

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 230 and 240**

**[Release Nos. 33-9108; 34-61560; IC-29131; File No. S7-22-09]**

**RIN 3235-AK25**

**AMENDMENTS TO RULES REQUIRING INTERNET AVAILABILITY OF PROXY MATERIALS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are amending rules under the Securities Exchange Act of 1934 and the Securities Act of 1933 to clarify and provide additional flexibility regarding the format of the Notice of Internet Availability of Proxy Materials that is sent to shareholders and to permit issuers and other soliciting persons to better communicate with shareholders by including explanatory materials regarding the reasons for the use of the notice and access proxy rules and the process of receiving and reviewing proxy materials and voting pursuant to the notice and access proxy rules. The amendments also revise the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice and access proxy rules and permit mutual funds to accompany the Notice with a summary prospectus.

**EFFECTIVE DATE:** [Insert date 30 days after publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Steven G. Hearne, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, or with respect to registered investment companies, Sanjay Lamba, Senior Counsel, in the Office of Disclosure Regulation, Division of Investment Management, at (202) 551-6784, 100 F Street, NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Commission is amending Rule 14a-16<sup>1</sup> under the Securities Exchange Act of 1934<sup>2</sup> and Rule 498<sup>3</sup> under the Securities Act of 1933.<sup>4</sup>

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<sup>1</sup> 17 CFR 240.14a-16.

<sup>2</sup> 15 U.S.C. 78a et seq.

<sup>3</sup> 17 CFR 230.498.

<sup>4</sup> 15 U.S.C. 77a et seq.

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## **I. BACKGROUND AND OVERVIEW OF THE AMENDMENTS**

On October 14, 2009, we proposed amendments to the notice and access proxy rules to remove regulatory impediments that may be reducing shareholder response rates to proxy solicitations by permitting issuers and other soliciting persons to more effectively use the notice and access model.<sup>5</sup> These amendments were proposed based on our continuing review of the disclosures shareholders receive when they are asked to make a voting decision and the process followed when those votes are solicited.<sup>6</sup> As discussed in detail below, we are adopting the proposed amendments with certain modifications based on the comments received on the proposal.

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<sup>5</sup> Amendments to Rules Requiring Internet Availability of Proxy Materials, Release No. 33-9073 (Oct. 14, 2009) [74 FR 53954] (the “Proposing Release”).

<sup>6</sup> See, e.g., Facilitating Shareholder Director Nominations, Release No. 33-9046 (June 10, 2009) [74 FR 29024], Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009) [74 FR 68443], and Order Approving Proposed Rule Change, as modified by Amendment No. 4, to Amend NYSE Rule 452 and Corresponding Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting for the Election of Directors, Except for Companies Registered under the Investment Company Act of 1940, and to Codify Two Previously Published Interpretations that Do Not Permit Broker Discretionary Voting for Material Amendments to Investment Advisory Contracts with an Investment Company, Release No. 34-60215 (July 1, 2009) [74 FR 33293].

We received 25 comment letters in response to the proposed amendments.<sup>7</sup> These letters came from corporations, professional associations, institutional investors, law firms, transfer agents, proxy service providers and other interested parties. We have reviewed and considered all of the comments that we received on the proposed amendments. Most commenters supported the use of the notice and access model and the Commission’s proposed modifications to improve its implementation.<sup>8</sup> The adopted rules reflect changes made in response to some of these comments. We explain our revisions with respect to each proposed rule amendment in more detail throughout this release.

In 2007, the Commission established procedures that promote the use of the Internet as a reliable and cost-efficient means of making proxy materials available to shareholders.<sup>9</sup> The notice and access proxy rules require all issuers and other soliciting persons to post their proxy materials on an Internet Web site and provide a Notice of Internet Availability of Proxy Materials (“Notice”) to shareholders. These rules also provide issuers and other soliciting persons an option as to whether to send a full set of

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<sup>7</sup> See letters from American Bar Association (“ABA”), American Business Conference (“ABC”), Ameriprise Financial, Inc. (“Ameriprise”), Association of Corporate Counsel (“ACC”), The Altman Group (“Altman”), BNY Mellon Shareowner Services (“BNY”), Broadridge Financial Solutions, Inc. (“Broadridge”), Independent Steering Committee of Broadridge Investor Communications Solutions (“Broadridge Steering Committee”), California State Teachers Retirement System (“CalSTRS”), Calvert Group Limited (“Calvert”), U.S. Chamber of Commerce (“Chamber”), Computershare Limited (“Computershare”), Corporate Governance, Diversified Global Graphics Group (“DG3”), Edison International (“Edison”), Investment Company Institute (“ICI”), Intel Corporation (“Intel”), IR WebReport.com, Moxy Vote (“Moxy”), National Investor Relations Institute (“NIRI”), Otter Tail Corporation (“Otter Tail”), Registrar and Transfer Company (“R&T”), Sullivan & Cromwell (“S&C”), Society of Corporate Secretaries and Governance Professionals (“SCSGP”), and Securities Transfer Association, Inc. (“STA”).

<sup>8</sup> See, e.g., letters from ABA, ABC, ACC, Altman, BNY, Broadridge, Broadridge Steering Committee, CalSTRS, Calvert, Chamber, Computershare, Edison, ICI, Intel, NIRI, Otter Tail, R&T, S&C, SCSGP, and STA.

