

Manual of Publicly Available Telephone Interpretations

N. PROXY RULES AND SCHEDULE 14A

1. Proxy Rules

A cooperative subject to the Exchange Act has a procedure for sending an advisory ballot to its members seeking their recommendations on the 15 persons to be nominated to the board of directors. Counsel was informed that the advisory vote material would constitute the first step in the election of directors. Accordingly, the advisory ballot would have to meet the requirements of Regulation 14(a) and the accompanying material would have to comply with Schedule 14A.

2. Proxy Rules

A "search letter" is not deemed to be proxy soliciting material where it is sent to a broker by an insurgent and only requests information about the number of copies of the insurgent's proxy materials that the broker will need to forward to beneficial owners.

3. Proxy Rules; Form 10-KSB

A Regulation S-B filer filed a Form 10-KSB indicating that, for the second consecutive year, it failed the same small business issuer eligibility standard. Therefore, it can not use the Regulation S-B reporting system for the following fiscal year. The issuer asked whether its proxy statement could still exclude the executive compensation and other information that a small business issuer may exclude in its Form 10-KSB (which is often incorporated by reference into that annual report by means of the later proxy statement). Yes, for two reasons. First, if the Form 10-KSB had not been completed in reliance upon the later incorporation by reference, that information could have been excluded. Second, during the prior fiscal year the issuer did not know that it would have to prepare that additional information, so it would be inappropriate to retroactively apply the disclosure requirements.

4. ** Rule 14a-2(b)(2) **

The following advice was given regarding conduct of a limited solicitation under the "ten-person" exemption set forth in former Rule 14a-2(b)(1), now Rule 14a-2(b)(2):

1. Providing a form of proxy to a person in response to that person's unsolicited call based on a Schedule 13D filing and news reports is not counted against the ten person limit because the communication is not a solicitation pursuant to Rule 14a-1(l)(2).
2. An insurgent intending to engage or engaging in a solicitation of no more than 10 persons under Rule 14a-2(b)(2) should remain mindful that its filing and dissemination of a Schedule 13D -- depending on the content of this document and other relevant facts and circumstances -- may be deemed to constitute a more widespread "general" solicitation that may preclude reliance upon Rule 14a-2(b)(2).
3. If title to securities is transferred by the transfer agent after the record date, but securities were purchased and paid for prior to such date, efforts by the purchaser to obtain proxies from the

sellers will be deemed an exempt solicitation under Rule 14a-2(a)(2), and will not count toward the ten-person limitation of Rule 14a-2(b)(2).

4. A solicited person holding in several nominee accounts will be deemed one "person" for purposes of Rule 14a-2(b)(2).

5. Rule 14a-3

A special meeting of a limited partnership for the purpose of adding a general partner would be analogous to an annual meeting to elect directors, or a special meeting in lieu of an annual meeting to elect directors for a corporation. Accordingly, an annual report prepared in accordance with Rule 14a-3 should be provided to the limited partners in connection with the meeting. However, in no event would the partnership be required to provide more than one annual report to the limited partners during any fiscal year.

6. Rule 14a-3

Information required in the annual report to shareholders required by Rule 14a-3 to be distributed in connection with the same meeting of shareholders may be included in proxy statement contained in a Form S-4 registration statement. No separate annual report is required.

7. Rule 14a-3(b)

A limited partnership registered under Section 12(g) of the Exchange Act, which does not hold director elections and therefore does not solicit proxies for the elections of directors, is not required by Rule 14a-3 to file with the Commission copies of its annual report to security holders.

8. Rule 14a-3(c); Form 10-K

The annual report to shareholders must be filed as an exhibit to Form 10-K only if information contained in the annual report is incorporated by reference in the Form 10-K or the registrant specifically requests that the annual report be treated as part of the proxy soliciting material. Note, only those portions of the annual report incorporated by reference or specifically requested by the registrant to be treated as proxy soliciting material are deemed to be filed as part of the Form 10-K.

9. Rule 14a-4

The authority to cumulate votes among directors, in the discretion of the proxy, need not be printed in bold-face type on the proxy card itself pursuant to Rule 14a-4(b)(1). There should, however, be appropriate disclosure of cumulative voting in the proxy statement.

10. Rule 14a-6

The exemption from the requirement to file proxy materials in preliminary form for solicitations relating only to the approval or ratification of a compensation plan or amendments does not extend to the ratification or approval by security holders of awards made pursuant to such plans.

11. Rule 14a-6(a)

The caller raised the question whether a preliminary proxy statement need be filed in connection with a proposed corporate name change to be submitted for shareholder approval at the issuer's annual meeting, along with a shareholder proposal and the election of directors. While the latter two items fall within one of five Rule 14a-6(a) exclusions from the preliminary proxy filing requirement, a change in the issuer's name to delete the surname of a long-dead founder that bore no relation to a change in the present membership of the board of directors would not appear to qualify for exclusion under the literal reading of the rule.

As set forth in Exchange Act Rel. No. 25217 (Dec. 21, 1987), the underlying purpose of these exclusions is "to relieve registrants and the Commission of unnecessary administrative burdens and processing costs associated with the filing the processing of proxy material that is currently subject to selective review in preliminary form." Consistent with this purpose and the reason for the name change proposal, the Division staff advised the requestor that a preliminary proxy filing relating to the planned name change was not required.

