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SEC Amends E-Proxy Rules

Background

In 2007, the U.S. Securities and Exchange Commission (the “SEC”) established procedures to promote the use of the Internet as a reliable and cost-efficient means of making proxy materials available to shareholders. All issuers and other soliciting persons must post their proxy materials on the Internet and provide a Notice of Internet Availability of Proxy Materials (the “Notice”) to their shareholders. The SEC affords issuers and other soliciting persons the option to send a full set of proxy materials to all shareholders or to send shareholders the Notice only.

On February 22, 2010, the SEC adopted amendments (the “Final Rule”) to its e-proxy rules to clarify and provide additional flexibility to its Notice-only option and to permit issuers and other soliciting persons to better communicate with shareholders. The amendments also revise the timeframe for delivering Notices to shareholders when a soliciting person other than the issuer relies on the notice and access proxy rules. These amendments, which were effective March 29, 2010, are discussed below.

Revisions to the Notice Requirements and Inclusion of Explanatory Materials

The Final Rule allows issuers and other soliciting persons additional flexibility in selecting the format and language to be used in the Notice. Although the Notice is required to address certain topics, this new flexibility is intended to discourage the use of boilerplate language. No uniform design of the Notice is necessary, and the Notice does not have to mirror the proxy card.

In addition, the amendments allow soliciting persons to provide explanations of (i) the process of receiving and reviewing the proxy materials, (ii) voting under the notice and access proxy rules, and (iii) the reasons for the use of the notice and access model.

Materials designed to persuade shareholders to vote in a particular manner or to change the method of delivery of proxy materials are still not permitted. The Final Rule requires an issuer or other soliciting person to indicate that the Notice is not a form of proxy and may not be voted.

Amendment to Notice Deadlines for Soliciting Persons Other than the Issuer

The Final Rule is also designed to improve the ability of a soliciting person other than the issuer to use the Notice-only option. A soliciting person other than the issuer is now required to: (i) file a preliminary proxy statement within 10 calendar days after the issuer files its definitive proxy statement and (ii) send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the SEC.

While the Final Rule does not require a specific period of time before the shareholder meeting by which a soliciting person must mail the Notice, the SEC recommends the Notice and proxy materials be made available to shareholders with sufficient time for shareholders to review the materials and make an informed voting decision.

Further SEC Review of the Proxy Process

Many comments received in response to the proposed amendments addressed broad concerns with the proxy system and the notice and access model. The Final Rule does not address these issues; however, the adopting release states that the SEC is conducting a comprehensive review of the mechanics by which proxies are voted and the way in which information is conveyed to shareholders. Additionally, the SEC is conducting educational efforts to increase the overall understanding of proxy mechanics generally and the notice and access model of delivery of proxy material.

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