

Corporate Alert

SEC Adopts Amendments to E-Proxy Rules

March 1, 2010

On February 22, 2010, the Securities and Exchange Commission (SEC) adopted amendments to its notice and access, or e-proxy, rules. Specifically, the amendments—

- permit additional flexibility with respect to the format and content of the Notice of Internet Availability of Proxy Materials (Notice)
- permit issuers and other soliciting persons to better communicate with shareholders by including explanatory materials with the Notice regarding the reasons for the use of the e-proxy rules and the process of receiving and reviewing proxy materials and voting
- revise the time period for delivering the Notice when a soliciting person other than the issuer relies on the notice and access option (as discussed below).

Although the SEC sought comment on whether it should reduce the amount of time required for sending the Notice to shareholders from 40 days before the shareholder meeting to 30 days, the SEC determined not to take action on this matter at this time.

The amendments become effective March 29, 2010. Therefore, companies with annual meetings scheduled for mid-May or later should be able to take advantage of the rule changes. The SEC did not address whether it will permit early adoption of the rule amendments.

Enhanced Flexibility with Respect to Format and Content of the Notice

Currently, companies and soliciting persons have two options for delivering proxy materials:

- the “full set delivery option,” pursuant to which companies or soliciting persons deliver the traditional full set of paper copies of the proxy materials, along with the Notice
- the “notice and access option,” pursuant to which companies or soliciting persons deliver the Notice to shareholders instructing them how to access the proxy materials on the Internet in lieu of receiving the materials in paper format.

The amendments are intended to improve the notice and access option and address concerns raised by recent data suggesting that the notice and access option leads to lower shareholder response rates, particularly by retail shareholders.

Under the current rules, the SEC mandates the specific wording of the legend required to be included in the Notice. The SEC acknowledged that this language may have been viewed by shareholders as boilerplate language and, consequently, may have discouraged voting. Under the amendments, the SEC will still require a legend (that reads “Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]”), but will allow some flexibility in formatting and selecting the remainder of the language used in the Notice. The SEC will require the Notice to contain the following, but will no longer specify the exact language to be used—

- an indication that the Notice is not a form for voting and presents only an overview of the more complete proxy materials, which contain important information and are available on the Internet or by mail
- encouragement for shareholders to access and review the proxy materials before voting

- the Internet Web site address where the proxy materials are available
- instructions regarding how a shareholder may request a paper or e-mail copy of the proxy materials at no charge, including the date by which they should make the request to facilitate timely delivery
- an indication that shareholders will not otherwise receive a paper or e-mail copy of the proxy materials.

Inclusion of Explanatory Materials with Notice

Under the current rules, companies are prohibited from including any materials with the Notice other than a pre-addressed, postage-paid reply card for requesting a copy of the proxy materials and a copy of any notice of any shareholder meeting required by state law. Under the amendments, companies and other soliciting persons will be permitted to accompany the Notice with an explanation of the reasons for the use of the notice and access proxy rules and an explanation of the process of receiving and reviewing the proxy materials and voting under the notice and access proxy rules. Materials designed to persuade shareholders to vote in a particular manner or change the method of the delivery of proxy materials, however, are still not permitted.

Amended Deadline for Sending Notice by Soliciting Persons Other Than the Issuer

Under the current rules, a soliciting person other than the issuer is required to send the Notice to shareholders by the later of (a) 40 calendar days before the shareholder meeting or (b) 10 calendar days after the issuer first sent its Notice or proxy statement to shareholders. Because the SEC staff's review of preliminary proxy materials may exceed 10 calendar days, the practical effect of the current rules is to limit the use of the notice and access option by soliciting persons other than the issuer. To address this issue, under the amendments a soliciting person relying on the alternative 10-day time frame will be required to—

- file a preliminary proxy statement no later than 10 calendar days after the date the company files its definitive proxy statement
- send its Notice to shareholders no later than the date it files its definitive proxy statement.

CONTACT INFORMATION

If you have any questions concerning this alert, please contact —

Julie M. Kaufer
jkaufer@akingump.com
310.728.3313
Los Angeles

Terry M. Schpok
tschpok@akingump.com
214.969.2870
Dallas

Samuel Wolff
swolff@akingump.com
202.887.4462
Washington, D.C.

Christine B. LaFollette
clafollette@akingump.com
713.220.5896
Houston

Rosa A. Testani
rtestani@akingump.com
212.872.8115
New York

Shar Ahmed
sahmed@akingump.com
713.220.8126
Houston