

Client Alert

SEC Provides for Internet Availability of Proxy Materials and Proposes Mandatory Compliance

Overview

On January 22, 2007, the SEC issued a final rule release¹ allowing an alternative method for issuers and other soliciting persons to furnish proxy materials to shareholders by providing shareholders with a notice of the availability of proxy materials and posting such materials on the Internet. This “notice and access” model takes advantage of the widespread use of the Internet and is intended to reduce the costs of proxy solicitations and proxy contests. The new rules are voluntary and do not apply to business combination transactions. Issuers and other soliciting persons are *not* permitted to use the new rules prior to July 1, 2007.

While the newly adopted rules do not eliminate the availability of existing methods for distributing proxy materials, in a second release² also issued on January 22, 2007, the SEC proposed rules that would *require* issuers and other soliciting persons to follow the notice and access model in all solicitations not involving business combinations, unless paper copies of proxy materials are sent in the first instance.

Notice and Access Model for Issuers

Beginning on July 1, 2007, the new rules will allow all issuers to use the notice and access model as an alternative means of furnishing proxy materials, including notices of meetings, proxy and information statements, proxy cards, annual reports to shareholders and additional soliciting materials, to shareholders by:

- sending a Notice of Internet Availability of Proxy Materials to shareholders at least 40 days before the date of the shareholder meeting, or if no meeting is to be held, at least 40 days before the date that votes are to be used to decide the relevant corporate actions; the Notice may be sent electronically to shareholders who have previously provided affirmative consent (or other evidence to show delivery) or in hard copy;
- filing the Notice as additional soliciting material under Rule 14a-6(b) by the date it is first sent to shareholders; and
- posting the proxy materials on the Internet at or before the time that shareholders receive the Notice.

¹ See SEC Release No. 34-55146; IC-27671; File No. S7-10-05. A copy of the Release is available on the SEC’s website at www.sec.gov/rules/final/2007/34-55146.pdf.

² See SEC Release No. 34-55147; IC-27672; File No. S7-03-07. A copy of the Release is available on the SEC’s website at www.sec.gov/rules/proposed/2007/34-55147.pdf.

Under the new rules, the Notice:

- may include only the information specified below, unless the Notice is being combined with a notice of shareholder meeting required by state law, in which case any information required by state law may also be included in the Notice;
 - cannot accompany other proxy materials (including the proxy card);
 - must be written in plain English;
 - must include the following information:
 - a prominent bold-faced legend that states:
 - **“Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**
 - **This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.**
 - **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert website address].**
 - **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery.”**
 - the date, time and location of the meeting or, if action is to be taken by written consent, the earliest date on which the action may be taken;
 - a clear and impartial identification of each matter to be acted upon and the issuer’s recommendations on those matters (without supporting statements);
 - a list of materials available at the website;
 - a toll free phone number, e-mail address and website address where paper copies of the proxy materials can be requested (for all meetings and for the particular meeting to which the Notice relates);
 - any control or identification numbers that the shareholder needs to access his or her proxy card;
 - instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement and annual report (*e.g.*, the Notice cannot include a telephone number that may be used to execute the proxy); and
 - information on how to obtain directions to be able to attend the meeting and vote in person; and
- may include a statement advising shareholders that they are not required to provide any personal information (other than the identification or control number) to execute a proxy.

In a change from the proposed rules, a copy of the proxy card may not accompany the initial Notice. An issuer may send the proxy card only 10 calendar days or more *after* sending the Notice (unless the shareholder has already requested that proxy materials be sent, as discussed below) and, if such subsequent communication includes the proxy card, it must also include either a copy of the proxy statement and any annual report or a copy of the Notice. Issuers will be permitted to “household” the Notice (*i.e.*, send a single Notice to all shareholders residing at the same address) if the applicable householding conditions are satisfied, but separate proxy cards must be provided for each shareholder as currently required by the householding rules.

An issuer will have to post its proxy materials (including the proxy card) on the Internet at or before the time that shareholders receive the Notice. The website must be a publicly accessible site other than the SEC’s EDGAR site. The web address in the Notice must direct shareholders *directly* to the proxy materials. Shareholders will have access to the materials, free of charge, through the time of the shareholder meeting. Additional soliciting materials must be posted on the same website on or before the day they are sent to shareholders or made public without the need to send an additional Notice. Proxy materials posted on the website must be in a format or formats convenient for both printing and viewing online (which, in some cases, may require the materials in two different formats).

Issuers relying on the notice and access model for electronic delivery will be required to provide a requesting shareholder with a paper copy (or electronic copy by e-mail, if requested) of the proxy materials within three business days of the request for a period of one year after the conclusion of the meeting to which the proxy materials relate. Paper copies must be sent by first class mail or other reasonably prompt means.

Under the notice and access model, each meeting will be considered separately, and:

- an issuer’s use of the notice and access model for one meeting would have no effect on the methods used for future meetings;
- a shareholder’s decision not to request paper copies for one meeting would have no effect on that shareholder’s ability to do so for future meetings; and
- the 40-day time period for delivery of the Notice will be specific for each meeting.

The new rules also provide for the ability of shareholders to make a permanent election to receive paper or e-mail copies from each issuer.

The new rules have no effect on state law requirements concerning delivery of documents related to annual meetings or proxy materials, which remain in full effect.