12. Rule 14a-6(a)

Where a public utility holding company is asking shareholders to elect directors, ratify the selection of auditors and approve a charter amendment, and the solicitation with respect to charter amendment is exempt from proxy rules under Rule 14a-2(a)(5), the company is not required to file preliminary proxy material.

13. Rule 14a-6(a)

The "10 day" period specified in the rule relates to calendar days rather than business days.

14. Rule 14a-6

For purposes of calculating the "10 day" period in Rule 14a-6, the date of filing is day one for purposes of counting the 10 calendar days. Ten calendar days must be complete before the materials are sent or given to security holders. Accordingly, the material may be sent or given to security holders at 12:01 a.m. on day eleven. As an example, assume the preliminary materials are filed on January 6. Calendar day ten, for purposes of Rule 14a-6, would be January 15, so the materials could be sent or given to security holders at 12:01 a.m. on January 16.

15. ** Rule 14a-6; Form S-4 **

A registrant can use its S-4 proxy statement/prospectus as a red herring. Since 1992, registrants have been able to solicit immediately upon filing of a preliminary proxy statement (absent invocation of confidential treatment under Rule 14a-6(e)(2)) rather than waiting 10 days pursuant to Rule 14a-6(a), so long as the proxy card (whether in preliminary or definitive form) is not circulated. Because a vote on the transaction described would amount to an investment decision with respect to the securities being registered, no proxy card could be sent until after the registration statement became effective and the final prospectus was furnished.

16. ** Rule 14a-6; Form S-4 **

An issuer filed a registration statement on Form S-4 that contained its proxy material. After the effective date of the registration statement, the issuer decided to mail an additional letter to

shareholders in connection with the transaction. This letter is filed as additional soliciting material pursuant to Rule 14a-6 upon first use.

17. **** Rule 14a-9; Item 21 of Schedule 14A ****

When a company offers shareholders the option of submitting a proxy by Internet, the proxy statement should include a description of Internet voting procedures and the validity under applicable state law of proxies granted pursuant to this mechanism of electronic transmission. Rule 14a-9 requires similar disclosure on the proxy card.

18. ** Rule 14a-11 **

A parent that creates a subsidiary for the purpose of engaging in a proxy solicitation itself would be a participant in the solicitation pursuant to Rule 14a-11(b)(2) and Instruction 3 to Item 4 of Schedule 14A.

19. ** Schedule 14A **

A proxy statement requesting shareholder approval of the elimination of preemptive rights involves the modification of a security for purposes of Item 12 of Schedule 14A (and may be tantamount to creation of a new security, depending on the facts and circumstances, thereby raising an issue regarding Securities Act registration absent an exemption). Thus, the financial statement requirements of Item 13 would apply.

20. Schedule 14A

An issuer recently solicited proxies for the election of 15 directors. In about three months, the issuer hopes to acquire another company, and will hold a special meeting to elect one of the officers of the newly acquired company as a sixteenth director. The issuer asked whether the proxy material for the special meeting would have to include the information required by Items 6 and 7 of Schedule 14A for the 15 recently elected directors. The issuer was informed that Schedule 14A would require that information to be included in the proxy statement.

21. Schedule 14A, Note A

B is to be merged into A in a Rule 145 transaction. B's shareholders will be voting to approve the transaction and will become shareholders of A. A's shareholders are not voting on the proposed transaction. Three of B's directors will become directors of A. Pursuant to Note A to Schedule 14A the Form S-4 should contain the information required by Items 6 and 7 of Schedule 14A as to the A directors.

22. Schedule 14A, Item 5(d)

A "street name" holder of record (like Cede & Co.) of more than 5% of a company's stock need not be disclosed in a proxy statement where such person is not deemed to be the beneficial owner of such shares pursuant to Rule 13d-3(d)(2).

23. Schedule 14A, Items 6 and 7

A company intends to solicit proxies for a special meeting at which management will propose a classification of the company's board of directors. Information need not be furnished pursuant to Items 6 and 7 of Schedule 14A, provided that the company submits the entire board to shareholders for their approval at the next annual meeting. This position was taken because the vote on the classification of the board would not enable any of the existing directors to serve for any longer term than the term for which they originally had been elected by shareholders.

24. ** Schedule 14A, Item 7(f) **

The "total number of meetings of the board of directors" specified as the basis for calculation of director's attendance in Item 7(f) does not include board action by written consent.

25. Schedule 14A, Item 10

Any action on a compensation plan requires complete Item 10 disclosure. If the action proposed is just an amendment to an existing plan (e.g., adding shares available under an option plan), the Item 10 disclosure still must include a complete description of all material features of the plan (Item 10(a)(1)) as proposed to be modified, including the material differences from the existing plan (Instruction 2).

26. ** Schedule 14A, Item 10 **

Full Item 10 disclosure would be required where a plan is being amended to add a new class of participants. See Instruction 2.

