

October 22, 2009

SEC Proposes Amendments and Guidance to E-Proxy

The SEC recently published proposed amendments to its “notice and access” model of proxy material distribution (also known as “e-proxy”). Under this model, companies and other soliciting persons must deliver to shareholders a Notice of Internet Availability of Proxy Materials (a “Notice”) in the exact form specified by the SEC and post proxy materials on a publicly accessible website. Soliciting persons can then elect to use a “notice-only” or a “full-set delivery” option (or some combination thereof) to distribute actual proxy materials to shareholders. Under the full-set delivery option, companies and other soliciting persons provide paper or e-mail copies of proxy materials as they did historically prior to adoption of e-proxy requirements.¹

In an effort to address the sharp decline in retail voting rates for companies who use notice-only e-proxy procedures, the proposed amendments would allow companies the flexibility to tailor the Notice by, among other things, replacing the SEC’s specific legend and format requirements with requirements about the types of information that the Notice must contain, without specifying the exact language to be used. Other than the requirement for a heading that reads “Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date],” companies and other soliciting persons may include the remainder of the information required to be in the Notice under current e-proxy rules in any manner that they deem appropriate.

To further alleviate confusion as to whether the Notice can be used for voting purposes, the proposal clarifies that the Notice need not reflect the format and wording mandated by SEC rules for proxy cards as some companies had thought.

As an added option to help clarify the e-proxy process for shareholders, companies and other soliciting persons may include an explanation of the notice and access model with the Notice, so long as such explanation is limited to the process of receiving or reviewing proxy materials and voting. Statements intended to persuade shareholders to vote in a specific way, alter the method of delivery or explain why the company or soliciting person elected to use the notice-only model are not permitted.

¹ For a more detailed description of the existing e-proxy rules, please see our August 8, 2007 publication “The SEC’s New Universal E-Proxy Rules” available at <http://www.paulweiss.com/resources/pubs/detail.aspx?publication=1586>.

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Finally, the proposed amendments would extend the deadline for soliciting persons (other than the company) to deliver their proxy materials under the notice and access model in certain circumstances. Currently, such soliciting persons must send their Notices to shareholders by the later of (i) 40 calendar days before the shareholder meeting or action and (ii) ten calendar days after the company first sends its proxy statement or Notice to shareholders. Under the proposed amendments, soliciting persons other than the company could send their Notices out as late as the date on which they file their definitive proxy statements with the SEC, so long as their preliminary proxy statements are filed no later than ten calendar days after the date that the company files its definitive proxy statement.

In addition to seeking comments on the specifics of the proposed amendments, the SEC also seeks comments on numerous aspects of the notice and access model generally, including whether the model has made proxy materials more or less accessible to shareholders. While the SEC did not propose amendments to the 40-day requirement for companies to send their Notice to shareholders and post proxy materials online, it is seeking comments as to whether a 30-day deadline would be more appropriate.

Comments on the proposed amendments are due on or before November 20, 2009.

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This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. If you have questions regarding the foregoing, please contact:

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