<sup>9</sup> See Internet Availability of Proxy Material, Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148] (“Internet Availability of Proxy Material Adopting Release”) and Shareholder Choice Regarding Proxy Materials, Release No. 34-56135 (July 26, 2007) [72 FR 42221].

proxy materials to all shareholders or to send shareholders only the Notice. According to Broadridge Financial Solutions, Inc. (“Broadridge”), over 1,300 corporate issuers used the notice-only option for distribution of the Notice to some portion of their beneficial owners under the notice and access model in the 2009 proxy season.<sup>10</sup> Commenters, including Broadridge and transfer agents who conduct the distribution to registered owners, indicated that issuers have experienced significant cost savings in printing, postage and processing fees.<sup>11</sup>

As we noted in the Proposing Release, while many issuers have experienced significant cost savings using the notice-only option, statistics indicate lower shareholder response rates to proxy solicitations when the notice-only option is used.<sup>12</sup> We are concerned that some investors may be confused when issuers and other soliciting persons distribute proxy materials using the notice-only option and we believe our rules should be amended to provide additional flexibility for issuers and other soliciting persons to better communicate with shareholders to reduce that confusion.

We are adopting amendments today to provide issuers and other soliciting persons with additional flexibility to provide to shareholders a more effective explanation of the

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<sup>10</sup> See Broadridge Notice & Access, Statistical Overview of Use with Beneficial Shareholders (as of June 30, 2009) attached to the letter from Broadridge (“Broadridge Statistical Overview”). Broadridge is the largest provider of brokerage processing services with respect to beneficial owners holding through a broker or similar intermediary and has provided detailed statistical information on the use of the notice and access model. The Broadridge Statistical Overview is generally limited to comparisons between issuers that have used the notice-only option for distribution to some portion of their beneficial owners and issuers that exclusively used the full set delivery option and comparisons between the first and second years of use of the notice-only option. The data does not provide a comparison to an issuer’s experience in the year prior to using the notice-only option for distribution.

<sup>11</sup> See, e.g., letters from Broadridge, BNY, and R&T. Some commenters noted that processing fees were reduced on distributions to registered owners, but expressed concern about the processing fees charged by service providers for distributions to beneficial owners. See, e.g., letters from Altman, BNY, ICI, NIRI, Otter Tail, R&T, and STA.

<sup>12</sup> See notes 18 – 20 of the Proposing Release.

importance and effect of the Notice and the reasons for its use, which should better facilitate use of our rules and improve investor understanding. Specifically, the amendments provide additional flexibility regarding the format and content of the Notice, permit issuers and other soliciting persons to better communicate with shareholders by including explanatory materials regarding the reasons for the use of the notice and access rules and the process of receiving and reviewing proxy materials and voting, and revise the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option.

## **II. DISCUSSION OF THE AMENDMENTS**

### **A. Revisions to the Notice Requirements and Inclusion of Explanatory Materials**

We proposed amendments to Exchange Act Rule 14a-16 to provide issuers and other soliciting persons with additional flexibility to develop a more effective Notice and to provide shareholders with guidance as to how to access the proxy materials online, request a paper copy of the proxy materials, and vote their shares. We are adopting the amendments generally as proposed with some changes as recommended by commenters.

#### **1. Proposed Amendments**

Under the amendments we proposed, issuers and other soliciting persons would have additional flexibility in formatting and selecting the language to be used in the Notice. Rather than requiring the soliciting person to include a detailed legend that may seem like boilerplate language to shareholders, we proposed to require that the information appearing on the Notice address certain topics, without specifying the exact

language to be used.<sup>13</sup> Further, in order to mitigate confusion about the Notice and to allow issuers and other soliciting persons to better engage shareholders, we proposed to revise Exchange Act Rule 14a-16(f)(2)<sup>14</sup> to permit issuers and other soliciting persons to accompany the Notice with an explanation of the notice and access model, which would be limited to an explanation of the process of receiving and reviewing the proxy materials and voting. Materials designed to persuade shareholders to vote in a particular manner, change the method of delivery of proxy materials, or explain why the person was sending only a Notice to shareholders would not be permitted under the proposed amendments.

## **2. Comments on the Proposed Amendments**

Most commenters supported the additional flexibility provided by the proposed amendments to design and prepare the Notice and provide explanatory materials, and many of these commenters offered additional suggestions for improving the proposals.<sup>15</sup> Several commenters recommended that the design and wording of the Notice should be required to clearly indicate that the Notice is not a proxy card and may not be voted.<sup>16</sup> Other commenters supported a uniform and easily recognizable design for the Notice,<sup>17</sup>

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<sup>13</sup> As proposed, Exchange Act Rule 14a-16(d) would limit the required legend to the line “Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]” and would require the other information currently required in the legend to be included in the Notice, but not as part of a specified legend.

<sup>14</sup> 17 CFR 240.14a-16(f)(2).

<sup>15</sup> See, e.g., letters from ABA, ACC, BNY, Broadridge, Broadridge Steering Committee, Calvert, Chamber, Computershare, Edison, ICI, Intel, Otter Tail, R&T, S&C, SCSGP, and STA.

<sup>16</sup> See, e.g., letters from ABA, Altman, Otter Tail, and Intel. Letters from ABA, Altman and Intel suggested the inclusion of a mandatory legend indicating that a separate proxy card should be used for voting.