27. ** Schedule 14A, Item 10, Instruction 3 **

If a plan to be acted upon is set forth in a written document, it should be filed along with the proxy statement and form of proxy. It does not have to be provided to security holders unless it is a part of the proxy statement.

28. Schedule 14A, Item 10(a)(2)

Item 10(a)(2)(i) disclosure regarding benefits or amounts that will be received by or allocated to each of the named executive officers and certain groups typically will only be called for if the plan being acted upon is: (i) a plan with set benefits or amounts (e.g., director option plans); or (ii) one under which some grants or awards have been made by the board or compensation committee subject to shareholder approval (e.g., action is to add shares available under an existing option plan, because there are not enough shares remaining under the plan to honor exercises of all outstanding options).

29. Schedule 14A, Item 10(a)(2)

If the New Plan Benefits Table is required, all of the individuals and groups for which award or benefit information is required should be listed (including those for which the amount to be reported is "0").

30. Schedule 14A, Item 10(a)(2)

Other information (such as that called for by Item 10(b)) should not be mixed in with that required to be in the New Plan Benefits Table.

31. Schedule 14A, Item 10(a)(2)

Additional columns should be added to the New Plan Benefits Table for each plan for which information is required.

32. Schedule 14A, Item 10(a)(2)

For option plans, no "dollar value" information should be given in the Table (i.e., no 5%/10% or Black-Scholes valuation). The number of shares underlying options should be provided in the "Number of Units" column.

33. Schedule 14A, Item 10(a)(2)(iii)

The language of Item 10(a)(2)(iii) relating to "if the plan had been in effect" contemplates plans that were not in effect for the prior year. Accordingly, Item 10(a)(2)(iii) disclosure of actual awards under an existing plan for the last year is not required. Disclosure under this item would be required when action is being taken on an existing plan only where the existing plan is being amended to alter a formula or other objective criteria to be applied to determine benefits.

34. Schedule 14A, Item 10(a)(2)(iii)

As with prospective benefits under Item 10(a)(2)(i), the "pro forma" presentation of what would have been received under the plan is not applicable where awards are discretionary (and thus, not determinable).

35. Schedule 14A, Item 10(a)(2)(iii)

This disclosure requirement applies only to plans that have objective criteria for determining the compensation thereunder, so that the registrant can take the criteria and, assuming the variables of the last year, determine what would have been paid under the plan had it been in place then. An example would be a bonus or long-term incentive plan with award opportunities based upon a fixed percentage of salary and actual payment earned based upon corporate performance against fixed measures (such as percentage growth in earnings over previous years).

36. Schedule 14A, Item 10(b)(2)(i)

Disclosure should address each item required ((A)-(E)) for each grant of or plan containing options, warrants, or rights submitted for shareholder approval.

37. Schedule 14A, Item 10(b)(2)(i)(D)

"Market value of the securities underlying the options, warrants or rights as of the latest practicable date" may be presented as either: (i) market price per share or (ii) aggregate market value of the total number of shares underlying all options (granted or available for grant) under the plan.

38. Schedule 14A, Item 10(b)(2)(ii)

The requirement to "state separately the amount of such options received or to be received" by each named executive officer, each director nominee, and certain other persons and groups only covers options under the plan upon which action is being taken. For example, the Item would be inapplicable if a new plan were being considered, because there have been no grants under that new plan to report. No disclosure is required if a new plan is being considered, even if the company has other plans under which there have been or will be options granted, and even if a previous or existing plan appears identical to the new plan in all but name.

39. Schedule 14A, Item 10(b)(2)(ii)

This disclosure does not have to be in a table; narrative disclosure is acceptable.

40. Schedule 14A, Item 10(b)(2)(ii)

This Item covers all options received at any time (not just last year), and options to be received (if determinable) by the specified persons and groups. The information should be given for each separate individual and group (including those for which the amount of options received or to be received is "0").

41. Schedule 14A, Item 13

A proxy statement seeking shareholder approval of an increase in authorized common shares and the elimination of an authorized but unissued class of preferred stock would not require the inclusion or incorporation of financial statements. See Item 13, Instruction 1 of Schedule 14A.

42. Schedule 14A, Item 13(b)(2)

The Division staff took the position that the proxy statement may incorporate by reference from a prospectus the information required by paragraph (a) of this Item despite the fact that Item 13(b)(2) refers only to a "previously-filed statement or report".

43. ** Schedule 14A, Item 13 (Instruction 1) and Item 14 (Instruction 2) **

The financial statements required by Item 13 of Schedule 14A were not required in a proxy statement filed in connection with a merger intended solely to change the issuer's domicile from one state to another.

44. Schedule 14A, Item 14(a)(12)

Counsel inquired as to whether disclosure of market prices was required in a Delaware reincorporation proxy statement. The Division staff advised that if the transaction would have a material effect on the securities, the disclosure required by Item 14(a)(12) would be required.

45. **** Schedule 14A, Item 21; Rule 14a-9 ****

When a company offers shareholders the option of submitting a proxy by Internet, the proxy statement should include a description of Internet voting procedures and the validity under

applicable state law of proxies granted pursuant to this mechanism of electronic transmission.
Rule 14a-9 requires similar disclosure in the proxy card.