SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
812112	Beauty Salons	$7.0	
812113	Nail Salons	$7.0	
812191	Diet and Weight Reducing Centers	$19.0	
812199	Other Personal Care Services	$7.0	
812210	Funeral Homes and Funeral Services	$7.0	
812220	Cemeteries and Crematories	$19.0	
812310	Coin-Operated Laundries and Drycleaners	$7.0	
812320	Drycleaning and Laundry Services (except Coin-Operated)	$5.0	
812331	Linen Supply	$30.0	
812332	Industrial Launderers	$35.5	
812910	Pet Care (except Veterinary) Services	$7.0	
812921	Photo Finishing Laboratories (except One-Hour)	$19.0	
812922	One-Hour Photo Finishing	$14.0	
812930	Parking Lots and Garages	$35.5	
812990	All Other Personal Services	$7.0	
Subsector 813—Religious, Grantmaking, Civic, Professional and Similar Organizations			
813110	Religious Organizations	$7.0	
813211	Grantmaking Foundations	$30.0	
813212	Voluntary Health Organizations	$25.5	
813219	Other Grantmaking and Giving Services	$35.5	
813311	Human Rights Organizations	$25.5	
813312	Environment, Conservation and Wildlife Organizations	$14.0	
813319	Other Social Advocacy Organizations	$7.0	
813410	Civic and Social Organizations	$7.0	
813910	Business Associations	$7.0	
813920	Professional Organizations	$14.0	
813930	Labor Unions and Similar Labor Organizations	$7.0	
813940	Political Organizations	$7.0	
813990	Other Similar Organizations (except Business, Professional, Labor, and Political Organizations).	$7.0	

* * * * *

Dated October 9, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–25199 Filed 10–20–09; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 240

[Release Nos. 33–9073; 34–60825; IC–28946; File No. S7–22–09]

RIN 3235–AK25

Amendments to Rules Requiring Internet Availability of Proxy Materials

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing changes to the proxy rules under the Securities Exchange Act of 1934 to improve the notice and access model for furnishing proxy materials to shareholders. Specifically, we are proposing revisions to our rules to provide additional flexibility regarding the format of the Notice of Internet Availability of Proxy Materials that is sent to shareholders. We are also providing guidance about the current requirement for the Notice to identify the matters intended to be acted on at the shareholders' meeting. In addition to the proposed changes and guidance regarding the format of the Notice, we are proposing a new rule that will permit issuers and soliciting shareholders to include explanatory materials regarding the process of receiving and reviewing proxy materials and voting. Finally, we are proposing revisions to the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option.

DATES: Comments should be received on or before November 20, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–22–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–22–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

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 proposing amendments to Rule 14a–16 [1] under the Securities Exchange Act of 1934 [2] and Rule 498 [3] under the Securities Act of 1933.[4]

I. Background

As part of a continuing review of the proxy disclosure and solicitation process, we have been exploring ways to improve the disclosures shareholders receive when they are asked to make a voting decision and the process followed when those votes are solicited. In May 2009, we voted to propose changes to our proxy rules to require issuers to include shareholder nominated directors in issuer proxy statements if certain conditions are met.[5] We also recently proposed amendments to our proxy rules to enhance the compensation and corporate governance disclosures that issuers are required to make and to address certain proxy solicitation matters.[6] We also approved changes proposed by the New York Stock Exchange (''NYSE'') to its Rule 452 that eliminated broker discretionary voting for uncontested elections of directors at shareholder meetings.[7]

One of the other ways we identified to improve the proxy solicitation process is to revise our notice and access proxy rules to further facilitate informed shareholder participation in the proxy voting process. In 2007 we amended the proxy rules by adopting a notice and access model that required all issuers and other soliciting persons to post their proxy materials on an Internet Web site and furnish notice of the materials' availability to shareholders.[8] The notice and access model was intended to establish procedures that would promote use of the Internet as a reliable and cost-efficient means of making proxy materials available to shareholders. Even though we recently adopted these requirements, we believe based on our experience that it is important to propose these limited modifications in order to advance the regulatory goals of the notice and access model.

Under the notice and access model, an issuer or other soliciting person may choose to provide proxy materials to shareholders under either of two options, the ''notice-only option'' and the ''full set delivery option.'' [9] An issuer or other soliciting person is permitted to provide proxy materials to some shareholders via the notice-only option and to other shareholders via the full set delivery option. Under both options, the issuer or other soliciting person must make its proxy materials available on an Internet Web site.

The notice-only option permits the issuer or other soliciting person to send only a Notice of Internet Availability of Proxy Materials (''Notice'') to shareholders. The Notice must include, among other things, the Internet Web site address where shareholders can access the proxy materials and a description of the means by which a shareholder can request paper or electronic copies of the materials.[10] Under this option, an issuer must send the Notice to shareholders at least 40 days prior to the shareholder meeting to which the proxy materials relate.[11] A soliciting person other than the issuer must send the Notice to shareholders by the later of 40 days prior to the meeting or 10 days after the issuer first sends its Notice or proxy materials to shareholders.[12] An issuer or other soliciting person must then provide copies of the proxy materials upon the request of shareholders receiving the Notice.[13] The full set delivery option permits an issuer or other soliciting person to send the traditional full set of proxy materials in paper to shareholders accompanied by the Notice, or to include the information required in the Notice in the proxy materials.[14]

According to Broadridge Financial Solutions, Inc. (''Broadridge''), 1,312 corporate issuers used the notice-only option for distribution to some portion of their beneficial owners under the notice and access model in the 2009 proxy season.[15] While issuers may enjoy significant cost savings using the notice-only option under the notice and access model, we are concerned by statistics indicating lower shareholder response rates to proxy solicitations when the notice-only option is used.[16] According

[1] 17 CFR 240.14a–16.

