

CLIENT UPDATE

SEC INCREASES FLEXIBILITY IN E-PROXY PROCESS

The Securities Group provides strategic advice to our clients on all aspects of federal and state securities law and regulation.

Our clients include public and private corporations, partnerships, limited liability companies and other business entities, financial institutions, mutual funds, investment advisers and broker-dealers, as well as executives and entrepreneurs.

On February 22, 2010, the Securities and Exchange Commission ("SEC") amended its notice and access proxy rules, better known as the "e-proxy" rules, which were initially enacted in 2007. The e-proxy rules require all issuers and other soliciting persons to post their proxy materials on an internet website, while allowing issuers and soliciting persons the option of providing only a Notice of Internet Availability of Proxy Materials ("Notice") to shareholders instead of the full set of printed proxy materials. The Notice, if sent without the full set of proxy materials, would indicate how shareholders could access the proxy materials on the website. The goal of the e-proxy rules was to limit the cost and resource wastefulness of traditional mailed proxy materials. However, the SEC soon learned that an unintended consequence of the e-proxy rules is lower shareholder response rates when the Notice is sent in lieu of the full set of printed proxy materials. The SEC believes this is due to shareholder confusion about the e-proxy process and these amendments are designed to facilitate more effective communication about the process between issuers and other solicitors and shareholders.

The SEC's primary rule change is to permit issuers and other soliciting persons to provide, with the Notice, an explanation of the e-proxy process and the reasoning behind the e-proxy rules. The SEC believes this information will enhance shareholder understanding of the e-proxy process, and through that understanding, enhance shareholder participation. Of

course, language or materials intended to persuade shareholder voting in a particular way are not permitted.

The amendments remove the requirement that a prescribed, detailed legend be placed on the Notice. In its place, the SEC now will require that certain topics are addressed in the Notice, such as that the Notice is not a form of voting and how shareholders may access the full set of proxy materials via the website. Language contained in the Notice does not have to directly mirror language used on the proxy card, provided the Notice identifies each separate matter to be voted upon at the shareholder meeting.

Finally, the amendments streamline the timing for when solicitors other than issuers use the e-proxy process. Under the amended rules, such a solicitor would file a *preliminary* proxy statement within 10 calendar days after the issuer files its *definitive* proxy statement, with such soliciting person's Notice sent to shareholders no later than the date on which the soliciting person files its *definitive* proxy statement with the SEC. This change should allow non-issuer solicitors to use the e-proxy process with greater regularity, despite the time it takes the SEC to review the preliminary proxy materials. This amendment is intended to "even the playing field" between issuers and non-issuer solicitors using the e-proxy process.

The amendments take effect on March 29, 2010.