

# ClientAlert

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## SEC Proposes Changes to E-Proxy Rules

On October 14, 2009, the Securities and Exchange Commission proposed amendments to the notice and access rules for furnishing proxy materials to shareholders through the internet to improve implementation of the notice and access model, specifically the disclosures that shareholders receive when they are asked to make a voting decision and the process followed when such votes are solicited. A copy of the SEC's release can be found at [www.sec.gov/rules/proposed/2009/33-9073.pdf](http://www.sec.gov/rules/proposed/2009/33-9073.pdf).

### Form of Notice

Current Exchange Act Rule 14a-16(d) requires certain information to be disclosed in the Notice of Internet Availability of Proxy Materials, including, among other things:

- a prominent legend indicating that the document is an important notice regarding the internet availability of proxy materials for a specified shareholder meeting;
- a statement indicating that the Notice presents only an overview of the more complete proxy materials available to shareholders on the internet;
- an explanation of how a shareholder may request a paper or email copy of the proxy materials;
- a clear and impartial identification of each separate matter intended to be acted on; and
- the soliciting person's recommendations regarding such matters without supporting statements.

In light of serious concerns the SEC has regarding shareholder confusion and the potential that the current rules may be causing a reduction in shareholder voting, the proposed amendments provide issuers and other soliciting persons with additional flexibility in formatting and selecting the language to be used in the Notice. Rather than requiring the soliciting person to include a detailed legend that may seem like boilerplate language to shareholders, the proposed rules require that the information on the Notice address certain topics without specifying the exact language to be used.

Current Rule 14a-16(d)(3) requires that the Notice identify each matter that will be considered at the shareholder meeting (*e.g.*, election of directors, ratification of auditors and approval of a stock option plan). The proposed amendment clarifies that the Notice does not need to directly mirror the proxy card and Rule 14a-16(d)(3) should not be interpreted as a requirement that the Notice comply with the formatting and content requirements for the disclosure of matters on the proxy card under Rule 14a-4.

### Materials Permitted to Accompany Notice

The proposed amendments would permit issuers and other soliciting persons to accompany the Notice with explanatory materials on the notice and access model — limited to describing the process of receiving or reviewing the proxy materials and voting — in order to better educate shareholders on the notice and access model. Materials designed to persuade shareholders to vote in a particular manner,

change the method of delivery or explain the basis for sending only a Notice to shareholders (as opposed to sending the full set of proxy materials) would not be permitted. The SEC noted that while issuers would be allowed to provide their own explanation of the process of receiving and reviewing the proxy materials and voting, it expects that many issuers will use standardized materials prepared for this purpose.

Current Rule 14a-16(f) permits a registered investment company to accompany the Notice with a prospectus or report to shareholders. The SEC recently adopted a rule change that permits mutual funds to satisfy their prospectus delivery obligations by sending or giving investors key information in the form of a summary prospectus. The proposed amendment permits mutual funds to accompany the Notice with a summary prospectus for purposes of consistency.

### **Notice Deadlines for Soliciting Persons Other Than the Issuer**

Under current Rule 14a-16, if a soliciting person other than the issuer chooses to send only a Notice to shareholders (as opposed to sending the full set of proxy materials), the soliciting person must send its Notice by a date that is the later of:

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

Rule 14a-16(b)(4) requires a soliciting person to provide shareholders with a means to execute a proxy at the time the Notice is first sent to shareholders; however, Rule 14a-4(f) prohibits a soliciting person from providing a form of proxy unless it is accompanied or preceded by a definitive proxy statement. Since a soliciting person may not have finished the process of revising its proxy statement and may not have filed its definitive proxy statement with the SEC by the date required by Rule 14a-16, the SEC acknowledged that the deadlines under the current notice and access rules, combined with current SEC review practices (which often exceed 10 calendar days), may prevent a soliciting person other than the issuer from using the Notice-only option for a proxy contest if such soliciting person's initial proxy statement filing is made in response to the issuer's definitive proxy statement filing.

The proposed amendments would require a soliciting person relying on the notice and access model 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 own definitive proxy statement with the SEC. The SEC believes that this proposed time period would provide sufficient time for a soliciting person to prepare its proxy statement and respond to any SEC comments while still allowing the soliciting person to use the notice and access model. The SEC noted that while the proposed amendments do not provide for a specific period of time before the meeting by which a soliciting person would need to mail the Notice, the soliciting person should make the Notice and proxy materials available to shareholders with sufficient time for shareholders to review the materials and make an informed voting decision.

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Comments on the proposed rule changes may be submitted to the SEC until November 20, 2009. Information on submitting comments to the SEC can be found on the SEC's website at [www.sec.gov/rules/submitcomments.htm](http://www.sec.gov/rules/submitcomments.htm).

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