<sup>17</sup> See letter from Otter Tail.

requiring intermediaries to forward the Notice in issuer provided envelopes,<sup>18</sup> or requiring that the Notice identify proxy items by topic rather than specific proposals.<sup>19</sup>

Several commenters supported more flexibility than we had proposed for the explanatory materials, such as permitting an issuer to explain the reasons for its use of the notice-only option.<sup>20</sup> Commenters suggested that an issuer's rationale for using the notice-only option would enhance shareholders' understanding of the reasons for receiving the Notice, inform investors of the benefits of using the notice-only option and help to distinguish the Notice from the proxy card, without influencing a shareholder's voting decision.<sup>21</sup> One commenter supported additionally requiring that intermediaries be required to pass explanatory materials on to beneficial owners.<sup>22</sup>

Finally, one commenter noted that if the Commission approved the proposed amendments to the Notice requirements, a technical change is necessary to Exchange Act Rule 14a-16(n).<sup>23</sup> Rule 14a-16(n) addresses the notice and access requirements when an issuer or other soliciting person sends a full set of proxy materials to security holders. The suggested technical change related to references in Rule 14a-16(n)(4) to the disclosure requirements of the Notice in Exchange Act Rule 14a-16(d). Since the proposed amendments revise the disclosure requirements of Rule 14a-16(d), conforming changes should also be made to 14a-16(n)(4).

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<sup>18</sup> See letter from Edison.

<sup>19</sup> See letter from Intel suggesting that the mandated format of the Notice be changed so that matters to be addressed at the annual meeting be identified by topic rather than identifying the specific proposals in order to avoid confusion between the Notice and the proxy card.

<sup>20</sup> See, e.g., letters from ABA, ACC, S&C, and STA.

<sup>21</sup> See, e.g., letters from ABA and ACC.

<sup>22</sup> See letter from ABA.

<sup>23</sup> See letter from S&C.

### 3. Final Rule

After considering the comments, we are adopting the amendments to our requirements regarding the Notice and the rules about what materials may accompany the initial distribution of the Notice as proposed with some changes as recommended by commenters. The final rule provides issuers and other soliciting persons with additional flexibility in formatting and selecting the language to be used in the Notice, as proposed. The information appearing on the Notice is required to address certain topics, without specifying the exact language to be used. In response to comments requesting that the rules specifically state that the Notice is not a form of proxy and may not be voted, we are adopting final rules that require an issuer or other soliciting person to indicate that the Notice is not a form for voting. We are not, however, adopting suggested changes to the Notice requirements that would require a prescribed legend that the Notice is not a proxy card. We are also not adopting changes to the Notice that would require a uniform design for the Notice or would require that the Notice identify proxy items by topic rather than specific identification. We believe that the requirement that the Notice indicate that it is not a form for voting and the additional flexibility provided by the revised rules, as well as the guidance regarding the requirements of redesignated Exchange Act Rule 14a-16(d)(6),<sup>24</sup> address the concerns raised by commenters. These changes also provide issuers and other soliciting persons the flexibility to draft the Notice more effectively. We believe that the flexibility should discourage the development of boilerplate disclosure, which is one of the problems our amendments are designed to address.

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<sup>24</sup> We are redesignating 17 CFR 240.14a-16(d)(2) through 17 CFR 240.14a-16(d)(8) as 17 CFR 240.14a-16(d)(5) through 17 CFR 240.14a-16(d)(11). Prior to this redesignation, the referenced paragraph was 17 CFR 240.14a-16(d)(3) as indicated in the Proposing Release. After adoption, as noted here, the referenced paragraph is 17 CFR 240.14a-16(d)(6).

As noted above, several commenters supported additional flexibility to allow the materials to address the reasons for the use of the notice-only option.<sup>25</sup> Consistent with the proposal, the final rule permits issuers and other soliciting persons to accompany the Notice with an explanation of the notice and access model.<sup>26</sup> As proposed, new Exchange Act Rule 14a-16(f)(2)(iv)<sup>27</sup> allows issuers and other soliciting persons to provide an explanation of the process of receiving and reviewing the proxy materials and voting under the notice and access proxy rules. In a change from the proposal, new Exchange Act Rule 14a-16(f)(2)(iv) also permits an explanation of the reasons for the use of the notice and access rules, as some commenters suggested.

We concur that additional flexibility to explain the reasons for the use of the notice and access rules and the notice-only option may enhance shareholders' understanding of the notice and access model and, therefore, we have expanded the exception to include those topics. Materials designed to persuade shareholders to vote in a particular manner or change the method of the delivery of proxy materials are still not permitted under the revised exception.<sup>28</sup> As also noted above, one commenter suggested that we specifically require that intermediaries and their agents be required to distribute explanatory materials prepared in reliance on the amended rules. Since issuers and other soliciting persons are generally required to reimburse intermediaries for the reasonable

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<sup>25</sup> See note 20 above.

<sup>26</sup> We emphasize that under revised Rule 14a-16(f)(2) only registrants and other soliciting persons, and not other parties, may accompany a Notice with explanatory materials.

<sup>27</sup> This new provision is an additional exception to the general rule in Exchange Act Rule 14a-16(f) that the Notice be sent separately from other types of security holder communications.

<sup>28</sup> While the Notice continues to permit the soliciting person to include their recommendations as provided in redesignated Exchange Act Rule 14a-16(d)(6), as we explained in the Internet Availability of Proxy Material Adopting Release, "The Notice is intended merely to make shareholders aware that these proxy materials are available on an Internet Web site; it is not intended to serve as a stand-alone basis for making a voting decision."

expenses incurred in connection with forwarding materials to shareholders, we are not at this time specifically requiring intermediaries and their agents to forward explanatory materials. Of course, to the extent that materials that accompany the Notice are “other soliciting materials” then our current rules<sup>29</sup> would specifically require distribution of the materials.

In response to comments, we are also making a technical change to Exchange Act Rule 14a-16(n). Rule 14a-16(n)(4) details the notice and access disclosures that registrants and other soliciting persons are not required to include in proxy materials when they choose to send a full set of proxy materials to security holders. Since we are amending the notice and access disclosure requirements in Rule 14a-16(d), we are making conforming changes to Rule 14a-16(n)(4). Specifically, we are revising Rule 14a-16(n)(4)(i) to delete the reference to legend requirements that are no longer part of Rule 14a-16(d)(1) and to make reference to new paragraph 14a-16(d)(2) and changing the reference to “(d)(7)” in Rule 14a-16(n)(4)(iii) to “(d)(10)” to track the new numbering in Rule 14a-16(d).

