

# MORROW & CO., LLC

## Proxy Update

March, 2010

### Amendments to Notice & Access Rules

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On February 22, 2010, the SEC posted final amendments to rules requiring Internet availability of proxy materials (Notice & Access). The SEC initially proposed the amendments last October because they were concerned that investor confusion caused by the use of Notice & Access had led to a significant decline in shareholder voting. The finalized rules will go into effect on March 29<sup>th</sup>.

The SEC hopes that by providing flexibility on format and content, the amendments will enable better communication. The required legend on the Notice has been reduced to one sentence in the hopes of avoiding a boilerplate look. In addition, issuers and other soliciting persons will be allowed to accompany the Notice with explanatory materials regarding the process of obtaining and reviewing proxy material and voting under the Notice & Access rules. In a change from the proposed amendments, you can also explain the reasons for using Notice & Access. On the issue of timing, the SEC did not shorten the 40 day mailing period to 30 days.

While the addition of explanatory materials should prove beneficial, it is likely that shareholder confusion and voter apathy resulting from the use of Notice & Access will persist. In addition, the timing of the effective date is unfortunate since companies with meetings in March and April will not be able to take advantage of the amended rules (until next year).

Below is an overview of the amended rules.

#### Discouraging Boilerplate

As noted, the SEC hopes the amendments remove impediments that may be reducing shareholder voting. In that regard, the SEC is looking to discourage the use of boilerplate language. The SEC notes that the detailed legend that was previously required may seem like boilerplate. To lessen that possibility, the required legend would be reduced to one sentence: *“Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]”*.

The other information that is required, but would not have to be part of the legend, is below (the highlighted words are a new requirement).

- An indication that **the communication is not a form for voting** and presents only an overview of the more complete proxy materials, which contain important information and are available on the Internet or by mail, and encouraging a security holder to access and review the proxy materials before voting;

- *The Internet Web site address where the proxy materials are available;*
- *Instructions regarding how a security holder may request a paper or email copy of the proxy materials at no charge, including the date by which they should make the request to facilitate timely delivery, and an indication that they will not otherwise receive a paper or email copy.*

### **Attempting to Reduce Confusion**

Issuers and other soliciting persons can now include explanatory materials regarding the process of obtaining and reviewing proxy material and voting under the Notice & Access rules. In a change from the proposed amendments, issuers and other soliciting persons can also explain their reasons for utilizing Notice & Access. For many issuers, this will be an opportunity to promote an environmentally-friendly, green agenda within their explanatory materials. A letter on company letterhead or a well designed flyer, for example, would be good tools that could increase voting returns.

Since we are already at the beginning of proxy season, Broadridge does not currently anticipate altering their beneficial holder Notice (such as changing the legend), so most street name holders will not see a change this proxy season. Since most shareholders hold in street name, it is important to consider using explanatory materials that explain how to obtain and review the proxy material and how to vote.

In another attempt to reduce confusion, the amended rules require an issuer or other soliciting person to specify that the Notice is *not* a form for voting. Many shareholders were confused; thinking the Notice itself was a proxy card and had attempted to vote on the Notice. The SEC also confirmed guidance that the Notice does not have to mirror the proxy card.

While the amendments provide an opportunity to educate shareholders about Notice & Access, as well as provide some flexibility, the amendments still do not allow an issuer to include a proxy card and business reply envelope with the Notice. Also, explanatory materials are limited and can't be used to solicit votes or to encourage shareholders to change the method of delivery. Since Notice & Access essentially offers a delivery choice to the shareholder, encouraging alternate methods of delivery, such as electronic delivery, would have helped issuers further reduce costs and increase future vote returns. Holders that receive proxy material electronically vote in greater percentages than those that receive a Notice.

### **Timing Changes Only for Other Soliciting Persons**

The timeframe for using Notice & Access has been revised, but only for other soliciting persons, *not* for issuers. The SEC notes that commenters expressed support for reducing the date on which the Notice must be sent from 40 to 30 days; but the SEC determined not to address that issue at this time. This is unfortunate, in that the 40-day requirement has made it difficult for some issuers to use Notice & Access.

However, other soliciting persons have been provided with increased flexibility on timing that may facilitate less expensive proxy fights for dissident shareholders. Under the original rules, the other soliciting person was required to send a Notice 10 calendar days after the issuers first sent its proxy materials to shareholders. The SEC was concerned that their review process would not allow the other soliciting persons to meet that deadline and could limit the other soliciting persons' ability to use Notice & Access. Under the amended rules, the other soliciting persons would be required to file a preliminary proxy statement within 10 calendar days of the issuer filing its definitive proxy statement. The other soliciting persons would then have to send its Notice no later than the date they file a definitive proxy statement. The rule does not specify a period of time in advance of the meeting for the mailing of the Notice by the other soliciting person.

### **Advance Planning is More Important than Ever**

Since the use of Notice & Access can provide for cost savings that can be compelling, we anticipate issuers will continue using Notice & Access. As we have suggested in the past, when determining whether to use Notice & Access, issuers need to factor in their shareholder profile, the proposals shareholders will vote on, and timing. For 2010, the loss of the broker discretionary vote on directors is another very important factor, especially for issuers that have a majority vote requirement.

The use of a stratified mailing, a targeted phone campaign, and a well designed educational insert can help increase retail voting. If you are considering using Notice & Access, please contact us as early as possible, since advance planning will result in the most effective solicitation.

### **MORROW & CO., LLC**

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