

NOTICE AND ACCESS REVISITED: THE SEC'S LATEST INITIATIVES

On February 22, the SEC announced revised rules that should make it easier for public companies to use notice and access—or e-proxies—while attempting to reverse the decline in shareholder voting rates. To complement the amendments, the SEC issued an Investor Alert and created a “Spotlight” page devoted to proxy matters. Your company is not required to do anything in response to these initiatives, but you may elect to distribute a more personal and informative Notice of Internet Availability of Proxy Materials.

Amendments to existing notice and access rules

The SEC had four goals when it adopted notice and access in 2007:

- Reduce proxy solicitation costs,
- Offer shareholders a choice of how to access proxy materials,
- Promote the use of the Internet for efficient communication, and
- Ease the environmental impact of proxy solicitations.

There certainly has been progress toward these goals. Smaller print runs and mailings have helped the environment, and some issuers have saved money. But the shift to notice and access also had a negative effect the SEC did not fully anticipate.

In its 2007 adopting release, the SEC downplayed warnings that shareholders who don't receive hard-copy proxy materials may not bother to vote, or understand how to vote. After two years of notice and access, the SEC can no longer discount these concerns. Statistics compiled by Broadridge, the leading provider of notice and access services, indicate that shareholder participation in corporate elections has declined significantly. Here are some key figures:

- The retail vote (defined as accounts that are not managed by an adviser and have not consented to electronic delivery) historically has hovered around 20%.
- In the first year of notice and access, retail accounts that received only a Notice voted at a rate of 5%, compared to 19.4% for retail accounts that received hard-copy proxy materials. In the second year, participation rates were 4% and 19.8%.
- Retail shareholders that specifically requested hard-copy proxies voted at a rate of 68.4% in 2008 and 64.3% in 2009.
- Only 2.9% of shareholders that received a Notice visited the referenced website; only 0.43% actually viewed the linked proxy materials. In comparison, studies of pre-2007 behavior found that approximately 85% of shareholders at least glanced at proxy materials they received.

(Broadridge's complete survey of the first two years of notice and access can be found at www.broadridge.com/notice-and-access/NAStatsStory.pdf.)

The SEC's recent initiatives were designed to address this troubling decline in shareholder participation without giving up on notice and access. In particular, the SEC wants to ensure that investors understand what a Notice is and what to do when they receive one.

As you probably know, the original notice and access rules mandated much of the language on the Notice that told shareholders how to retrieve electronic proxy materials or request hard copies. Unfortunately, the required legends looked like boilerplate, so shareholders often ignored them. Even where issuers had flexibility, they did not use it effectively. For example, to comply with the requirement that a Notice identify each matter to be acted on at the meeting, many issuers repeated the wording and format from their proxy cards. Since the Notice looked a proxy card, some shareholders tried to use it to vote.

Under the revised rules, there is only one mandated legend: “Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [date].” After that, your company can adopt its own language and format, so long as your Notice:

- Clearly indicates that it cannot be used for voting,
- Gives a web address where shareholders can get electronic proxy materials,
- Warns that hard-copy proxies will be mailed only on request, and explains how to make a request,
- Encourages shareholders to review the proxy before voting, and
- Identifies each matter that will be voted on.

You also have the option to explain why the company is using electronic delivery and to provide information about how notice and access works. You may not attempt to influence voting decisions or discourage shareholders from requesting a hard-copy proxy statement.

The Investor Alert

The decline in shareholder participation takes on new urgency this year. In addition to the concern that your company may not be engaging shareholders, the recent amendment to NYSE Rule 452 that prevents brokers from voting uninstructed shares in corporate elections means that you need more shareholders to complete their proxy cards or your directors may be elected by an uncomfortably small margin (assuming you achieve a quorum at all).

The new Investor Alert, entitled “New Shareholder Voting Rules for the 2010 Proxy Season,” warns shareholders that the burden to vote in director elections falls squarely on them. Using plain language, the Alert explains how the amendment to Rule 452 affects beneficial owners, how shareholders will get proxy materials, and the various ways they can vote.

