**THOMPSON  
HINE**

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**INVESTMENT MANAGEMENT  
UPDATE****Proposed Amendments to E-Proxy Rules**

On October 14, the Securities and Exchange Commission (SEC) proposed amendments to Rule 14a-16 under the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 498 under the Securities Act of 1933, which generally require proxy materials to be made available to shareholders via the Internet (collectively, the “e-proxy rules”). In addition, the SEC has also provided guidance with respect to the application of the e-proxy rules. Comments to the proposed amendments are due by November 20, 2009.<sup>1</sup>

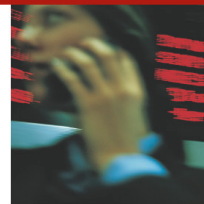
**BACKGROUND**

The e-proxy rules permit an issuer or other soliciting person to delivery proxy materials to shareholders via either a “notice-only option” or a “full set delivery option.”<sup>2</sup> Under the notice-only option, an issuer or other soliciting person is permitted to send only a Notice of Internet Availability of Proxy Materials (“Notice”) to shareholders in lieu of a full set of traditional paper proxy materials. This Notice includes, among other things, the Internet web site address where shareholders can access the proxy materials and a description of how a shareholder can request paper or electronic copies of proxy materials.<sup>3</sup> The full set delivery option permits an issuer or other soliciting person to send the traditional full set of paper proxy materials to shareholders accompanied by the Notice, or to include the information required by the Notice in the proxy materials themselves.

**SUMMARY OF PROPOSED CHANGES**

The SEC is proposing the following revisions to the notice-only option:

- **Content of Notice.** The proposed amendments eliminate the requirement that the Notice include a detailed legend containing certain specified text. Instead, the proposed amendments would require information appearing on the Notice to address certain topics, without specifying the exact language to be used.<sup>4</sup>
- **Notice Need Not Mirror Proxy Card.** The SEC also clarified existing Exchange Act Rule 14a-16(d)(3) by noting that, while the Notice must identify each matter that will be considered at a shareholders’ meeting, the Notice need not directly mirror the formatting and content of the proxy card.<sup>5</sup>
- **Permit Explanatory Materials to Accompany Notice.** The SEC has proposed new Exchange Act Rule 14a-16(f)(2)(iv), which would permit issuers and other soliciting persons to accompany the Notice with an explanation of the Notice and information regarding the process of receiving and reviewing proxy materials and voting. Materials



designed to persuade shareholders to vote in a particular manner, change the method of delivery or explain the basis for sending only a Notice would, however, not be permitted under the new rule.<sup>6</sup>

- ***Permit Notice to Accompany Summary Prospectus.*** Under existing Rule 14a-16(f)(2)(iii), a registered investment company is permitted to accompany the Notice with a prospectus or report to shareholders. In light of the SEC's recent adoption of rule amendments that permit mutual funds to satisfy their prospectus delivery requirements by sending or giving investors key information in the form of a summary prospectus,<sup>7</sup> the SEC has now proposed amendments permitting a summary prospectus to accompany a Notice.
- ***Revision to Filing Deadlines for Soliciting Persons Other Than the Issuer.*** Under current Exchange Act Rule 14a-16, if a soliciting person other than the issuer chooses to use the notice-only option, the soliciting person must send its Notice to shareholders by a date that is the later of 40 calendar days before the shareholder meeting to which the proxy materials relate or 10 calendar days after the issuer first sends its Notice or proxy statement to shareholders. Due to the SEC's review and comment procedures for preliminary proxy materials filed by soliciting shareholders in a contested solicitation, the existing 10-day requirement may result in the soliciting person being unable to use the notice-only option. The SEC has proposed amending Rule 14a-16(l)(2)(ii) to require the soliciting person relying on the notice-only alternative to file a preliminary proxy statement within 10 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 SEC.

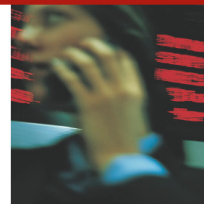
## OUTLOOK

As the comment period for the proposed amendments is somewhat narrow and the Proposing Release did not specify an anticipated effective date, it is possible that the proposed amendments may become effective for the 2010 proxy voting season. We will closely monitor the SEC's actions with respect to these issues and provide future updates as appropriate.

## FOR MORE INFORMATION

For more information, please contact:

Michael V. Wible	614.469.3297	<b><a href="mailto:Michael.Wible@ThompsonHine.com">Michael.Wible@ThompsonHine.com</a></b>
Richard S. Heller	212.908.3907	<b><a href="mailto:Richard.Heller@ThompsonHine.com">Richard.Heller@ThompsonHine.com</a></b>
James P. Jalil	212.908.3976	<b><a href="mailto:James.Jalil@ThompsonHine.com">James.Jalil@ThompsonHine.com</a></b>
Donald S. Mendelsohn	513.352.6546	<b><a href="mailto:Don.Mendelsohn@ThompsonHine.com">Don.Mendelsohn@ThompsonHine.com</a></b>
JoAnn M. Strasser	513.352.6725	<b><a href="mailto:JoAnn.Strasser@ThompsonHine.com">JoAnn.Strasser@ThompsonHine.com</a></b>
Marc L. Collins	513.352.6774	<b><a href="mailto:Marc.Collins@ThompsonHine.com">Marc.Collins@ThompsonHine.com</a></b>



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<sup>1</sup> See generally “Amendments to Rules Requiring Internet Availability of Proxy Materials,” Release Nos. 33-9073, 34-60825 and IC-28946 (Oct. 14, 2009) (the “Proposing Release”).

<sup>2</sup> See “Internet Availability of Proxy Material,” Release No. 34-55146 (Jan. 22, 2007) and “Shareholder Choice Regarding Proxy Materials,” Release No. 34-56135 (July 26, 2007).

<sup>3</sup> Current Exchange Act Rule 14a-16(d) imposes strict requirements regarding the content of the Notice and requires that the Notice is presented in a prescribed format. Specifically, the rule requires that a Notice contain a legend indicating that the document is an important notice regarding the availability of proxy materials on the Internet for a specified shareholder meeting; indicate that it presents only an overview of the more complete proxy materials that have been made available to shareholders on the Internet; include a statement encouraging shareholders to access and review the proxy materials; explain how a shareholder may request a paper or email copy of proxy materials; and provide a clear and impartial identification of each separate matter intended to be acted on and the soliciting person’s recommendations regarding those matters, but no supporting statements.

<sup>4</sup> The proposed rules will, however, continue to require that each Notice contain the exact words “Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].”

<sup>5</sup> The SEC reported that certain issuers interpreted Rule 14a-16(d)(3) to require them to comply with the Exchange Act Rule 14a-4 formatting and content requirements for disclosure of matters on the proxy card when identifying in the Notice each separate matter to be acted upon at the specified shareholder meeting.

<sup>6</sup> Under existing Rule 14a-16(f), the Notice must be sent separately from other types of shareholder communications and may not accompany any other document or materials, except for a pre-addressed, postage-paid reply card for requesting a paper copy of the proxy materials and a copy of a notice of shareholder meeting required by state law. Registered investment companies are, however, permitted to include the Notice along with a prospectus or a report that is required to be transmitted to shareholders by Section 30(e) of the Investment Company Act and the rules thereunder. See Exchange Act Rule 14a-16(f)(2)(iii).

<sup>7</sup> See “Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies,” Release No. 33-8998 (Jan. 13, 2009).