

SEC Proposes Amendments to Notice and Access Requirements Under E-Proxy Rules

October 2009

On October 14, 2009, the Securities and Exchange Commission ("SEC") issued a proposing release (the "Proposing Release") soliciting comments regarding proposed amendments to the existing proxy rules under the Securities Exchange Act of 1934, as amended (the "Exchange Act") and the "notice and access" model for distributing proxy materials to shareholders thereunder.

The Proposing Release is part of the SEC's ongoing review of the proxy disclosure and solicitation process, which this year alone has also included proposed changes to the proxy rules requiring issuers to include shareholder nominated directors in proxy materials in certain circumstances and to provide enhanced disclosures concerning compensation and corporate governance, as well as approving an amendment to New York Stock Exchange Rule 452 eliminating broker discretionary voting for uncontested director elections at shareholder meetings. For more information on these topics, please see our previous Securities Law Updates: "SEC Seeks to Expand Director Nomination Process" (July 2009); "SEC Proposes New Compensation and Governance Disclosures" (August 2009); and "SEC Approves Elimination of Discretionary Proxy Voting by Brokers in Elections of Directors" (August 2009).

The proposed amendments include (a) providing more flexibility in the form and content of the Notice of Internet Availability of Proxy Materials (the "Notice"), (b) allowing the inclusion of explanatory materials with the Notice, and (c) revising the delivery timeframe for the Notice applicable to soliciting persons other than the issuer. The Proposing Release reflects the SEC's stated intent to provide a more effective means for issuers and other soliciting persons to utilize the notice and access model, as well as the SEC's concern that certain of the existing requirements under this model may be reducing individual shareholder participation and voting rates,

particularly among shareholders of issuers using the so-called "notice-only option".

The full text of the Proposing Release can be found at <http://www.sec.gov/rules/proposed/2009/33-9073.pdf>.

BACKGROUND

In 2007, the SEC amended the proxy rules adopting a "notice and access" model for delivery of proxy materials to shareholders. The notice and access model requires issuers and other soliciting persons to post proxy materials on a website and to provide shareholders with the Notice.

Under the notice and access model, issuers and other soliciting persons may deliver proxy materials to shareholders by using one of two methods (or a combination of both): the "notice-only option" and the "full set delivery option". The notice-only option allows for the delivery to shareholders of only the Notice, and to provide paper copies of the proxy materials to shareholders upon request. Under the full set delivery option, issuers and other soliciting persons send paper copies of the proxy materials to shareholders (in addition to posting the materials on a website) and may either include the Notice or include the information required in the Notice in the proxy materials.

The Proposing Release reflects the SEC's concern regarding the impact on participation under the notice-only option among "individual shareholders" (as used in the Proposing Release, this term refers to "non-institutional shareholders generally"). In particular, the Proposing Release cites to a recent report by Broadridge Financial Solutions, Inc. titled "Broadridge Notice & Access, Statistical Overview of Use with Beneficial Shareholders (as of May 31, 2009)" (the "Broadridge Report"). A summary of the methodology and other survey components behind the Broadridge Report are contained in the Proposing Release.

According to the Broadridge Report, a total of 1,312 corporate issuers used the notice-only option to deliver proxy materials to some part of their beneficial owners during the 2009 proxy season (July 1, 2008 through May 31, 2009). For issuers using the notice-only option for some portion of their shareholders, the percentage of "retail" shares (as used in the Broadridge Report, the term "retail" does not include shares or accounts (i) that are managed by an advisor, and (ii) that have consented to electronic delivery of proxy materials) voted was 27.69% during the period analyzed, compared to 31.8% of retail shares voted by shareholders of issuers exclusively using the full-set delivery option during the same period. Among issuers using both the notice-only option and the full set delivery option, the percentage of retail shares voted by shareholders receiving notice-only was 13.48% during the period analyzed, compared with 28.63% of retail shares voted by shareholders receiving full set delivery during the same period.