Finally, we are confirming the guidance provided in the Proposing Release that it is not necessary that the Notice directly mirror the proxy card. Rather, Exchange Act Rule 14a-16(d)(6) provides that the Notice must clearly and impartially identify each separate matter intended to be acted on that will be considered at the meeting. We do not believe the Notice has to conform to the specific Exchange Act Rule 14a-4<sup>30</sup> formatting and content requirements for disclosure of matters on the proxy card.

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<sup>29</sup> See 17 CFR 240.14b-1(b)(2) and 17 CFR 240.14b-2(b)(3).

<sup>30</sup> 17 CFR 240.14a-4.

**B. Amendment to Notice Deadlines for Soliciting Persons Other Than the Issuer**

We proposed to amend Exchange Act Rule 14a-16(l)(2)(ii)<sup>31</sup> to improve the workability of the notice and access rules that apply to soliciting persons, other than the issuer, that choose to use the notice-only option.

**1. Proposed Amendment**

As we noted in the Proposing Release, the current requirement in Exchange Act Rule 14a-16(l)(2) that requires soliciting persons to send the Notice to shareholders 10 calendar days after the date that the issuer first sends its proxy materials to shareholders can create potential compliance issues for soliciting persons. The staff review of filings may result in outstanding comments on a soliciting person's preliminary proxy statement more than 10 calendar days after the soliciting person has initially filed. The practical effect of this requirement was to limit that soliciting person's ability to use the notice-only option if the soliciting person was unable to file its definitive proxy statement with the Commission by that time. To improve implementation of the notice and access model, we proposed to amend Exchange Act Rule 14a-16(l)(2)(ii) to require soliciting persons relying on this alternative<sup>32</sup> to file a preliminary proxy statement within 10 calendar 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 with the Commission.

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<sup>31</sup> 17 CFR 240.14a-16(l)(2)(ii).

<sup>32</sup> Alternatively, a soliciting person may also send the Notice 40 calendar days before the shareholder meeting to which the proxy materials relate. 17 CFR 14a-16(l)(2)(i).

## **2. Comments on the Proposed Amendment**

Comments on the proposal were limited and mixed. One commenter supported the Commission's proposal for a soliciting person to file a preliminary proxy statement within 10 calendar days after the issuer files its definitive proxy statement and send its Notice no later than the date on which it files its definitive proxy statement.<sup>33</sup> Other commenters expressed concern that without a specific time requirement for sending the Notice prior to the shareholder meeting, shareholders may not have sufficient time to access and consider the materials provided or obtain paper copies prior to casting their vote.<sup>34</sup>

## **3. Final Rule**

After considering the comments, we are adopting the revisions as proposed to amend Exchange Act Rule 14a-16(l)(2)(ii) to require soliciting persons other than the issuer to file a preliminary proxy statement within 10 calendar 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 with the Commission. We continue to believe that the time period provides sufficient time for a soliciting person to prepare its proxy statement and respond to any staff comments, while still permitting the soliciting person to use the notice and access model. While the rule does not provide for a specific period of time before the meeting by which a soliciting person is required to mail the Notice, the soliciting person should, and generally it would be in their best interest to, make the Notice and proxy materials available to shareholders with sufficient time for

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<sup>33</sup> See letter from ABA.

<sup>34</sup> See, e.g., letters from Ameriprise, SCSGP, and S&C.

shareholders to review the materials and make an informed voting decision.

### **C. Additional Comments on the Proposed Amendments and Actions Taken by the Commission**

Some commenters indicated their belief that the proposed amendments would result in only modest improvements.<sup>35</sup> A number of commenters recommended revising the notice and access model to permit issuers to send a proxy card and business reply envelope, either with or without a short summary proxy statement accompanying the Notice in order to increase voting rates and facilitate shareholder participation.<sup>36</sup> Other commenters expressed support for reducing the amount of time required for sending the Notice prior to the meeting from 40 days to 30 days.<sup>37</sup> Still other commenters expressed concern regarding the notice and access processing fee structure, the lack of competition for proxy service providers and issuers' inability to negotiate the fees which results in limitations on the amount of the cost savings from switching to the notice and access model.<sup>38</sup> We are not addressing these issues at this time, as the Commission is still considering these and other ways to further encourage informed shareholder participation.

Many commenters suggested that the Commission should do more to improve not only the notice and access model, but also the proxy process generally.<sup>39</sup> While supporting the proposal, a number of commenters suggested that the Notice and lack of

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<sup>35</sup> See, e.g., letters from ABC and R&T.

<sup>36</sup> See, e.g., letters from Altman, Chamber, Computershare, Edison, ICI, Intel, R&T, SCSGP, and STA.

<sup>37</sup> See, e.g., letters from ABA, ACC, Altman, Broadridge Steering Committee, Calvert, Chamber, Computershare, ICI, Intel, NIRI, Otter Tail, R&T, and SCSGP.

<sup>38</sup> See, e.g., letters from Altman, DG3, Otter Tail, NIRI, R&T, SCSGP, and STA.

