

## SEC PROPOSES AMENDMENTS TO E-PROXY RULES

October 20, 2009

Last week, the SEC proposed amendments to its “notice and access” rules for furnishing proxy materials to shareholders via the Internet.<sup>1</sup> The proposed amendments are intended to improve shareholder participation in the proxy solicitation process and permit public companies and other soliciting persons to more effectively use the SEC’s notice and access model. The e-proxy proposals are the latest of the SEC’s efforts this year to enhance the proxy disclosure and solicitation process, following on the heels of SEC proposals to facilitate shareholder access in director nominations and improve compensation and corporate governance disclosures and its elimination of discretionary broker voting in uncontested director elections.<sup>2</sup> The deadline for comments to the SEC e-proxy proposals is November 20, 2009.

### 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 (the “notice”) of the materials’ availability on the Internet to shareholders.<sup>3</sup> 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” (which notice must include, among other things, the Internet website where shareholders can access the proxy materials and instructions regarding 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). The SEC proposals were issued in part to respond to shareholder confusion about the purpose of the notice and to address recent data indicating that (particularly individual) shareholder participation rates have dropped, especially for companies using the notice-only option.

The SEC proposals focus on three primary changes: (i) enhancing flexibility in the format of the notice; (ii) permitting companies to include explanatory materials describing the notice and access process; and (iii) revising the timeframe for delivery of the notice for non-issuers using the notice and access method.

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<sup>1</sup> See Release Nos. 33-9073 and 34-60825, “Amendments to Rules Requiring Internet Availability of Proxy Materials,” available at: <http://www.sec.gov/rules/proposed/2009/33-9073.pdf> (October 14, 2009).

<sup>2</sup> 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 proposed changes to proxy compensation, corporate governance and related solicitation and disclosure rules may be found at: <http://www.wcsr.com/resources/pdfs/cs072309.pdf> (July 23, 2009). 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). The SEC has delayed action on the shareholder access proposals, although many expect the SEC’s compensation and corporate governance proposals to be finalized in time for the 2010 proxy season.

<sup>3</sup> 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).

## **Flexibility in Format of the Notice**

Current proxy rules impose strict requirements about notice content. These requirements are intended to prevent the notice from being used as a means of persuading shareholders how to vote or to deliver other marketing materials. In light of the SEC's concerns about shareholder confusion over the purpose of the notice, the proposals would require that the notice address certain topics but would at the same time give issuers and other soliciting persons more flexibility regarding the text of the notice. The proposals also clarify that the notice must identify the matters to be voted on at the meeting, but need not be identical to the proxy card.

## **Providing Explanatory Materials**

The proposals also would permit issuers and other soliciting persons to accompany the notice with an explanation of the notice and access model. The explanation would only be permitted to address the process for receiving and reviewing proxy materials and voting and could not be used to, for instance, 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 proposed rules would 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 it files its definitive proxy statement.

## **Additional Information**

As companies gear up for proxy season, they should begin to consider how the proposals, if adopted, may impact shareholder voting response. In particular, in light of the elimination of discretionary broker voting for uncontested director elections, the importance of individual shareholder participation will likely increase in the 2010 proxy season. If you have any questions regarding the proposals, 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>.

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