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 230.498.

[4] 15 U.S.C. 77a *et seq.*

[5] *See* Facilitating Shareholder Director Nominations, Release No. 33–9046 (June 10, 2009) [74 FR 29024].

[6] *See* Proxy Disclosure and Solicitation Enhancements, Release No. 33–9052 (July 10, 2009) [74 FR 35076].

[7] *See* 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].

[8] *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]. The rules were phased-in over a two year period. Large accelerated filers, not including registered investment companies, were required to use the model with respect to proxy solicitations commencing on or after January 1, 2008. All other companies (including registered investment companies), and soliciting persons, were required to use the model for proxy solicitations commencing on or after January 1, 2009.

[9] The process of distributing proxy materials to beneficial owners differs from the process for direct delivery of the materials by an issuer to its record holders. Beneficial owners are owners whose names do not appear directly in issuers' stock registers because they hold their securities through a broker, bank, trustee, or similar intermediary. The proxy rules, specifically Exchange Act Rule 14a–13, Rule 14b–1 and Rule 14b–2 [17 CFR 240.14a–13, 240.14b–1 and 240.14b–2], impose obligations on issuers and intermediaries to ensure that beneficial owners receive proxy materials and are given the opportunity to participate in the shareholder voting process. Under the proxy rules, intermediaries are required to forward the proxy materials, other than the proxy card, along with a request for voting instructions. The request for voting instructions is prepared by the intermediary and the beneficial owner returns the voting instructions to the intermediary. The intermediary is required to vote the beneficial owners' shares in accordance with each owner's voting instructions when formally executing the proxy card. In the absence of voting instructions from the beneficial owner, the intermediary may vote the beneficial owner's shares in its own discretion under certain circumstances. *See* NYSE Rule 452.

[10] *See* Exchange Act Rule 14a–16(b) and (d) [17 CFR 240.14a–16(b) and (d)].

[11] *See* Exchange Act Rule 14a–16(a) [17 CFR 240.14a–16(a)].

[12] *See* Exchange Act Rule 14a–16(*l*) [17 CFR 240.14a–16(*l*)].

[13] *See* Exchange Act Rule 14a–16(j) [17 CFR 240.14a–16(j)].

[14] *See* Exchange Act Rule 14a–16(n) [17 CFR 240.14a–16(n)].

[15] *See* Broadridge Notice & Access, Statistical Overview of Use with Beneficial Shareholders (as of May 31, 2009) at *http://www.broadridge.com/notice-and-access/NAStatsStory.pdf* (''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 that is currently publicly available and directly comparable to the data in the May 31, 2009 Broadridge Statistical Overview does not provide a comparison to an issuer's experience in the year prior to using the notice-only option for distribution.

[16] The Commission has long had an interest in facilitating shareholder participation in corporate

Continued

to Broadridge, the percentage of ''retail'' shares [17] voted by shareholders in issuers using the notice-only option for distribution to some portion of their beneficial owners is lower than the percentage in issuers that exclusively use the full-set delivery option to provide proxy materials to their shareholders.[18] In addition, when comparing between shareholders in issuers that used both the notice-only and full set delivery options, the response rates of retail shares voted by shareholders that received notice-only was half that of shareholders that received full set delivery.[19] With regard to the effect on voting by retail account holders, rather than retail shares voted, statistics provided by Broadridge indicate even lower voting response rates for retail accounts that received notice-only instead of full-set delivery.[20] The available data do not necessarily exclude the possibility that factors other than requirements of our notice and access rules may contribute to the different voting response rates, although the available data do not identify them.

We are exploring the reasons for the difference in retail share and account voting response rates and whether our rules are creating difficulties or affecting voting rates. We note that there appears to have been some confusion among shareholders regarding the operation of the notice and access model.[21] The legend required to be put on the Notice does not appear to have provided clear guidance for some shareholders as to how those shareholders could access the proxy materials online or request a paper copy of the proxy materials and vote their shares. For example, the Commission's staff has received reports of some shareholders attempting to indicate their voting instructions by returning a marked copy of the Notice.[22] Disclosing the matters to be acted on in the Notice in the same format as the matters listed in the proxy may have resulted in some shareholders misunderstanding the purpose of the Notice. There may be other reasons why shareholder participation under the notice and access model, especially by individual shareholders, is lower, and we are soliciting comment on why the participation rates are lower and how best to advance the Commission's regulatory interest in informed shareholder participation.

We are proposing revisions to remove regulatory impediments that may be reducing shareholder response rates to proxy solicitations. The revisions are intended to permit issuers and other soliciting persons to more effectively use the notice and access model. The proposed amendments are described below. We are also soliciting comment on ways to improve the mechanics of the notice and access model and other ways to increase informed shareholder participation in the proxy solicitation process.[23] We intend to continue monitoring implementation of the notice and access rules and may propose additional revisions in order to achieve greater shareholder participation.