<sup>39</sup> See, e.g., letters from ABA, ABC, Altman, BNY, Broadridge, Broadridge Steering Committee, Chamber, Computershare, Edison, ICI, Intel, NIRI, Otter Tail, R&T, S&C, and SCSGP.

explanatory materials accompanying the Notice were not the primary reasons for reduced retail voting and advocated for more sweeping changes.<sup>40</sup> A few commenters did not directly address the proposed amendments, but made broader appeals regarding the proxy process or provided alternative insights,<sup>41</sup> and one commenter suggested that use of the notice and access model undermines investor protection and should be repealed.<sup>42</sup>

While we are not in this release addressing the broader concerns with the proxy system or the notice and access model raised by commenters that went beyond the scope of the proposals, we are continuing to consider these and other concerns relating to the proxy process that have been raised. At the direction of the Chairman, the Commission's staff is conducting a comprehensive review of the mechanics by which proxies are voted and the way in which information is conveyed to shareholders and is preparing a concept release to seek public comment on these issues.<sup>43</sup> In that review, the Commission's staff will continue to monitor shareholder activity under, and the effects of, the notice and access model. In addition, the Commission's staff is undertaking educational efforts to increase understanding of proxy mechanics generally and the notice and access model of delivery of proxy materials.<sup>44</sup>

#### **D. Technical Amendments Relating to Registered Investment Companies**

We are also adopting, as proposed, technical amendments to our rules for registered investment companies. Exchange Act Rule 14a-16(f)(2)(iii) currently permits

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<sup>40</sup> See, e.g., letters from ABC, Altman, ICI, NIRI, R&T, and STA.

<sup>41</sup> See, e.g., letters from Corporate Governance, DG3, and Moxy.

<sup>42</sup> See letter from IRWebReport.com.

<sup>43</sup> See Speech by Chairman Mary Schapiro to the Practising Law Institute's 41st Annual Institute on Securities Regulation (Nov. 4, 2009) at <http://sec.gov/news/speech/2009/spch110409mls.htm>.

<sup>44</sup> Information about the Commission's educational efforts can be found at: <http://www.sec.gov/spotlight/proxymatters.shtml>.

a registered investment company to accompany the Notice with a prospectus or report to shareholders.<sup>45</sup> The Commission recently adopted rule amendments that permit mutual funds<sup>46</sup> to satisfy their prospectus delivery obligations by sending or giving investors key information in the form of a summary prospectus.<sup>47</sup> Consistent with permitting mutual funds to use a summary prospectus to satisfy their delivery obligations, we are revising our rules to permit mutual funds to accompany the Notice with a summary prospectus.<sup>48</sup> Commenters that addressed this issue supported the technical amendments.<sup>49</sup>

### **III. PAPERWORK REDUCTION ACT**

#### **A. Background**

Certain provisions of the amendments contain a “collection of information” within the meaning of the Paperwork Reduction Act of 1995.<sup>50</sup> The Commission published a notice requesting comment on the collection of information requirements in the Proposing Release for the amendments, and we are submitting these requirements to

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<sup>45</sup> 17 CFR 240.14a-16(f)(2)(iii). Unless otherwise specified or the context otherwise requires, the term “prospectus” means a prospectus meeting the requirements of Section 10(a) of the Securities Act [15 U.S.C. 77j(a)]. See 17 CFR 240.0-1(d).

<sup>46</sup> We use the term “mutual fund” to mean a registered investment company that is an open-end management company as defined in Section 5(a)(1) of the Investment Company Act of 1940 [15 U.S.C. 80a-5(a)(1)].

<sup>47</sup> See Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33-8998 (Jan. 13, 2009) [74 FR 4546]. Although the summary prospectus is not a Section 10(a) prospectus, it may be used to satisfy any prospectus delivery obligations under Section 5(b)(2) of the Securities Act [15 U.S.C. 77e(b)(2)]. 17 CFR 230.498(c).

<sup>48</sup> See amendment to Exchange Act Rule 14a-16(f)(2)(iii). We are also adopting a conforming amendment to Rule 498 under the Securities Act [17 CFR 230.498], which permits mutual funds to use a summary prospectus to satisfy their prospectus delivery obligations. Rule 498(f)(2) provides that a mutual fund’s summary prospectus shall be given greater prominence than any accompanying materials. We are amending Rule 498(f)(2) to provide that a summary prospectus need not be given greater prominence than an accompanying Notice.

<sup>49</sup> See, e.g., letters from ABA, Calvert, and ICI.

<sup>50</sup> 44 U.S.C. 3501 *et seq.*; 5 CFR 1320.11.

the Office of Management and Budget for review in accordance with the PRA.<sup>51</sup> An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. Compliance with the rules as they are amended is mandatory; however, certain information collections under these rules are required and some are voluntary. Responses to the information collections will not be kept confidential and there is no mandatory retention period for the information disclosed.

## **B. Summary of the Final Rules**

As discussed in more detail below, the amendments that we are adopting provide additional flexibility regarding the format of the Notice that is sent to shareholders, permit issuers and other soliciting persons to better communicate with shareholders by including explanatory materials regarding the reasons for the use of the notice and access rules and the process of receiving and reviewing proxy materials and voting, and revise the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option.

In the Proposing Release, we requested comment on the PRA analysis. We received no comments that addressed our burden estimates for the proposed amendments.

### **1. Regulation 14A and 14C**

The titles for the collections of information for operating companies are:

- Regulation 14A (OMB Control No. 3235-0059); and
- Regulation 14C (OMB Control No. 3235-0057).

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<sup>51</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

We previously revised these collections of information in the release that proposed the notice and access model as a voluntary model for disseminating proxy materials<sup>52</sup> and the release in which we adopted amendments requiring issuers and other soliciting persons to follow the model.<sup>53</sup> We submitted the revisions in those releases and are submitting the amendments to OMB for review in accordance with the PRA.

