

MEMO# 23895

October 22, 2009

SEC Proposes Revisions to Rules Requiring Internet Availability of Proxy Materials

[23895]

October 22, 2009

TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 26-09
SEC RULES COMMITTEE No. 62-09
SMALL FUNDS COMMITTEE No. 19-09 RE: SEC PROPOSES REVISIONS TO RULES
REQUIRING INTERNET AVAILABILITY OF PROXY MATERIALS

The Securities and Exchange Commission has proposed revisions to the proxy rules under the Securities and Exchange Act of 1934 requiring that proxy materials be made available on the Internet, and permitting issuers and other soliciting persons to use the “notice and access” model. [\[1\]](#) The proposed revisions are intended to facilitate informed shareholder participation in the proxy voting process, and to improve the notice and access model. The Commission has also provided guidance as to information that may be contained in the Notice of Internet Availability of Proxy Materials. The proposed revisions and guidance are summarized below.

Comments on the proposed amendments are due no later than November 20, 2009. The Institute will hold a conference call on Tuesday, October 27, at 3:00 p.m. eastern, to discuss the proposed amendments. The dial-in number for the call is 888-324-8143, and the passcode is 30649. If you plan to participate on the call, please r.s.v.p. to Jennifer Odom (jodom@ici.org). If you are unable to participate on the call, please provide your comments to Mara Shreck at 202-326-5923 or mshreck@ici.org.

Background

Under the current rule requiring Internet availability of proxy materials, issuers [\[2\]](#) may provide proxy materials to shareholders using either of two options. Under the “notice-only” or “notice and access” option, the issuer must send shareholders a Notice of Internet Availability of Proxy Materials (“Notice”). The Notice must contain prescribed information, including an Internet address at which the shareholder may access proxy materials, and a means by which shareholders may obtain paper or electronic copies of the materials. Information not prescribed by the rule is not permitted to be in the Notice. The Notice must be sent at least 40 days prior to the shareholder meeting to which the materials relate. Alternatively, issuers may use the “full set delivery option,” under which they send shareholders the full set of proxy materials in paper, accompanied by or incorporating the information contained in the Notice. Under both models, the proxy materials must be made available on the Internet. [\[3\]](#)

The Proposing Release indicates the Commission’s concern that shareholder response rates to proxy solicitations are lower when the notice-only option is used. The Commission is soliciting comments on why the response rates are lower and how to improve them, as well as ways to improve the mechanics of the notice and access model.

Proposed Revisions

The Commission is proposing several revisions to the notice and access model. First, the rules governing the permitted contents of the Notice would be revised to provide additional flexibility. The revised rules would require that the information in the Notice address certain topics, but would not specify exact language. The intent is to allow issuers and other soliciting persons to develop a more effective explanation of the importance and effect of the Notice. Additionally, the Proposing Release explains that the existing rule requiring the disclosure, in the Notice, of matters to be considered at the shareholder meeting does not require that this information be written and formatted identically to the proxy card.

The proposed revisions would also permit issuers and other soliciting persons to accompany the Notice with an explanation of the notice and access model. As a related initiative, the Commission’s Office of Investor Education and Advocacy, in consultation with the Division of Corporation Finance, will develop an educational program intended to inform shareholders about the notice and access model.

The notice and access rules permit registered investment companies to accompany the Notice with a prospectus or report to shareholders. In a technical amendment, the proposed revisions would permit funds to also include a Notice with a Summary Prospectus, and would clarify in the Summary Prospectus Rule that the Summary Prospectus need not be given greater prominence than the Notice.

Finally, the proposed revisions would alter the timeframe for soliciting persons other than the issuer who rely on the notice and access model. Current rules require such persons to send a Notice to shareholders by the later of 40 calendar days prior to the shareholder meeting, or 10 calendar days after the issuer first sends out its proxy statement or Notice. The revisions would instead require the soliciting shareholder to file a preliminary proxy statement with the SEC 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 definitive proxy statement.

Requests for Comment

In addition to specific comments on the proposed revisions, the Proposing Release requests comments on a number of issues relating more broadly to the use and success of the notice and access model. Among other things, the Commission seeks comment on the following:

- Have the fees charged by proxy distribution service providers affected use rates of the notice and access model? Should the Commission address fees charged by service providers relating to the implementation of the notice and access model? If so, how? [\[4\]](#)
- Has the notice and access model lowered costs for issuers? Have any costs increased?
- Has the use of the notice and access model made proxy materials more or less accessible to shareholders? What factors have caused the lower shareholder response rates by individual shareholders to proxy solicitations when the notice-only model is used?
- What changes could be made to help shareholders better understand the Notice?
- Would changing the deadline for issuers to mail the Notice from 40 days to 30 days encourage use and improve implementation of the notice and access model?
- Should the Commission consider proposing suspension of the notice and access rules until a later date to provide more time for shareholders to understand and be better prepared for the notice and access model?

Mara Shreck
Associate Counsel

endnotes

[\[1\]](#) See Amendments to Rules Requiring Internet Availability of Proxy Materials, SEC Release Nos. 33-9073, 34-60825, IC-28946 (Oct.14, 2009) (“Proposing Release”), available at <http://www.sec.gov/rules/proposed/2009/33-9073.pdf>.

[\[2\]](#) The rules also permit other soliciting persons to use either option, subject to certain modifications.

[\[3\]](#) For a more detailed summary of the notice and access rules, see Institute [Memorandum](#) 21404, dated July 30, 2007.

[\[4\]](#) In a separate release related to proxy fees, FINRA has proposed to adopt without material change former NASD Rules 2260 and IM-2260, which govern, among other things, the rates of reimbursement for a broker-dealer that are considered reasonable in connection with the forwarding of proxy materials, as new FINRA Rule 2251. See SEC

Release No. 34-60824 (Oct. 14, 2009), available at <http://www.finra.org/Industry/Regulation/RuleFilings/2009/P120097>. Comments on Proposed Rule 2251 are due November 12, 2009.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.