II. Proposed Amendments

A. Improving Clarity of the Notice

Exchange Act Rule 14a–16(d) [24] currently imposes strict requirements regarding the content of the Notice, and requires the Notice to be presented in a prescribed format.[25] The rule requires the Notice to contain a prominent legend indicating that the document is an important notice regarding the Internet availability of proxy materials for a specified shareholder meeting. Among other things, the Notice also must indicate that it presents only an overview of the more complete proxy materials available to the shareholders on the Internet and must include a statement encouraging shareholders to access and review the proxy materials at a specified Web site address. In addition, the Notice must explain how a shareholder may request a paper or e-mail copy of the proxy materials. Rule 14a–16(d)(3) further requires the Notice to contain ''[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.'' [26] The intent behind the specific Notice requirements was to inform shareholders of the availability of proxy materials and to notify them of the matters to be considered and voted on at the meeting. The specific limitations on the type of information that can be included in the Notice were included because we do not intend the Notice to become a means of persuading shareholders how to vote or to deliver marketing or other materials

governance and in fair corporate suffrage. *See, for example,* the testimony of Chairman Ganson Purcell in 1943, Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong., 1st Sess., at 17–19 (1943) and more recently Security Holder Director Nominations, Release No. 34–48626 (Oct. 14, 2003) [68 FR 60784], Shareholder Proposals Relating to the Election of Directors, Release No. 34–56161 (July 27, 2007) [72 FR 43488], and Release No. 33–9046 in note 5 above.

[17] The term ''retail,'' as used in the Broadridge Statistical Overview, does not refer to shares or accounts that are managed by an advisor and that have previously consented to the electronic delivery of their proxy materials. *See* Broadridge Statistical Overview at 1. When not referring specifically to the Broadridge statistics, this release uses the term individual shareholders to more broadly refer to non-institutional shareholders generally.

[18] According to the Broadridge Statistical Overview, when comparing the 11-month period from July 1, 2008 to May 31, 2009, response rates were 4.11% less for retail shares voted in issuers that used the notice-only option for distribution to *some portion* of their beneficial owners (27.69%) compared to issuers that *exclusively* used the full set delivery option (31.8%).

[19] According to the Broadridge Statistical Overview, for companies that used a mixed approach—using the notice-only option for some retail shareholders and the full set delivery option for the remaining shareholders—the percentage of retail shares voted by shareholders that received notice-only was 13.48% during the 11-month period from July 1, 2008 to May 31, 2009. In comparison, the percentage of retail shares voted by shareholders of the same set of issuers that received full set delivery during the same period was 28.63%.

[20] The percentage of retail accounts that responded when receiving notice-only under the mixed approach during the 11-month period from July 1, 2008 to May 31, 2009 was only 4.10%. In comparison, for companies that used a mixed approach, the percentage of retail accounts that responded after receiving full-set delivery during the same period was 21.44%. To the extent that retail account data represent individual shareholders, the data indicates a large difference in voting by individual shareholders that receive full-set delivery as opposed to those that receive notice only. It is important to note, however, that issuers (absent specific instructions from a shareholder) have the flexibility under the notice and access model to determine which shareholders will receive notice-only or full set delivery of proxy materials. As a result, when making such determinations, it is possible that consideration is given to the historical response rates of particular shareholders or certain similarly situated shareholders. Consequently, the subset of retail investors that only receive the Notice may be stratified to include those shareholders that are least likely to respond to the materials. Among the other potential reasons for the difference in these response rates may be an issuer's consideration of the number of shares held in an account (*e.g.,* all accounts holding 500 shares or more will receive a full set of proxy materials) when deciding whether to furnish notice-only or full set delivery of proxy materials.

[21] Our Office of Investor Education and Advocacy has received complaints about the notice and access model and members of our staff have heard about the experience of some issuers with the notice and access model from informal meetings with Broadridge and issuer representatives.

[22] *Id.*

[23] For example, when the amendments to NYSE Rule 452 were approved, we noted our support for the establishment of an Investor Education Sub-Committee of the NYSE Proxy Working Group to develop and encourage the NYSE and its member firms to implement an investor education effort to inform investors about the amendments to NYSE Rule 452, the proxy voting process, and the importance of voting. *See* Release No. 34–60215 in Note 7 above. Our Office of Investor Education and Advocacy is also considering ways to educate investors about these matters.

[24] 17 CFR 240.14a–16(d).

[25] 17 CFR 240.14a–16(d)(1).

[26] 17 CFR 240.14a–16(d)(3).

that may distract shareholders from the Notice.

Exchange Act Rule 14a–16(f) imposes a strict prohibition on the types of materials that may accompany the Notice when an issuer or other soliciting person elects to follow the notice-only option. Specifically, for companies other than registered investment companies, the Notice under this option 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 copy of the proxy materials and a copy of a notice of shareholder meeting required by state law.[27] Therefore, a soliciting person may not include additional materials to explain why the shareholder is receiving only a Notice instead of the proxy materials.

In light of our serious concerns regarding shareholder confusion and the potential that our rules may be causing a reduction in shareholder voting, we propose to revise our rules to provide issuers and other soliciting persons with 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 are proposing to require that the information appearing on the Notice address certain topics, without specifying the exact language to be used.[28] We hope the flexibility will allow issuers and other soliciting persons to develop a more effective explanation of the importance and effect of the Notice, including to provide clearer guidance for shareholders as to how to access the proxy materials online, request a paper copy of the proxy materials, and vote their shares.