We have made some additional changes to the amendments, but we do not expect those changes to affect our estimates.<sup>54</sup> The following table summarizes for purposes of the PRA the burden estimates for Schedules 14A and 14C reflecting amendments that permit, but do not require, an issuer or other soliciting person to include explanatory materials with the Notice, which are the only amendments in the release affecting our burden estimates:

Table 1: Calculation of Incremental Paperwork Reduction Act Burden Estimates for Proxy and Information Statements

Form	Annual Responses	Incremental Hours/Form	Incremental Burden	75% Issuer	25% Professional	\$400 Professional Cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*\$400
Schedule 14A	7300	0.5	3650	2737.5	912.5	\$365,000
Schedule 14C	680	0.5	340	255	85	\$34,000
Total	7980		3990	2992.5	997.5	\$399,000

## 2. Rule 20a-1

Certain provisions of the current notice and access model contain “collection of information” requirements within the meaning of the PRA, including preparation of Notices, maintaining Web sites, maintaining records of shareholder preferences, and

<sup>52</sup> See Internet Availability of Proxy Materials, Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597].

<sup>53</sup> See the Internet Availability of Proxy Material Adopting Release at note 9 above.

<sup>54</sup> While the revised amendments additionally permit an explanation of the reasons for an issuer’s use of the notice and access rules, we expect the additional explanation to be part of the same drafting process and to be limited to a few lines of text. Likewise, the required clarification that the Notice is not a form for voting should not add materially to the time to prepare the disclosure. We therefore believe the changes do not affect our burden estimates.

responding to requests for copies. Those provisions increase the current burden for the existing collection of information entitled “Rule 20a-1 under the Investment Company Act of 1940,<sup>55</sup> Solicitation of Proxies, Consents and Authorizations” (OMB Control No. 3235-0158). Rule 20a-1 under the Investment Company Act<sup>56</sup> requires that the solicitation of a proxy, consent, or authorization with respect to a security issued by an investment company be in compliance with Regulation 14A,<sup>57</sup> Schedule 14A,<sup>58</sup> and all other rules and regulations adopted under Section 14(a) of the Exchange Act.<sup>59</sup> It also requires a fund’s investment adviser, or a prospective adviser, to transmit to the person making a proxy solicitation the information necessary to enable that person to comply with the rules and regulations applicable to the solicitation. The notice and access model requires all registered investment companies to post their proxy materials on an Internet Web site and furnish Notice of the materials’ availability to shareholders.<sup>60</sup> The Notices, the proxy materials posted on the Web site, and copies of the proxy materials sent in response to shareholder requests are not kept confidential.

The following discussion summarizes the burden estimates for Rule 20a-1 that we provided in the Proposing Release. For purposes of the PRA, we estimate that the total annual reporting burden for Rule 20a-1 increased by approximately 1,378 hours and that the annual cost increased by approximately \$735,000 for the services of outside professionals to comply with the disclosure provisions of the existing notice and access

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<sup>55</sup> 15 U.S.C. 80a-1 et seq.

<sup>56</sup> 17 CFR 270.20a-1.

<sup>57</sup> 17 CFR 240.14a-1 et seq.

<sup>58</sup> 17 CFR 240.14a-101.

<sup>59</sup> 15 U.S.C. 78n(a).

<sup>60</sup> See the Internet Availability of Proxy Material Adopting Release at note 9 above.

model. In addition, for purposes of the PRA, we estimate that a typical investment company issuer spends an additional five hours per year, or a total of 6,125 hours, to maintain these records as to which of its shareholders have made an election to receive proxy materials in paper or by e-mail. Further, we estimate that the additional burden to prepare an intermediary's Notice is approximately one hour, or a total annual burden of 1,225 hours for all investment company proxy solicitations. Finally, like investment company issuers, we estimate that the requirement to maintain records to keep track of which beneficial owners have made a permanent election to receive proxy materials in paper or by e-mail results in an additional annual burden of five hours, or a total of 6,125 hours, for intermediaries. We received no comments on the estimates and are making no adjustments. In total, we estimate that the annual PRA reporting burden for current Rule 20a-1 increased by 14,853 hours and \$735,000 in professional costs to reflect compliance with the existing notice and access model.

With respect to the amendments in this release, we have made some additional clarifying changes, but we do not expect those changes to affect our estimates. We estimate that the amendments that permit, but do not require, an issuer or other soliciting person to include explanatory materials with the Notice, increase the PRA burden estimates under Rule 20a-1 by approximately 459 hours and \$61,250 in professional costs.<sup>61</sup>

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<sup>61</sup> See the Proposing Release for calculations underlying the burden estimates.

## **IV. COST-BENEFIT ANALYSIS**

### **A. Introduction**

We are adopting amendments designed to improve implementation of the notice and access model by revising the legend requirements in the rule to make them more flexible, permitting the Notice to be accompanied by explanatory materials regarding the reasons for the use of the notice and access rules and the process of receiving and reviewing the proxy materials and voting, and revising the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option.<sup>62</sup> We received no comments on the costs and benefits of the amendments.

We expect the amendments to:

- Facilitate participation by shareholders who may be confused by the operation of the notice and access model;
- Provide additional flexibility in describing the notice and access model; and
- Facilitate participation by some soliciting persons who may currently be effectively precluded from using the notice-only option.