PROPOSED AMENDMENTS TO NOTICE AND ACCESS RULES

While it is unclear how much of a role the existing notice and access model requirements have played in the lower participation levels among individual shareholders cited in the Broadridge Report, the Proposing Release reflects the SEC's belief that, at a minimum, certain of these requirements have resulted in "some confusion among shareholders" regarding how the notice and access model works. The proposed amendments are an attempt by the SEC to "remove regulatory impediments that may be reducing shareholder response rates to proxy solicitations".

"Flexibility" in Form and Content of Notice

Exchange Act Rule 14a-16(d) contains the requirements concerning the form and substance of the Notice (including the content of the legend required to be included

in the Notice), while Exchange Act Rule 14a-16(f) generally prohibits the inclusion of additional materials with the Notice by an issuer or other soliciting person that is not a registered investment company.

Proposed Changes to Exchange Act Rule 14a-16(d)

The proposed amendments would replace the text of the current legend in Exchange Act Rule 14a-16(d)(1) with one that states simply "Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]". The remainder of Exchange Act Rule 14a-16(d), as revised, would include the other information previously required in the legend, but would not provide the specific language or format for such information. The SEC hopes this approach will result in issuers and other soliciting persons providing "clearer guidance for shareholders as to how to access proxy materials online, request a paper copy of the proxy materials, and vote their shares".

In response to issuer comments, the Proposing Release also clarifies that Exchange Act Rule 14a-16(d)(3), as drafted, does not require that the identification in the Notice of each matter to be acted upon at a shareholders meeting comply with the requirements under Exchange Act Rule 14a-4 applicable to the form and content of proxy cards.

Proposed Changes to Exchange Act Rule 14a-16(f)

The proposed amendments would change current Exchange Act Rule 14a-16(f) to include a new Exchange Act Rule 14a-16(f)(2) (iv), allowing issuers and other soliciting persons to distribute certain types of additional materials to shareholders with the Notice. The purpose of these additional materials would be limited to providing an explanation of the notice and access model by describing "the process for receiving or reviewing the proxy materials and voting". Additional materials that encourage a particular vote by shareholders on a certain matter, that change the method of delivery or that explain "the basis for sending only a Notice" would not be permitted.

While the delivery of these types of materials is merely permissible and voluntary under the proposed amendments, the SEC in the Proposing Release "strongly encourages

issuers and other soliciting persons who use the notice-only option to better inform shareholders about the notice and access model", and suggests issuers that achieved cost savings through the use of the notice-only option (and that also saw reduced participation rates among their individual shareholders) might direct these savings towards the development of these explanatory materials.

Notice Deadlines for Soliciting Persons Other Than the Issuer

Under current Exchange Act Rule 14a-16(l)(2), soliciting persons other than the issuer electing to use the notice-only option must send the Notice to shareholders by the later of (i) 40 calendar days prior to the shareholder meeting to which the proxy materials relate, and (ii) 10 calendar days after the issuer first sends its Notice or its proxy statement to shareholders.

Proposed Changes to Exchange Act Rule 14a-16(l)(2)

In the Proposing Release, the SEC states its belief that the current 10 day requirement in Exchange Act Rule 14a-16(l)(2)(ii) may create compliance problems for soliciting shareholders filing preliminary proxy materials in connection with a contested solicitation, which are subject to the SEC review process. The review process, which may take longer than 10 days, combined with Exchange Act Rule 14a-16(b)(4) (requiring a soliciting person to "make a means to execute a proxy available to shareholders at the time the Notice is first sent to shareholders") and Exchange Act Rule 14a-4(f) (prohibiting any person from providing a form of proxy unless accompanied or preceded by a definitive proxy statement), may result in a soliciting person other than the issuer being restrained from taking advantage of the notice-only option, where such soliciting persons' initial proxy statement is filed in response to the issuer's filing of its definitive proxy statement.