In addition, we have been informed that certain issuers are interpreting Rule 14a–16(d)(3) to require them to comply with the specific Exchange Act Rule 14a–4 [29] formatting and content requirements for disclosure of matters on the proxy card when identifying in the Notice each separate matter to be acted on at the meeting.[30] Rule 14a–16(d)(3) provides for more flexibility regarding the design of the Notice. It is not necessary that the Notice directly mirror the proxy card. Rather, the rule simply requires that the Notice identify each matter that will be considered at the meeting (*e.g.,* election of directors; ratification of auditors; approval of a stock option plan, *etc.*).

Further, in order to mitigate confusion about the Notice and to allow issuers and other soliciting persons to better engage shareholders, we propose to revise our rules to permit issuers and other soliciting persons to accompany the Notice with an explanation of the notice and access model.[31] The exception provided would be limited to the process of receiving or reviewing the 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 to shareholders would not be permitted under the exception.[32] With this increased flexibility, issuers could better educate shareholders about the notice and access model. While issuers would be permitted to provide their own explanation of the process of receiving and reviewing the proxy materials and the process of voting, we expect that many issuers will use standardized materials prepared for this purpose.[33]

In addition to proposing to amend our rules to reduce possible confusion about the Notice, the Office of Investor Education and Advocacy, in consultation with the Division of Corporation Finance, has been directed to develop a program designed to educate and inform shareholders, especially individual shareholders, about the notice and access model; explain how shareholders may participate through this model; and explain shareholders' rights under this model. Although the proposed amendments to our rules would permit, rather than require, issuers and other soliciting persons to include explanatory information about the Notice, the Commission strongly encourages issuers and other soliciting persons who use the notice-only option to better inform shareholders about the notice and access model. Issuers who have experienced significant cost savings, but may also have experienced a significant decrease in participation rates, may wish to consider using those cost savings in educational efforts designed to increase informed participation by shareholders.

We are also proposing technical amendments to our rules for registered investment companies. Rule 14a–16(f)(2)(iii) currently permits a registered investment company to accompany the Notice with a prospectus or report to shareholders.[34] The Commission recently adopted rule amendments that permit mutual funds [35] to satisfy their prospectus delivery obligations by sending or giving investors key information in the form of a summary prospectus.[36] Consistent with permitting mutual funds to use a summary prospectus to satisfy their delivery obligations, we propose to revise our rules to permit mutual funds to accompany the Notice with a summary prospectus.[37]

Request for Comment

• Has use of the notice and access model made proxy materials more or less accessible to shareholders? The Commission is concerned by reports that indicate there has been a drop in shareholder response rates to proxy solicitations by individual shareholders under the notice and access model, especially when the notice-only option has been used. We are proposing

[27] Registered investment companies may also include a prospectus or a report that is required to be transmitted to shareholders by Section 30(e) of the Investment Company Act (15 U.S.C. 80a–29(e)) and the rules thereunder. *See* Exchange Act Rule 14a–16(f)(2)(iii) [17 CFR 240.14a–16(f)(2)(iii)].

[28] *See* proposed Exchange Act Rule 14a–16(d), which 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.

[29] 17 CFR 240.14a–4.

[30] *See* note 21 above.

[31] *See* proposed Exchange Act Rule 14a–16(f)(2)(iv).

[32] 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.'' *See* note 8 above.

[33] Through informal meetings with the staff, issuer representatives, intermediaries and proxy distribution service providers have expressed interest in developing standardized educational materials to be included with the Notice.

[34] 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).

[35] 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)].

[36] *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).

[37] *See* proposed amendment to Exchange Act Rule 14a–16(f)(2)(iii). We are also proposing 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 fund's summary prospectus shall be given greater prominence than any accompanying materials. We are proposing to amend Rule 498 to provide that a summary prospectus need not be given greater prominence than an accompanying Notice. *See* proposed amendment to Rule 498(f)(2).

changes to the Notice requirements intended to make the Notice clearer and encourage efforts to better inform shareholders about participation under the notice and access model. Do the proposed changes help in enabling issuers and other soliciting persons to make the Notice clearer? Will these changes help address concerns about confusion and other factors that may be reducing shareholder participation? What other changes to the notice and access model should we consider to address these concerns?