### **B. Benefits**

As discussed above, by permitting some additional flexibility in designing the Notice and permitting explanatory materials regarding the reasons for the use of the notice and access rules and the process of receiving and reviewing the proxy materials and voting to accompany the Notice, the amendments are intended to reduce regulatory impediments and improve understanding of the notice and access model for participating

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<sup>62</sup> We do not expect our proposed conforming amendment, which would permit mutual funds to accompany the Notice with a summary prospectus, to have a substantive impact on a mutual fund's decision otherwise permitted under Rule 498 of the Securities Act to provide a summary

shareholders. Improved understanding of the model through an explanation of the reasons for the use of the Notice and the process of receiving and reviewing proxy materials and voting should reduce confusion and may thereby improve the efficiency and effectiveness of the proxy voting system. The benefits may be limited if issuers send notices to shareholders that are less likely to respond. Some commenters noted lower shareholder response rates under the notice and access model.<sup>63</sup>

Revising one of the two alternative Notice deadlines applicable to soliciting persons other than issuers is intended to facilitate use of the notice-only option by soliciting persons who may otherwise be precluded from using the notice-only option because of their inability to meet the deadline for sending the Notice. This would help lower costs for those persons by reducing impediments for certain soliciting persons to participate in the proxy process through use of the notice-only option.

### **C. Costs**

Eliminating the specific limitations of the legend requirement may result in some soliciting persons providing a more confusing Notice. This may increase the cost of shareholder participation in the proxy process, and to the extent that it affects participation, could distort votes and outcomes. In addition, an issuer or other soliciting person that chooses to include explanatory materials in the same mailing with the Notice will incur the cost of preparing that information.<sup>64</sup> For purposes of the PRA, we estimate

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prospectus instead of a statutory prospectus to its shareholders. No commenters suggested it would have a substantial impact.

<sup>63</sup> See, e.g., Broadridge, BNY, Computershare, and R&T.

<sup>64</sup> Since intermediaries and their agents already have systems to prepare and deliver proxy materials and the nature of the proposed changes are relatively small, we do not expect the intermediaries' role in sending explanatory material to beneficial owners to affect their costs associated with the rule. In any event, since soliciting persons reimburse intermediaries for their reasonable expenses

that the amendments will cause an aggregate annual increase in the compliance burden for operating and investment company issuers and other soliciting persons preparing explanatory materials of approximately 3,450 hours of in-house personnel time and approximately \$460,000 for the services of outside professionals.

**V. CONSIDERATION OF BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION**

Section 23(a) of the Exchange Act<sup>65</sup> requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act,<sup>66</sup> Section 3(f) of the Exchange Act<sup>67</sup> and Section 2(c) of the Investment Company Act<sup>68</sup> require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to also consider whether the action would promote efficiency, competition, and capital formation.

The amendments that we are adopting permit additional flexibility in designing the Notice, permit issuers and other soliciting persons to better communicate with shareholders by accompanying the Notice with explanatory materials regarding the reasons for the use of the notice and access rules and the process of receiving and

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of forwarding proxy materials, we do not expect intermediaries to incur costs associated with the rule.

<sup>65</sup> 15 U.S.C. 78w(a).

<sup>66</sup> 15 U.S.C. 77b(b).

<sup>67</sup> 15 U.S.C. 78c(f).

<sup>68</sup> 15 U.S.C. 80a-2(c).

reviewing the proxy materials and voting, and revise the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option. The amendments are designed to reduce regulatory impediments and thereby increase shareholder participation, improve implementation of the notice and access model, and enhance investor understanding of the operation of the notice and access model. These changes are intended to improve the efficiency and effectiveness of the proxy process.

No commenters suggested, and we do not anticipate, any effect on competition or capital formation as a result of these revisions.

## **VI. FINAL REGULATORY FLEXIBILITY ANALYSIS**

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to revisions to Exchange Act Rule 14a-16 and related changes that would permit some additional flexibility in designing the Notice, permit issuers and other soliciting persons to better communicate with shareholders by accompanying the Notice with explanatory materials regarding the reasons for the use of the notice and access rules and the process of receiving and reviewing the proxy materials and voting, and revise the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act in conjunction with the Proposing Release. The Proposing Release included, and solicited comment on, the IRFA.

### **A. Reasons for, and Objectives of, the Amendments**

The amendments are designed to improve implementation of the notice and access model. Based on our monitoring of the effects of the notice and access model on the proxy solicitation process and the experiences that issuers and shareholders have had with the notice and access model to date, we believe that these revisions will improve the operation of the model without adversely affecting soliciting persons' or shareholders' abilities to participate effectively in the proxy process.

Improved notice design and shareholder education should help to mitigate the difference in shareholder participation in the proxy voting process observed in the use of the notice and access model to the extent the difference was caused by the restrictions in our regulations. The amendment to the timing requirements for soliciting persons other than the issuer to file their preliminary proxy statements is designed to better enable soliciting persons other than the issuer to use the notice-only option.

### **B. Significant Issues Raised by Commenters**

We did not receive comments specifically addressing the impact of the proposed amendments on small entities.

### **C. Small Entities Subject to the Amendments**

The amendments affect issuers that are small entities. Exchange Act Rule 0-10(a)<sup>69</sup> defines an issuer to be a “small business” or “small organization” for purposes of the Regulatory Flexibility Act if it had total assets of \$5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 public companies, other than investment companies, that may be considered small entities.

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<sup>69</sup> 17 CFR 240.0-10(a).

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.<sup>70</sup> Approximately 168 registered investment companies meet this definition. Moreover, approximately 33 business development companies may be considered small entities.

Paragraph (c)(1) of Rule 0-10 under the Exchange Act<sup>71</sup> states that the term “small business” or “small organization,” when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Exchange Act Rule 17a-5(d);<sup>72</sup> and is not affiliated with any person (other than a natural person) that is not a small business or small organization. The Commission has estimated that there were approximately 910 broker-dealers that qualified as small entities as defined above.<sup>73</sup> Small Business Administration regulations define “small entities” to include banks and savings associations with total assets of \$165 million or less.<sup>74</sup> The Commission estimates that the amendments might apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of \$165 million or less.<sup>75</sup>

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<sup>70</sup> 17 CFR 270.0-10.

