

SEC Adopts Amendments to E-Proxy Rules to Increase Shareholder Participation in the Voting Process

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Overview

The adoption by the Securities and Exchange Commission ("SEC") of the "Notice and Access" E-Proxy model ("Notice & Access") in late 2007 allowed public companies to make their proxy materials available to shareholders through Internet access only, or by providing the traditional printed proxy materials, or a combination of both. Many companies adopted the Internet access only process and stopped mailing printed proxy materials to their shareholders, primarily as a means to save on the associated costs,¹ which was approximately \$143 million in 2008 for 653 issuers, and \$239 million in 2009 for 1,363 issuers.

For those companies that went to a strict Internet access only process, there has been a significant trend towards lower voting participation by registered shareholders than when the company mailed a full set of printed proxy materials to its shareholders. For the 12 months ended June 30, 2009, participation by registered shareholders has been approximately 15% versus 32%, respectively.² Registered shareholder voting participation becomes especially important this year, due to the elimination

of discretionary broker voting for uncontested director elections.³

Each public company must balance the cost savings of making proxy materials available to shareholders through Internet access only against the lower likely registered shareholder vote. For those companies opting to rely on the Internet access only process, the SEC's recent actions should give them more flexibility and may result in greater investor participation.

The SEC indicated in its February 22, 2010 release⁴ amending the rules governing the Notice & Access process, that it believed at least part of the drop in participation was due to shareholder confusion about the purpose and function of the form of Notice of Internet Availability of Proxy Materials ("Notice") which had been mailed to shareholders.

The amendments which go into effect March 29, 2010 are intended to:

- expand the flexibility of the format of the Notice;
- allow issuers and other soliciting persons to include explanatory materials regarding the reasons for the

¹Broadridge Financial, *Notice & Access, Statistical Overview of Use with Beneficial Shareholders* (June 30, 2009). Broadridge determined that the 653 issuers who took advantage of the SEC's Notice & Access rule saved \$143 million, net of fees, in 2008, in moving from paper to Internet only access. For 2009, Broadridge determined that the 1,363 issuers who used Notice & Access saved \$239 million.

²Broadridge Financial, *Notice & Access, Statistical Overview of Use with Beneficial Shareholders* (June 30, 2009). For the 12 months ended June 30, 2009, 15.28% of shares held by registered shareholders who received notice and access only were voted, compared to 31.95% of shares held by registered shareholders at companies that did not use the Notice & Access process.

³Vorys, Securities Alert: SEC Approves NYSE's Elimination of Broker Discretionary Voting (July 6, 2009) available at: <http://www.vorys.com/publications-211.html>.

⁴The final amended rule release is available on the SEC's website. See Release Nos. 33-9108 and 34-61560, "Amendments to Rules Requiring Internet Availability of Proxy Materials" (February 22, 2010), available at: <http://www.sec.gov/rules/final/2010/33-9108.pdf>. The original rule release is also available on the SEC's website. See Release No. 34-56135, "Shareholder Choice Regarding Proxy Materials" (July 26, 2007), available at: <http://www.sec.gov/rules/final/2007/34-56135.pdf>.

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use of the Notice & Access process and the process of receiving and reviewing proxy materials and voting; and

- revise the timetable for non-issuer soliciting persons relying on the Notice & Access process.

Flexibility of Notice

The amendments require that the Notice have the following bold-face legend:

“Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to be Held on [insert meeting date].”

It must also address the following topics:

- an indication that the Notice is only an overview of the more complete proxy materials, which contain important information and are available on the Internet or by mail;
- the Internet website address where the proxy materials are available;
- encourage shareholders to access and review the proxy materials on-line before voting;
- instructions on how a shareholder may request a paper or e-mail copy of the proxy materials at no charge, the date by which proxy materials should be requested to ensure timely delivery and an indication that shareholders will not receive a paper or e-mail copy unless requested; and
- indicate that the Notice is not a form for voting.

In an effort to avoid boilerplate disclosure, the SEC now allows companies and other soliciting persons flexibility regarding the design and format of the Notice, as well as the language actually used to address the topics described above.

Accompanying Materials

The amendments permit companies and other soliciting shareholders to accompany the Notice with explanatory materials. These materials may explain the process of receiving and reviewing proxy materials, as well as voting under the Notice & Access process. Companies and soliciting shareholders may also include an explanation of their reasons for using the Notice & Access process. However, materials designed to persuade shareholders to vote in a particular manner are still not permitted.

Notice Deadlines for Soliciting Shareholders

Under the amendments, soliciting shareholders are allowed to file a preliminary proxy statement within ten calendar days after a public company files its definitive proxy statement, and must send their Notice to shareholders no later than the date on which the soliciting shareholders file their definitive proxy statement with the SEC.

SEC’s Continuing Review of Ways to Improve the Proxy Voting Process

The SEC is still considering ways to encourage registered shareholder participation in the proxy voting process. The SEC staff is in the process of conducting a comprehensive review of the mechanics by which proxies are voted and the way in which information is conveyed to shareholders. As part of its ongoing effort to enhance the proxy voting process, the SEC established a new Spotlight⁵ page on its website with information about proxy voting and the Notice & Access process. In addition, a new Investor Alert⁶ is available on the SEC’s website explaining the amended rules for the 2010 proxy season.

This client alert is for general information purposes and should not be regarded as legal advice.

⁵Available at: <http://www.sec.gov/spotlight/proxymatters.shtml>.

⁶Available at: <http://www.sec.gov/investor/alerts/votingrules2010.htm>.