- What factors have caused the lower shareholder response rates by individual shareholders to proxy solicitations when the notice-only option is used under the notice and access model? If the lower shareholder response rates result primarily from the notice and access model itself, would requiring issuers to deliver paper copies of proxy materials to some subset of individual shareholders, such as shareholders that own over a certain threshold of shares or that have received paper copies of proxy materials and voted in the past, affect voting rates? Does permitting issuers to choose to which shareholders to provide notice-only and full set delivery affect voting rates? If so, how are issuers exercising their discretion over full set delivery and are they doing so appropriately? Would additional requirements affect an issuer's ability to implement the notice and access model? Are there other alternatives that would increase the voting rates under the notice and access model?
- Should we consider adding requirements that would limit an issuer's ability to use the notice-only option where the issuer has experienced a decrease in shareholder participation as a result of using the notice-only option for distribution to some portion of its shareholders? For example, should we only allow an issuer to continue to use the notice-only option if the shares voted or the voting response rate has not decreased from the most recent issuer's meeting when they provided all of their shareholders with full set delivery? Would some decrease, such as 10% or 20% be acceptable? Should we instead consider requiring shareholder participation to increase from prior years in order for an issuer to continue to use the notice-only option? Are there other participation-level conditions that we should consider?
- Will shareholders find the Notice more confusing if we do not prescribe how to describe the matters to be acted on at the meeting? Should we prescribe minimum standards for formatting? Should we instead require a legend to the effect that the Notice should not be used for voting on matters, and that a separate proxy card or Vote Instruction Form should be used for voting?
- Should we permit the Notice to be accompanied by materials to explain the process of receiving and reviewing the proxy materials and voting as proposed? Should we require that explanatory materials be included? Should we allow these explanatory materials to include any additional information? For example, should an issuer or other soliciting person be permitted to explain what the benefits of using the notice and access model would be? Should we specify by rule the topics that cannot be included? Should we include the level of detail in the explanation in this section in the text of the rule? For example, should the rule specifically provide that the explanation in the Notice may not contain materials designed to persuade shareholders to vote in a particular manner, change the methods of delivery or explain the basis for sending the Notice? Should a soliciting person be permitted to explain why it has decided to use the notice-only option?
- The Commission is aware that there has been some confusion relating to the Notice and that some shareholders have attempted to indicate their voting instructions by returning a marked copy of the Notice. What changes can we make to help shareholders better understand the Notice? Should the Commission amend its rules to prohibit issuers and other soliciting persons from including voting recommendations in the Notice as permitted under Rule 14a–16(d)(3)? Would removing recommendations increase the likelihood that a shareholder will access the proxy materials through the Internet? Does the Notice currently look too similar to a proxy card or Vote Instruction Form? Would possible confusion in the Notice be reduced if the Commission amended its rules to require identification of matters to be voted on by topic rather than identifying the specific matters as they appear on the proxy card, so that the Notice looks less like a proxy card or Vote Instruction Form?
- Has the notice and access model lowered costs for issuers and other soliciting persons resulting from the proxy solicitation process? Have any costs increased? In your response, please quantify the costs and savings of using the notice and access model, and provide supporting data where possible.
- It is our understanding from informal conversations our staff has had with issuers and proxy distribution service providers that a number of issuers were discouraged from using the notice and access model due to the difficulty of meeting the 40-day Notice mailing requirement. Would a 30-day deadline for delivery of the Notice still allow sufficient time for shareholders who prefer paper proxy materials to request and receive them through the mail? Would changing to a 30-day deadline encourage use and improve implementation of the notice and access model? If the Notice mailing requirement for the issuer were shortened, would any changes be necessary to the filing and mailing requirements for soliciting persons other than the issuer?
- Some issuers have expressed concern regarding the fees charged by proxy distribution service providers. Have the fees charged by proxy distribution service providers affected use rates of the notice and access model? Should the Commission address fees charged by service providers relating to the implementation of the notice and access model? If so, how?
- Should the Commission consider proposing suspension of the notice and access rules until a later date to provide more time for shareholders to understand and be better prepared for the notice and access model? If so, how much time would be appropriate? Would additional educational efforts be sufficient to inform shareholders about the notice and access model, or would other efforts, such as development of an on-line disclosure and voting infrastructure, be needed? If so, why?

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

Under 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. [38]

We created this 10-day period to provide soliciting persons other than the issuer desiring to rely on the notice-only option sufficient time to respond to an issuer's mailing of proxy materials and still allow shareholders receiving a Notice from the soliciting person enough time to request paper copies of

[38] 17 CFR 240.14a–16(*l*)(2)(i) and (ii).

the soliciting person's proxy materials.[39]

The current 10-calendar-day requirement for soliciting persons to send the Notice to shareholders can create potential compliance issues for soliciting persons. Under current practice, the staff of the Division of Corporation Finance reviews and provides comments on preliminary proxy materials filed by soliciting shareholders in a contested solicitation. While the staff makes great effort to review filings and address comments as quickly as possible, there may continue to be outstanding comments on a soliciting person's preliminary proxy statement more than 10 calendar days after the soliciting person has initially filed. Consequently, a soliciting person may not be in a position to send its Notice within 10 calendar days after the issuer first sends its Notice or proxy statement to shareholders.

Thus, because a soliciting person is required to send its Notice within 10 days after the issuer first sends its Notice or proxy statement, the practical effect of Rule 14a–16, as currently written, is to limit that person's ability to use the notice-only option. This is because Rule 14a–16(b)(4) requires the soliciting person to make a means to execute a proxy available to shareholders at the time the Notice is first sent to shareholders. Rule 14a–4(f), however, prohibits a person from providing a form of proxy unless it is accompanied, or preceded, by a definitive proxy statement. Because the soliciting person may not have finished revising its proxy statement and may not have filed its definitive proxy statement with the Commission by that time, the notice and access rules, combined with current staff review practice, may, in many circumstances, prevent a soliciting person other than the issuer from using the notice-only option for a proxy contest if that soliciting person's initial proxy statement filing is made in response to the issuer's definitive proxy statement filing.

To improve implementation of the notice and access model, we propose to amend Rule 14a–16(*l*)(2)(ii) to require the soliciting shareholder relying on this 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 Commission. We believe that this proposed time period would provide 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 proposed rule does not provide for a specific period of time before the meeting by which a soliciting person would need to mail the Notice, the soliciting person should make the Notice and proxy materials available to shareholders with sufficient time for shareholders to review the materials and make an informed voting decision.

Request for Comment

- We are proposing to revise one of the two alternative Notice deadlines applicable to soliciting persons other than the issuer to reconcile Rule 14a–16(b)(4) with Rule 14a–4(f) and better coordinate the timing requirements with the Commission staff's review process. Is there a preferable way to revise the rule to address this issue? If so, how should we revise the rule?
- The proposed rule would require a soliciting person to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the Commission. The soliciting person, however, has control over the date that it files a definitive proxy statement. Is it necessary to impose a specific time period by which a soliciting person other than the issuer must send its Notice? If so, should we impose a specific time period after the filing of the preliminary proxy by which a soliciting shareholder must send its Notice?

III. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- The proposed amendments that are the subject of this release;
- Other ways to reduce regulatory impediments to shareholder participation and thereby improve shareholder response rates to proxy solicitations using the notice and access model or otherwise improve the notice and access model;
- Additional or different changes; or
- Other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of issuers, investors, and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. Paperwork Reduction Act

A. Background

Certain provisions of the proposed rule amendments contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995.[40] The Commission is submitting this proposed amendment to the Office of Management and Budget for review in accordance with the PRA. 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 proposed to be amended would be mandatory, however certain information collections under these rules are required and some are voluntary. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the information disclosed.

The proposed revision to Rule 14a–16 would permit issuers and other soliciting persons to include explanatory materials about the notice and access model along with the Notice. The proposed revision would still require a legend in the Notice, but would allow more flexibility in how prescribed topics are described in the legend.[41] The proposed explanatory materials would be a relatively short and straight-forward explanation of the notice and access model that could accompany the Notice. Finally, the proposed change to the filing deadline for soliciting persons other than the issuer is not expected to affect the burden estimates.

B. Regulation 14A and 14C

The titles for the collections of information for operating companies are:[42]

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

We previously revised these collections of information in the release that proposed the notice and access model as a voluntary model for

[39] *See* Internet Availability of Proxy Materials, Release No. 34–52926 (Dec. 8, 2005) [70 FR 74597] (''Internet Availability of Proxy Materials Proposing Release'').

[40] 44 U.S.C. 3501 *et seq.;* 5 CFR 1320.11.

[41] We anticipate no change in the burden estimates for the change in the legend requirement. The proposed rule would require essentially the same information as is currently required in the legend to continue to be conveyed creating no additional burden.

[42] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S–K.

disseminating proxy materials [43] and the release in which we adopted amendments requiring issuers and other soliciting persons to follow the model.[44] We submitted the revisions in both releases to the OMB for review in accordance with the PRA. We received approval for the revised information collections and now propose a further revision which we will submit to OMB.

Under the proposed amendments, an issuer or other soliciting person will be permitted, but not required, to include explanatory materials with the Notice. We expect that this information will generally consist of approximately one or two paragraphs of text. For purposes of the PRA, we estimate the annual burden if a soliciting person chooses to prepare the explanatory materials would be approximately 0.5 reporting hours per issuer or other soliciting person.[45] We estimate that 75% of the burden would be borne by the soliciting person and that 25% of the burden would be borne by outside counsel retained by the soliciting person at an average cost of approximately $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

The following table summarizes the proposed PRA burden estimates for Schedules 14A and 14C:

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	7,300	0.5	3,650	2,737.5	912.5	$365,000
Schedule 14C	680	0.5	340	255	85	$34,000
Total	7,980		3,990	2,992.5	997.5	$399,000

C. 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 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,[46] Solicitation of Proxies, Consents and Authorizations'' (OMB Control No. 3235–0158). Rule 20a–1 under the Investment Company Act [47] 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,[48] Schedule 14A,[49] and all other rules and regulations adopted under Section 14(a) of the Exchange Act.[50] 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.[51] 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.

For purposes of the PRA, we estimate that the annual burden required to prepare and transmit a Notice to be approximately 1.5 reporting hours. This estimate is based on the PRA burden for issuers other than investment companies to prepare and transmit a Notice. We estimate that 75% of the burden is prepared by the investment company and that 25% of the burden is prepared by outside counsel retained by the investment company at an average cost of approximately $400 per hour. Based on the number of proxy filings from registered investment companies received by the Commission during 2008, we would expect approximately 1,225 Notices to be filed annually. We estimate that the total annual reporting burden for rule 20a-1 should be increased by approximately 1,378 hours [52] and that the annual cost would be increased by approximately $735,000 [53] for the services of outside professionals to comply with the disclosure provisions of the existing notice and access model.

In addition, registered investment companies must permit shareholders to make permanent elections to receive proxy materials in paper or by e-mail. An investment company issuer must maintain records as to which of its shareholders have made such an election. We believe that many investment company issuers already maintain similar records to keep track of their shareholders who have affirmatively consented to electronic delivery consistent with past Commission guidance,[54] as well as their shareholders who have consented to householding of proxy materials pursuant to Rule 14a–3(e).[55] For purposes of the PRA, we estimate that a typical investment company issuer will spend an additional five hours per year, or a total of 6,125 hours, to

[43] *See* Internet Availability of Proxy Materials Proposing Release in note 39 above.

[44] *See* the Internet Availability of Proxy Material Adopting Release in note 8 above.

[45] As we have previously indicated, according to Broadridge, it processes more than 95% of proxy materials that are sent to beneficial owners on behalf of intermediaries. *See* the Internet Availability of Proxy Materials Adopting Release in note 8 above. We believe that issuers likely will rely on proxy distribution service providers to provide the explanatory materials and that issuers and intermediaries would provide explanatory materials that are substantially the same to the beneficial owners that hold through intermediaries, creating no additional annual burden to prepare an intermediary's Notice.

[46] 15 U.S.C. 80a–1 *et seq.*

[47] 17 CFR 270.20a–1.

[48] 17 CFR 240.14a–1 *et seq.*

[49] 17 CFR 240.14a–101.

[50] 15 U.S.C. 78n(a).

