

Client Alert

SEC Proposes Internet Availability of Proxy Materials

Overview

On December 8, 2005, the SEC proposed amending the proxy rules to allow for an alternative method for issuers and other soliciting persons to provide proxy materials to shareholders.¹ The proposed rules would allow for providing shareholders with a notice of the availability of proxy materials and posting such materials on the Internet. This “notice and access” proposal would take advantage of the widespread use of the Internet and reduce the costs of proxy solicitations and proxy contests. The proposals would not apply to business combination transactions and would not eliminate the availability of existing methods for distributing proxy materials.

Notice and Access Model for Issuers

The proposals would 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 30 days before the date of the shareholder meeting, or if no meeting is to be held, at least 30 days before the date that votes are to be used to decide the relevant corporate actions; the Notice could be sent electronically 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.

Under the SEC’s proposed rules, the Notice:

- could not be combined into a single document with any other information other than the notice of a shareholder meeting required under state law (unless prohibited by state law);
- could not accompany materials other than the proxy card and a return envelope;
- would have to include the following information:
 - a bold-faced legend stating:
 - that the notice contains only an overview of the complete proxy materials that are available on the Internet;
 - the web address where the proxy materials can be found on the Internet; and

¹ See SEC Release No. 34-52926; IC-27182; File No. S7-10-05. A copy of the Release is available on the SEC’s website at www.sec.gov/rules/proposed/34-52926.pdf.

- instructions on how to receive a paper copy of the proxy materials free of charge;
- 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;
- a list of materials available at the website; and
- a toll free phone number and an e-mail address where paper copies of the proxy materials can be requested.

An issuer would be permitted, though not required, to provide the proxy card together with the Notice through the same delivery medium. Alternatively, the proxy card could be provided with and through the same delivery medium as the proxy statement (including posting both on the website). Issuers using the notice and access alternative would 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 would have to post its proxy materials 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 would have to direct shareholders *directly* to the proxy materials. Shareholders would have access to the materials, free of charge, through the time of the shareholder meeting. Additional soliciting materials would have to be posted on the same website on which the proxy materials are posted on or before the day they are sent to shareholders or made public.

Issuers relying on the notice and access model for electronic delivery would still be required to provide a requesting shareholder with a paper copy (or electronic copy by e-mail, if requested) of the proxy materials within two business days of the request. Paper copies must be sent by first class mail or other reasonably prompt means.

Under the notice and access model, each meeting would 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 30-day time period for delivery of the Notice would be specific for each meeting.

The SEC proposals have no effect on state law requirements concerning delivery of documents related to annual meetings or proxy materials, which would 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 proposed rules would require intermediaries to use the notice and access model only if instructed to do so by the issuer (or other soliciting person).

If the issuer (or other soliciting person) requests that an intermediary use the notice and access model:

- the issuer (or other soliciting person) must deliver copies of the Notice to intermediaries at least five business days prior to the deadline for distributing the Notice; and
- the intermediary must forward the Notice to the beneficial owners within five business days after receipt of the Notice from the issuer (or other soliciting person).

The intermediary may include its request for voting instructions with the Notice, or post such a request on its own website. If its own website is used, the intermediary would need to post all of the issuer's proxy materials (other than the proxy card) on that website, and would need to direct beneficial owners to *its own* website, either by supplementing the issuer's Notice or substituting its own notice for the issuer's. A substitute notice would have to contain all of the information required in the issuer's Notice, with appropriate changes.

Beneficial owners would be able to request paper or e-mailed copies of the proxy materials from the intermediary. Following such a request, the intermediary would have two business days to request copies from the issuer. The intermediary would then have to forward the paper or e-mailed copies within two days of receiving them from the issuer.

Other Soliciting Persons

Persons other than the issuer who initiate a proxy contest would also have the option to use the notice and access model. If a soliciting person elects to use this model, it would have to follow the same basic procedures as an issuer, except as described below.

Since a soliciting person other than the issuer is not required to solicit all shareholders, it may state in the Notice that it will not provide a copy of the proxy materials to any shareholder who requests one. In such a case, the Notice would have to clearly explain that the person is only soliciting those shareholders who are willing and able to use the Internet to view the proxy materials.

Alternatively, a person other than the issuer may decide not to send any Notice at all, and instead post all proxy materials, including the proxy card, on an Internet website and direct shareholders to the materials on the website via communications permitted under Rule 14a-12. As long as the person does not provide shareholders with a proxy card other than on the website, no Notice would be required.

Should a soliciting person other than the issuer decide to send a Notice, the contents of the Notice and/or the proxy card may also differ from that of an issuer's Notice:

- As discussed above, if the person is limiting the solicitation to electronic means only, there is no need to explain in the Notice how a paper copy can be obtained. The legend must clearly state that the person is only soliciting those shareholders who are willing to access proxy materials electronically.
- If the person sends the Notice out before the issuer has sent its own proxy statement, the Notice must only list those agenda items of which the person is aware.
- The person may send a proxy card that only requests proxy power 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.