Intermediaries

Under current rules, issuers are required to send proxy materials to intermediaries (*i.e.*, banks and brokers who are the record holders of shares on behalf of their customers and clients) for forwarding to the beneficial owners. The new rules will require intermediaries to use the notice and access model only if instructed to do so by the issuer (or other soliciting person) and will not allow intermediaries to follow the model on their own initiative.

If the issuer (or other soliciting person) requests that an intermediary use the notice and access model, the intermediary must prepare its own Notice of Internet Availability of Proxy Materials. The issuer or other soliciting person must provide the intermediary with all information necessary

for the intermediary to prepare its own Notice in sufficient time for the intermediary to prepare and send its Notice to beneficial owners at least 40 days before the meeting date.

The intermediary's Notice will generally contain the same information as an issuer's Notice, including a similar legend, with certain revisions to reflect the differences between registered holders and beneficial owners. The intermediary may choose whether to direct beneficial owners to the issuer's website or to its own website to access the proxy materials. If it directs beneficial owners to its own website, access to that website must be free of charge and may not compromise a beneficial owner's anonymity. If it directs beneficial owners to the issuer's website, the intermediary must inform beneficial owners that they can submit voting instructions to the intermediary, but cannot execute and submit a proxy directly to the issuer (unless the intermediary has executed a proxy in favor of the beneficial owner).

The intermediary's Notice must contain instructions on how to access the request for voting instructions on its own website (even if the intermediary directs beneficial owners to the issuer's website for access to other proxy materials). This information should include any control or identification numbers necessary for the beneficial owner to provide voting instructions. However, the Notice cannot include a means which would enable a beneficial owner to provide voting instructions without first having access to the proxy materials (*e.g.*, a telephone number).

Beneficial owners will be able to request paper or e-mailed copies of the proxy materials from the intermediary and not from the issuer, as originally proposed. Following such a request, the intermediary will have three business days to request copies from the issuer. The intermediary must then forward the paper or e-mailed copies within three business days of receiving them from the issuer. Additionally, the intermediary's Notice must clarify that a permanent election to receive copies of the proxy materials in paper or e-mail format will apply to *all securities* in the beneficial owner's account.

Other Soliciting Persons

Persons other than the issuer who initiate a proxy contest will also have the option to use the notice and access model and would have to follow the same basic procedures as an issuer, with certain exceptions as described below.

Since a soliciting person other than the issuer is not required to solicit all shareholders, it may selectively solicit shareholders using the notice and access model, for example, only those who have not previously requested paper copies of the proxy materials. A soliciting person other than the issuer must send out its Notice by the later of 40 days prior to the meeting or 10 days after the issuer first sends out its proxy materials or Notice to shareholders. In a change from the proposed rules, the new rules require a soliciting person other than the issuer to send a paper or e-mail copy of the proxy materials to any requesting shareholder to whom it has sent a Notice.

The contents of the Notice and/or the proxy card of a soliciting person other than the issuer may also differ from those of an issuer:

- if the person sends the Notice out before the issuer has sent its own proxy statement, the Notice must list only those agenda items of which the person is aware; or
- the person may provide a proxy card that requests proxy power only for the agenda items in which the person is interested; however, the proxy card must clearly state that by signing the partial proxy card, the shareholder may invalidate an earlier vote on other matters listed only on the issuer's proxy card.

Currently, an issuer is required to provide a shareholder list to a shareholder who requests one or, alternatively, the issuer may send the proxy materials on behalf of the requesting shareholder. Under the new rules, if an issuer will be providing the shareholder list, the issuer would be required to indicate which of those shareholders have permanently requested paper copies of the proxy materials. If the issuer will be sending the proxy materials for a shareholder, it must do so electronically for any shareholder who has affirmatively consented to it. If the soliciting person directs the issuer to use the notice and access model, the soliciting person is responsible for providing the issuer with paper copies of its Notice for all shareholders to whom it intends to provide a Notice and the issuer must send the Notice with reasonable promptness after receipt from the soliciting person.

Proposed Rule Would Mandate Compliance with Notice and Access Model

Also on January 22, 2007, the SEC published for comment a proposed rule that would *require* issuers and other soliciting persons to comply with a model substantially similar to the “notice and access” model in all solicitations not involving business combinations. If adopted, the proposal would provide for universal Internet availability of proxy materials as the default method of delivery and shareholders would retain the ability to request proxy materials in paper or e-mail format.

In order to accommodate issuers and other persons preferring to furnish paper copies of the proxy materials in the first instance, the universal Internet availability proposal would permit an issuer or other soliciting person to send a full set of proxy materials (including proxy card or request for voting instructions) together with the Notice, unlike the voluntary notice and access model which does not permit any proxy materials to accompany the Notice in the first instance.

The SEC has proposed making the universal Internet availability model effective for large accelerated filers (other than registered investment companies) on January 1, 2008, and for all other issuers (including registered investment companies) on January 1, 2009.

Comments Sought

Comments with regard to the proposed rules requiring universal Internet availability of proxy materials are due by March 30, 2007. Information on submitting comments to the SEC can be found on the SEC’s website at www.sec.gov/rules/submitcomments.htm.

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January 30, 2007

For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, on our website at www.chadbourne.com/publications. Our client alerts are for general informational purposes and should not be regarded as legal advice. If you have any questions regarding Internet availability of proxy materials, please contact any of the following:

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