[51] *See* the Internet Availability of Proxy Material Adopting Release in note 8 above.

[52] 1,225 Notices × 1.5 hours per Notice × .75 = 1,378 hours.

[53] 1,225 Notices × $400 per hour × 1.5 hours per Notice × .25 = $735,000.

[54] Use of Electronic Media for Delivery Purposes, Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458] provided guidance on electronic delivery of prospectuses, annual reports to security holders and proxy solicitation materials under the Securities Act, the Exchange Act, and the Investment Company Act.

[55] 17 CFR 240.14a–3(e).

maintain these records.[56] Because this is an internal recordkeeping requirement, we do not expect a cost for hiring outside counsel.

Further, the notice and access model also requires an intermediary to prepare its own Notice and provide it to beneficial owners. We expect that all of the factual information required to appear in the Notice will become available as part of the ordinary preparations for a shareholder meeting. This Notice would be substantially the same as a registered investment company's Notice, but will be modified by the intermediaries to provide information that is relevant to beneficial owners rather than registered holders. According to Broadridge, it processes more than 95% of proxy materials that are sent to beneficial owners on behalf of intermediaries, reducing the need to create multiple intermediary Notices. In addition, the investment company issuer or other soliciting person will provide the majority of information required in the intermediary's Notice. Therefore, we estimate that the additional burden to prepare an intermediary's Notice will be approximately one hour, or a total annual burden of 1,225 hours for all investment company proxy solicitations.[57]

Finally, intermediaries must also maintain records to keep track of which beneficial owners have made a permanent election to receive proxy materials in paper or by e-mail. Like registered investment companies, intermediaries already maintain records of shareholders' affirmative consents to electronic delivery and householding of proxy materials. In addition, intermediaries maintain records as to whether their beneficial owner customers have objected, or not objected, to disclosure of their identities to the investment company issuer. Like investment company issuers, we believe this will result in an additional annual burden of five hours, or a total of 6,125 hours, for intermediaries.[58]

We estimate that the total annual PRA reporting burden for Rule 20a–1 should be increased by 14,853 hours and $735,000 in professional costs to reflect compliance with the existing notice and access model. We request comment and supporting empirical data on the burden and cost of sending copies of proxy materials under the notice and access model for registered investment companies.

Under the proposed amendments to the notice and access model, a registered investment company or other soliciting person will be permitted, but not required, to include explanatory materials with the Notice. We expect that this information will generally consist of approximately one or two paragraphs of text. For purposes of the PRA, we estimate the annual burden if a soliciting person chooses to prepare the explanatory materials would be approximately 0.5 reporting hours per investment company. We estimate that 75% of the burden would be borne by the investment company and that 25% of the burden would be borne by outside counsel retained by the investment company at an average cost of approximately $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. We estimate that the proposed amendments will increase the PRA burden estimates under Rule 20a–1 by approximately 459 hours and $61,250 in professional costs.

D. Solicitation of Comments

We request comments in order to evaluate: (1) Whether the proposed revision to the collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed revisions to the collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.[59]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–22–09. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–22–09, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

A. Proposed Amendments

The proposed amendments are designed to improve implementation of the notice and access model. The proposed amendments to Exchange Act Rule 14a–16 would revise the legend requirements in the rule to make them more flexible, revise the deadline applicable to soliciting persons other than the issuer to reconcile the rules and better coordinate them with the Commission staff's review process, and permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting.[60]

We expect that the economic effect of the proposed amendments, if adopted, would be to:

- Facilitate participation by shareholders who may be confused by the operation of the notice and access model;
- Provide flexibility to soliciting persons 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.

[56] 1,225 filings with an estimated one filing per issuer or soliciting person × 5 hours = 6,125 hours. This estimate is based on the PRA burden for issuers other than investment companies to maintain these records.

[57] 1,225 notices × 1 hour per Notice = 1,225 hours. We do not include a cost to intermediaries for hiring outside counsel because we expect that the substantive contents of an intermediary's Notice would be provided by the issuer or other soliciting person. The estimates assume that Broadridge will continue to process over 95% of the proxy solicitations on behalf of intermediaries, thereby eliminating the need for each intermediary to prepare a separate Notice.

[58] This estimate is based on the PRA burden for intermediaries for issuers other than investment companies to maintain records.

[59] 44 U.S.C. 3506(c)(2)(B).

[60] 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 prospectus instead of a statutory prospectus to its shareholders.

B. Benefits

As discussed above, by permitting some additional flexibility in designing the Notice and permitting explanatory materials regarding the process of receiving and reviewing the proxy materials and voting to accompany the Notice, we expect that the proposal would improve understanding of the notice and access model for participating shareholders. Improved understanding of the model would reduce confusion and may thereby improve the efficiency and effectiveness of the proxy voting system. However, to the extent that issuers send notices to shareholders that are less likely to respond, these benefits may be limited.

Revising one of the two alternative Notice deadlines applicable to soliciting persons other than issuers to reconcile the rules' timing requirements with the Commission staff's review process would 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.

C. Costs

Eliminating the specific limitations of the legend requirement may result in some soliciting persons providing a more confusing notice or seeking to include soliciting, marketing or other materials that may distract shareholders from the Notice. These activities would increase the cost of shareholder participation in the proxy process, and could distort votes and outcomes.[61] In addition, an issuer or other soliciting person that chooses to include explanatory materials in the same mailing with the Notice would incur the cost of preparing that information. We expect that this information generally would be no more than a few paragraphs long. For purposes of the PRA, we estimate that the proposal would cause an annual increase in the compliance burden for 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.

