareholders 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. Due to the SEC's review and comment procedures for preliminary proxy materials filed by soliciting shareholders in a contested solicitation, the alternative 10-day timeframe may result in the soliciting person being unable to use the notice-only option. To remove this barrier, the amended rules require the soliciting shareholder using the alternative deadline to file a preliminary proxy statement within 10 days after the issuer files its definitive proxy statement and to send its notice to shareholders no later than the date on which the soliciting shareholder files its definitive proxy statement.

Conclusion; Additional Information

The SEC declined when it took action earlier this week to make certain other changes to the notice and access rules, such as reducing the amount of time required for sending the notice from 40 days to 30 days before the shareholders meeting, although it said it would continue to monitor these and other related issues. Each issuer must assess whether the notice only or the full set method is more likely to produce the desired outcome at shareholders meetings, and, this year in particular, many companies will have to "circle the wagons" in an effort to garner sufficient votes for proxy proposals. For those issuers opting to rely on the notice-only method, the SEC's recent actions should give them more flexibility and may result in greater investor participation. We will continue to monitor the SEC's actions regarding the e-proxy rules. If you have any questions regarding the amended rules or their application, please contact Shandra N. Stout (<http://www.wcsr.com/ShandraStout>), the principal drafter of this client alert, or you may contact the Womble Carlyle attorney with whom you usually work or one of our Corporate and Securities attorneys at the following link: <http://www.wcsr.com/profSearch?team=corporateandsecurities>.

⁷ Our 2007 client alert discussing the adoption of the notice and access rules may be found at: <http://www.wcsr.com/resources/pdfs/cs080907.pdf> (August 9, 2007).

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