



## **SMALL BUSINESS SECURITIES BULLETIN - MARCH 2010**

March 2010

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### **Revisions to the Notice and Access Model for Proxy Materials Adopted**

Effective March 29, 2010, the U.S. Securities and Exchange Commission (SEC) adopted revisions to the notice and access model for the delivery of proxy materials to stockholders. We had discussed the proposed amendments in our November 2009 Bulletin. Under notice and access, most SEC reporting companies are required to post their annual meeting proxy materials, including their proxy card, on an internet web site (other than the SEC's EDGAR web site) and provide stockholders with a Notice of Internet Availability of Proxy Materials (Notice), and need not provide stockholders with a paper copy of the full set of proxy materials absent a specific request, though many companies continue to provide these materials to stockholders under the "full set delivery option."

The amendments provide greater flexibility regarding the language in the Notice. Companies (and other soliciting persons) are still required to address certain topics in the Notice, including that the Notice is only an overview of the complete proxy materials and a description of how investors can receive a paper or e-mailed copy of the proxy materials, but now have the flexibility to use their own language to address these issues rather than being required to use the boilerplate language mandated prior to the amendments. The Notice must now also indicate that the Notice is not a form for voting, which is an attempt to address stockholder confusion with the prior form of the Notice exemplified by several instances of stockholders attempting to mark their votes on the Notice and then returning the Notice to the company. In addition, companies and other soliciting persons may now include explanatory materials with the Notice which explain the notice and access model, including the reasons for using notice and access and the process for receiving and reviewing proxy materials and voting, as long as such materials are not designed to persuade stockholders to vote in a particular manner. Prior to the amendments companies and other soliciting persons were prohibited from providing any educational or other materials with the Notice (unless the full set delivery option was used) except for (i) any required state law notice and (ii) a proxy card with a second copy of the Notice sent no sooner than ten days after the first one. The SEC also confirmed the guidance in the proposing release that it is not necessary that the discussion in the Notice of the matters to be voted on at the meeting mirror the proxy card.

Finally, the amendments revise the 10-day period for other soliciting persons to require only that such persons file their preliminary proxy statements with the SEC within ten days of the company filing its definitive proxy statement with the SEC and send its notice no later than the date on which it files its definitive proxy statement with the SEC.

The adopting release with respect to the amendments is available at <http://www.sec.gov/rules/final/2010/33-9108.pdf>.

### **SEC Interpretive Release Regarding Disclosure About Climate Change**

On February 2, 2010, the SEC issued an interpretive release providing guidance regarding disclosure related to climate change. The release outlines the SEC's "views with respect to [its] existing disclosure requirements as they apply to climate change matters." The release outlines four main areas that may require disclosure regarding the impact of climate change:

- The impact of existing and pending legislation and regulation regarding climate change on a company's business, including the potential effects of such legislation and including costs and the difficulties involved in assessing the timing and effects of pending legislation, if material. The release cautions companies to discuss the potential positive impacts of such legislation on the company, not solely negative consequences.
- The impact of treaties or international accords related to climate change.
- The indirect consequences of regulation or business trends, such as decreased demand for goods and services that produce significant greenhouse gas emissions or increased demands for goods that result in lower emissions, as well as the potential impact on the company's reputation.
- The physical impacts of climate change, such as disruption to the manufacturing and distribution process that can

result from harm to physical plants and facilities as a result of extreme weather.

The SEC believes that in documents filed with the SEC such disclosure may be appropriate in, for example, the description of the company's business, risk factors, legal proceedings and management's discussion and analysis of financial condition and results of operations. The interpretive release was effective on February 8, 2010 and is available at <http://www.sec.gov/rules/interp/2010/33-9106.pdf>.

**About Me.** I am a former SEC attorney who also has prior "big firm" experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, and general corporate matters, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you.

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