If a soliciting person other than the issuer conducts an electronic-only proxy solicitation under the notice and access model, the 30-day time period for sending the Notice is not applicable. If the soliciting person also decides to provide copies of the proxy materials upon request, the Notice must be sent out before the later of (1) 30 days prior to the meeting or (2) ten days after the issuer first sends out its proxy solicitation.

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 proposals, if an issuer will be providing the shareholder list, the issuer must include any electronic delivery information it has for shareholders, including if any shareholder has consented to electronic delivery and, if the issuer has used the notice and access model, whether any shareholders have asked for 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 proxy card and Notice, if the soliciting person chooses to send the Notice and proxy card in that format.

Comments Sought

Comments with regard to the proposed rules on Internet availability of proxy materials are due by February 13, 2006. Information on submitting comments to the SEC can be found on the SEC's website at www.sec.gov/rules/submitcomments.htm.

* * * * *

December 20, 2005

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 the proposed rules on Internet availability of proxy materials, please contact any of the following:

New York

Marc A. Alpert	+1 (212) 408-5491	malpert@chadbourne.com
Philip L. Colbran	+1 (212) 408-1122	pcolbran@chadbourne.com
A. Robert Colby	+1 (212) 408-5571	rcolby@chadbourne.com
Dennis R. Dumas	+1 (212) 408-1184	ddumas@chadbourne.com
Barry S. Eisler	+1 (212) 408-1073	beisler@chadbourne.com
William Greason	+1 (212) 408-5527	wgreason@chadbourne.com
Daniel Greenberg	+1 (212) 408-5570	dgreenberg@chadbourne.com
Morton E. Grosz	+1 (212) 408-5592	mgrosz@chadbourne.com
Charles E. Hord, III	+1 (212) 408-5353	chord@chadbourne.com
Peter K. Ingerman	+1 (212) 408-5422	pingerman@chadbourne.com
Peter R. Kolyer	+1 (212) 408-5564	pkolyer@chadbourne.com
Sey-Hyo Lee	+1 (212) 408-5122	shlee@chadbourne.com
J. Allen Miller	+1 (212) 408-5454	amiller@chadbourne.com
Kessar Nashat	+1 (212) 408-5468	knashat@chadbourne.com
Alejandro R. San Miguel	+1 (212) 408-8009	asanmiguel@chadbourne.com
Edward P. Smith	+1 (212) 408-5371	esmith@chadbourne.com
Kevin C. Smith	+1 (212) 408-1092	ksmith@chadbourne.com

Washington, D.C.

Thomas V. Sjoblom	+1 (202) 974-5636	tsjoblom@chadbourne.com
-------------------	-------------------	-------------------------

London

David Levin	+44 (20) 7337-8048	dlevin@chadbourne.com
Claude S. Serfilippi	+44 (20) 7337-8030	cserfilippi@chadbourne.com

Chadbourne & Parke LLP

New York

30 Rockefeller Plaza
New York, NY 10112
Telephone: +1 (212) 408-5100
Facsimile: +1 (212) 541-5369

Washington, D.C.

1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: +1 (202) 974-5600
Facsimile: +1 (202) 974-5602

Los Angeles

350 South Grand Avenue, Suite 3300
Los Angeles, CA 90071
Telephone: +1 (213) 892-1000
Facsimile: +1 (213) 622-9865

Houston

1100 Louisiana, Suite 3500
Houston, TX 77002
Telephone: +1 (713) 571-5900
Facsimile: +1 (713) 571-5970

London

Chadbourne & Parke
(a multinational partnership)
Regis House, 45 King William Street
London EC4R 9AN
Telephone: +44 (20) 7337-8000
Facsimile: +44 (20) 7337-8001

Moscow

52/5 Kosmodamianskaya Naberezhnaya
Moscow 115054, Russian Federation
Telephone: +7 (495) 974-2424
Facsimile: +7 (495) 974-2425

St. Petersburg

Italianskaya Str., office 56/57
St. Petersburg 191186, Russian Federation
Phone: +7 (812) 326-9300
Fax: +7 (812) 326-9341

Warsaw

(through a Polish partnership)
ul. Emilii Plater 53
00-113 Warsaw, Poland
Telephone: +48 (22) 520-5000
Facsimile: +48 (22) 520-5001

Kyiv

11 Mykhailivska Street, 4th Floor
Kyiv 01001, Ukraine
Telephone: +380 (44) 230-2534
Facsimile: +380 (44) 230-2535

Almaty

90 Shevchenko Street, 3rd Floor
Almaty 050022, Kazakhstan
Telephone: +7 (3272) 585-088
Facsimile: +7 (3272) 588-084

Beijing

Room 902, Tower A, Beijing Fortune Centre
7 Dongsanhuan Zhonglu, Chaoyang District
Beijing 100020, China
Telephone: +86 (10) 6530-8846
Facsimile: +86 (10) 6530-8849

If you would like additional copies of this client alert, please contact Phillipa Yule, Director of Marketing and Creative Services, at +1 (212) 408-5240 or e-mail: pyule@chadbourne.com.