The “Spotlight on Proxy Matters” page

The SEC has consolidated links to all proxy-related rulemaking and guidance on the new Spotlight page, which viewers can access directly from the SEC’s home page. Shareholders can use the Spotlight page to learn what your company is required to disclose in the proxy (including the new compensation and governance disclosures) and

peruse FAQs about corporate elections, notice and access, voting procedures, and receiving proxy materials. Even if you intend to create a web page or printed information that is specific to your company and your annual meeting, consider directing shareholders to the Spotlight page to reinforce your message.

In search of effective notice and access

You can find plenty of advice, from both NIRI sources and law firm memoranda, about whether, and for which shareholders, to use notice and access. Once you work that out, you need to determine how to educate shareholders and motivate them to act. Here are some things other companies have done.

Several companies distribute information in advance of the Notice. For example, Sara Lee sent an insert with its dividend checks to alert shareholders that the company would deliver the proxy electronically two months hence, and to explain how to request hard-copy documents. Aaron Hoffman, Vice President of Investor Relations at Sara Lee, reports that the advance mailing minimized shareholder confusion about electronic delivery, and that the company receives very few requests for hard-copy documents. Indeed, Sara Lee's print runs are now 90% smaller than they were prior to 2007, but voter participation has remained roughly the same.

Steelcase took the same "advance warning" approach as Sara Lee, but went a step farther by distributing an annotated sample Notice so that shareholders would recognize the real thing.

Boeing distributed a brief letter from the Chairman—not to talk about electronic delivery, but to emphasize the importance of voting in the wake of revised Rule 452. The letter reads like one of the Q&A's that probably appears at the beginning of your company's proxy, but the message should have a greater impact since it is the only information the shareholder is receiving at that moment.

Prudential Financial is trying an innovative way to burnish its environmental credentials and improve the odds that its shareholders will vote. When a Prudential shareholder votes, he can elect to either receive an eco-friendly tote bag or have a tree planted in his honor. One commentator has likened notice and access to a direct mail advertisement: it only works if the recipient has an incentive to move from the Notice to the computer. Prudential's 2010 voting rates may tell us if something as mundane as a tote bag or a tree is incentive enough.

Finally, NIRI's Standards of Practice for Implementing Notice and Access suggests, among other things, that you create a separate web page devoted to your annual meeting, including links that enable visitors to vote and to sign up for electronic delivery. You can also use a company-sponsored shareholder forum or blog to educate and to advance your get-out-the-vote efforts.

We pause here to acknowledge that not every company has made encouraging efforts. Remember, a shareholder receiving your Notice needs to find the website that holds your

proxy materials. Make it easy! Try a web address like www.ABCInc/investors/2010proxy.pdf. One company (that we will not name) seems to be dissuading shareholder participation by adopting a URL that includes some seemingly random numbers. A shareholder who types the URL incorrectly will get a “page not found” message, and may decide that reading the proxy and voting are too much trouble.

Unfinished business

Some commenters lobbied the SEC to permit companies to send proxy cards and reply envelopes along with the Notice, rather than waiting ten days as is currently required. They argued that shareholders who are inclined to vote will want the proxy card right away, while shareholders who aren't so inclined are unlikely to use the intervening days to examine the proxy statement. Moreover, if the cost of two separate mailings (one for the Notice and one for the proxy card) approaches the cost of sending hard-copy documents, companies may decline to use notice and access at all. The SEC would not address that request as part of these amendments, but expect the topic to reappear in a forthcoming Concept Release on proxy matters.

The SEC also refused to alter the delivery obligations of brokers and other intermediaries. Intermediaries are required to deliver Notices and “other soliciting materials,” but that phrase may not include information sent in advance of the Notice. In addition, one company argued that shareholders would be more likely to read and act on their Notices if brokers were required to deliver them in issuer-provided logo envelopes rather than the brokers' own envelopes. It is unclear whether the SEC will address this concern in the future.

Conclusion

For some companies, like Sara Lee, notice and access has been what Aaron Hoffman calls an “absolute win.” If your company has had less success, or you have been watching and waiting to see how notice and access works elsewhere, the SEC's initiatives may be just the impetus you need.

Lois Yurow practiced corporate and securities law for several years and now helps public companies use plain English principles in their disclosure documents and investor communications. E-mail her at lois@securitieseditor.com.