The proposed amendments would amend Exchange Act Rule 14a-16(l)(2)(ii) to provide that soliciting persons other than the issuer who elect to use the notice-only option must file a preliminary proxy statement within 10 days after the filing by the issuer of its definitive proxy statement and to then distribute the Notice no later than the date of filing by such soliciting person of its definitive

proxy statement. The SEC states in the Proposing Release that, while this proposed change does not mandate a period of time prior to the shareholders' meeting when soliciting persons other than the issuer would be required to mail the Notice, such persons "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".

SOLICITATION OF COMMENTS

In the Proposing Release, the SEC is soliciting comments regarding the proposed amendments, the reasons for the apparent lower participation and voting rates among individual shareholders under the notice-only option, as well as ways in which to improve the notice and access model generally. Note, however, that the abbreviated comment period for these proposed changes closes on November 20, 2009, leaving open the question of how and to what extent the proposed amendments will affect the upcoming proxy season.

This Securities Update was written by Donald J. Ellis, an Associate in Burns & Levinson's Corporate Group.

Explanatory Notes:

This update is intended to provide a general summary and to call your attention to a number of proposed rule changes which may be of possible interest and relevance to you. It is not intended to constitute a legal opinion or definitive summary of all changes that could be material to you or to serve as a substitute for legal advice.

Please contact a member of the Securities Law Group at Burns & Levinson if you have any questions about these rule changes or want to learn more about our expertise in this area.

Burns & Levinson's Securities Law Group represents public and private companies, underwriters and investment banks, venture capital and investment funds, real estate investment funds, investment advisors, broker-dealers, stockholder groups and individuals in public and private securities offerings and transactions, SEC, FINRA and stock exchange compliance, corporate governance, fund formation and offerings, SEC enforcement and securities litigation.

THE SECURITIES LAW GROUP

Josef Volman - Co-Chair
617.345.3895 | jvolman@burnslev.com

Andrew Merken - Co-Chair
617.345.3740 | amerken@burnslev.com

If you have any questions regarding this Burns & Levinson Securities Law Update, please contact one of the individuals named above.

If you would like to be added to or removed from the mailing list for Burns & Levinson Securities Law Updates or other Burns & Levinson publications, please call 617.345.3000 or send your name and email address to clientservices@burnslev.com.

ABOUT BURNS & LEVINSON'S SECURITIES LAW GROUP

Burns & Levinson's attorneys have extensive experience representing public and private issuers, stockholder groups and individual investors. Our attorney team counsels clients on IPOs and follow-on offerings of equity, debt and other securities (including shelf registration takedowns), corporate acquisitions involving registered and restricted stock, mergers and acquisitions where one or both parties are publicly traded, private investment in public equity (PIPE) transactions, private placements, venture capital financings, and complex securities law transactions and issues, including corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance.

In the securities compliance area, we advise our clients on corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance. Specifically, we assist our clients in fulfilling their ongoing SEC and stock exchange reporting obligations, managing sensitive disclosure issues internally and with industry analysts, preparing proxy statements and handling stockholder meetings, structuring employee benefit plans and executive compensation packages under the SEC's "short-swing profit" reporting and liability rules, effecting resales of securities in the public trading markets under

the SEC's Rule 144, and advising boards of directors and board committees concerning the requirements and restrictions imposed on their actions by the securities laws and corporate governance laws such as Sarbanes-Oxley. We have served as special securities counsel to the Boards and Audit Committees of publicly traded companies looking for opinions or advice of counsel other than their regular outside counsel.

We have counseled clients both domestic and international, from high technology and life sciences to emerging growth companies, and are positioned to provide clients with timely, expert, efficient and cost effective advice that they need to meet their business objectives. We take a practical and proactive approach to the rapidly changing securities disclosure and corporate governance laws, providing our clients with timely updates, identifying specific situations in which the new laws will impact particular clients either operationally or structurally, and working with clients to implement the changes that are either required or advisable to comply with the new regulatory schemes and investor sentiment.

Underwriters and Investment Banks

Our attorneys also represent underwriters in initial and follow-on public offerings and investment banks in private placements and mergers and acquisitions.