D. Request for Comments

We request comment on all aspects of the cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed amendments. We also request that those submitting comments provide, to the extent possible, empirical data and other factual support for their views.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a) of the Exchange Act[62] 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,[63] Section 3(f) of the Exchange Act[64] and Section 2(c) of the Investment Company Act[65] 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 would permit some additional flexibility in designing the Notice, permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting, and revise one of the two deadlines applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the timing requirements with the Commission staff's review process. The proposed 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.

We do not anticipate any effect on competition or capital formation as a result of these proposed revisions.

The Commission solicits comment on whether the proposed amendment, if adopted, would affect efficiency, competition, and capital formation.

VII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to Exchange Act Rule 14a–16 that would permit some additional flexibility in designing the Notice, permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting, and revise one of the timing requirements applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the requirement with the Commission staff's review process.

A. Reasons for, and Objectives of, the Proposed Action

The proposed 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 several revisions to the existing rules would improve the operation of the model without adversely affecting soliciting persons or shareholders' abilities to effectively participate 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 our regulations. The proposed amendment to the timing requirements for soliciting persons other than the issuer to file their preliminary proxy statements is designed to better enable soliciting shareholders other than the issuer to use the notice-only option.

B. Legal Basis

We are proposing amendments to the forms and rules 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 Exchange Act, as amended, and Sections 8, 20(a), 24(a), 24(g), 30, and 38 of the Investment Company Act, as amended.

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

[62] 15 U.S.C. 78w(a).

[63] 15 U.S.C. 77b(b).

[64] 15 U.S.C. 78c(f).

[65] 15 U.S.C. 80a–2(c).

C. Small Entities Subject to the Proposed Rules

The proposals would affect issuers that are small entities. Exchange Act Rule 0–10(a) [66] 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.

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.[67] Approximately 178 registered investment companies meet this definition. Moreover, approximately 34 business development companies may be considered small entities.

Paragraph (c)(1) of Rule 0–10 under the Exchange Act [68] 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 § 240.17a–5(d); 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.[69] Small Business Administration regulations define ''small entities'' to include banks and savings associations with total assets of $165 million or less.[70] The Commission estimates that the rules might apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of $165 million or less. The proposals may affect these entities because they are intermediaries that are required under the Commission's proxy rules to forward proxy materials, including the Notice or any explanatory materials, on to shareholders who beneficially own their shares through the intermediaries.[71]

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments would allow soliciting persons more time to use the notice-only model before a shareholder meeting and permit, but do not require, issuers to include additional, explanatory material in their Notice.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or duplicate the proposed rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation or simplification of disclosure for small entities;
- The use of performance standards rather than design standards; and
- An exemption for small entities from coverage under the proposals.

The Commission has considered a variety of reforms to achieve its regulatory objectives.

The proposed amendments, if adopted, would apply to all issuers and other soliciting persons, including small entities, that choose to rely on the notice-only option. 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 accompany the Notice with explanatory materials regarding the notice and access model, and revising one of the timing requirements applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the requirement with the Commission staff's review process.

We considered the use of performance standards rather than design standards in the proposed rules. The proposal contains both performance standards and design standards. We are proposing revising existing design standards, such as the deadline applicable to soliciting persons other than the issuer, to the extent that we believe necessary. However, to the extent possible, we are proposing rules that impose performance standards to provide issuers, other soliciting persons and intermediaries with the flexibility to devise the means through which they can comply with such standards. For example, the proposed amendments regarding explanatory materials do not specify the content of such information.

We are requesting comment on whether separate requirements for small entities would be appropriate. 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. Exempting small entities would not be consistent with this goal. The establishment of any differing compliance or reporting requirements or timetables or any exemptions for small business issuers may not be in keeping with the objectives of the proposed rules.

G. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of

[66] 17 CFR 240.0–10(a).

[67] 17 CFR 270.0–10.

[68] 17 CFR 240.0–10(c)(1).

[69] 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 on FOCUS Report filings.

[70] 13 CFR 121.201.

[71] 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.

1996,[72] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments to Exchange Act Rule 14a–16 would be a ''major rule'' for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

IX. Statutory Authority and Text of Rule and Form Amendments

We are proposing the amendments pursuant to 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 in 17 CFR Parts 230 and 240

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulation is proposed to be amended 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, 78*l,* 78m, 78n, 78o, 78t, 78w, 78*ll*(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.

* * * * *

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

3. The authority citation for Part 240 continues to read in part 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, 78*l,* 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 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, 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); and

g. Revising paragraph (*l*)(2)(ii).

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 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 e-mail 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 e-mail 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 process of receiving and reviewing the proxy materials and voting as detailed in this section.

* * * * *

(*l*) * * *

(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.

* * * * *

Dated: October 14, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–25232 Filed 10–20–09; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PARTS 162 and 163

[USCBP–2009–0029]

RIN 1505–AC00

Use of Sampling Methods and Offsetting of Overpayments and Over-Declarations in CBP Audit Procedures; Sampling Under Prior Disclosure

AGENCY: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs and Border Protection (CBP) regulations to provide further guidance for the use of sampling methods in CBP audits and prior disclosure cases. It also provides guidance for the offsetting of overpayments and over-declarations when an audit involves a calculation of lost revenue or monetary penalties

[72] Public Law 104–121, Title II, 110 Stat. 857 (1996).