<sup>71</sup> 17 CFR 240.0-10(c)(1).

<sup>72</sup> 17 CFR 240.17a-5(d).

<sup>73</sup> These numbers are based on a review by the Commission’s Office of Economic Analysis of 2005 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent in FOCUS Report filings.

<sup>74</sup> 13 CFR 121.201.

<sup>75</sup> We note that while not subject to the amendments, the amendments may affect these entities because they are intermediaries that are required under the Commission’s proxy rules to forward

**D. Reporting, Recordkeeping and Other Compliance Requirements**

The amendments revise the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option, require clarification that the Notice is not a form for voting and permit, but do not require, issuers or other soliciting persons to include additional, explanatory material in their Notice.

**E. Agency Action to Minimize Effect on Small Entities**

The purpose of the amendments is to improve the implementation of the notice and access model based on our experience with the model to date. The amendments are intended to improve the operation of the notice and access model by providing additional flexibility in designing the Notice, permitting issuers and other soliciting persons to better communicate with shareholders by accompanying the Notice with explanatory materials regarding the reasons for the use of the notice and access rules and the process of receiving and reviewing the proxy materials and voting, and revising the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option.

We considered the use of performance standards rather than design standards in the amendments. The amendments contain both performance standards and design standards. We are revising existing design standards, such as the deadline applicable to soliciting persons other than the issuer. However, we are imposing performance standards to provide issuers, other soliciting persons and intermediaries with the

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proxy materials, including the Notice or any explanatory materials, on to shareholders who beneficially own their shares through the intermediaries. An intermediary is not required to forward proxy materials to beneficial owners unless the issuer or other soliciting person provides assurance of reimbursement of the intermediary's reasonable expenses incurred in connection with forwarding those materials. 17 CFR 240.14b-2(c)(2)(i). Therefore, any costs imposed on intermediaries by the rules will be borne by the issuer or other soliciting person.

flexibility to devise the means through which they can comply with such standards. For example, the amendments regarding explanatory materials do not dictate wording of such information, but allow flexibility in how to communicate the information.

We considered different compliance standards for the small entities that will be affected by the amendments. In the Proposing Release, we solicited comment regarding the possibility of different standards for small entities. We did not receive comment on this particular issue. We are not aware of any different standards that would be consistent with the purposes of the amendments.

## **VII. STATUTORY AUTHORITY AND TEXT OF THE AMENDMENTS**

The amendments described in this release are being adopted under the authority set forth in Sections 6, 7, 10, and 19 of the Securities Act of 1933, as amended, Sections 3(b), 13, 14, 15, and 23(a) of the Securities Exchange Act of 1934, as amended, and Sections 8, 20(a), 24(a), 24(g), 30, and 38 of the Investment Company Act of 1940, as amended.

### **List of Subjects**

17 CFR Parts 230 and 240

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission amends Title 17, Chapter II of the Code of Federal Regulation as follows.

### **PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

1. The authority citation for Part 230 continues to read in part as follows:

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

2. Amend §230.498 by revising paragraph (f)(2) to read as follows:

**§230.498 Summary Prospectuses for open-end management investment companies.**

\* \* \* \* \*

(f) \* \* \*

(2) Greater prominence. If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund's Summary Prospectus shall be given greater prominence than any materials that accompany the Fund's Summary Prospectus, with the exception of other Summary Prospectuses, Statutory Prospectuses, or a Notice of Internet Availability of Proxy Materials under §240.14a-16 of this chapter.

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**PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

3. The general authority citation for Part 240 is revised to read as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37,

80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350 and 12 U.S.C. 5221(e)(3), unless otherwise noted.

\* \* \* \* \*

4. Amend §240.14a-16 by:
  - a. Revising paragraph (d)(1).
  - b. Redesignating paragraphs (d)(2) through (d)(8) as paragraphs (d)(5) through (d)(11);
    - c. Adding new paragraphs (d)(2) through (d)(4);
    - d. Removing the word “and” at the end of paragraph (f)(2)(ii);
    - e. Revising paragraph (f)(2)(iii);
    - f. Adding paragraph (f)(2)(iv);
    - g. Revising paragraph (l)(2)(ii);
    - h. Revising paragraph (n)(4)(i); and
    - i. In paragraph (n)(4)(iii) removing the reference to “(d)(7)” and adding in its place “(d)(10)”.

The revisions and additions read as follows:

**§240.14a-16 Internet availability of proxy materials.**

\* \* \* \* \*

(d) \* \* \*

- (1) A prominent legend in bold-face type that states “Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]”;

(2) 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;

(3) The Internet Web site address where the proxy materials are available;

(4) 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;

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(iii) In the case of an investment company registered under the Investment Company Act of 1940, the company's prospectus, a summary prospectus that satisfies the requirements of §230.498(b) of this chapter, or a report that is required to be transmitted to stockholders by section 30(e) of the Investment Company Act (15 U.S.C. 80a-29(e)) and the rules thereunder; and

(iv) An explanation of the reasons for a registrant's use of the rules detailed in this section and the process of receiving and reviewing the proxy materials and voting as detailed in this section.

\* \* \* \* \*

(1) \* \* \*

(2) \* \* \*

(ii) The date on which it files its definitive proxy statement with the Commission, provided its preliminary proxy statement is filed no later than 10 calendar days after the date that the registrant files its definitive proxy statement.

\* \* \* \* \*

(n) \* \* \*

(4) \* \* \*

(i) Instructions regarding the nature of the communication pursuant to paragraph (d)(2) of this section;

\* \* \* \* \*

By the Commission.

Elizabeth M. Murphy  
Secretary

Dated: February 22, 2010