

SEC Proposes to Allow Electronic Delivery of Proxy Material

Summary

At an open meeting on November 29, 2005, the Securities and Exchange Commission ("SEC" or "Commission") approved for public comment a proposal to amend the proxy rules under Section 14 of the Securities Exchange Act of 1934 (the "1934 Act").

The amendment would allow companies and other persons and entities soliciting proxies to satisfy the proxy dissemination requirements of Rule 14a-3 under the 1934 Act by posting those proxy materials on a website and providing shareholders with notice of the Internet availability of the materials (the "Proposals"). As of the date of this report, the SEC had not released the text of the Proposals. The following summary and discussion is based on an SEC press release¹ issued on November 29, 2005, and the SEC webcast of the meeting.²

The Proposals apparently would apply to both open-end and closed-end investment companies registered under the Investment Company Act of 1940 ("1940 Act"). In this connection, there was no discussion, or even mention, of the applicability of the Proposals to those companies at the meeting or in the press release. No representative of the SEC Division of Investment Management participated in the discussion of the Proposals at the meeting.³

¹ SEC Press Release 2005-1066, Nov. 29, 2005.

² The webcast has been archived and is available on the SEC website.

³ Rule 20a-1 under the 1940 Act makes the requirements of Regulation 14A under the 1934 Act applicable to registered investment companies.

Discussion

Rule 14a-3 under the 1934 Act currently requires that a written proxy statement, which must include specified disclosures, be delivered concurrently or prior to soliciting a proxy from a shareholder. This proxy statement must be delivered in paper form unless the shareholder consents to an electronic delivery.

According to the press release, the Proposals would allow companies to satisfy their obligation to furnish proxy materials to shareholders through a "notice and access" model. The company would send the shareholder a notice and post on a publicly accessible website the related proxy materials. The notice, sent to shareholders at least 30 days before the date of the meeting, would describe in plain English: the matters to be considered at the meeting, along with the board recommendations; the date, time, and location of the meeting; and the electronic availability of the proxy materials at a specified website address.

The notice would also provide a toll-free number and e-mail address so that shareholders would have the option to request the material in paper format.

In his introductory remarks at the meeting, Chairman Cox emphasized the significant benefits to investors and registrants by using the Internet as a delivery platform. He cited the cost, time, and usefulness of the electronic format as compared to paper delivery, and specifically invited investors to comment on the Proposals. Commissioner Atkins stated that the Proposals would modernize the communication between registrants and shareholders, and that it is the logical next step in a twenty-year progression, starting with EDGAR in the 1980's,

to modernize information flow. He added that during the last proxy season, \$535 million in postage and printing costs alone were spent on proxy solicitation, and any cost that is avoided benefits issuers and shareholders.

At the open meeting, the SEC Commissioners primarily focused their attention on three topics: voting mechanics; cost reduction of proxy contests; and shareholder privacy. The SEC staff addressed each of these subjects at the meeting.

Voting Mechanics

The SEC staff explained that the Proposals are intended to work with current voting mechanics, not to change them, and that the Proposals would have no impact on any obligations under state law regarding soliciting proxies or holding annual meetings.

Proxy Contests

The SEC press release states that the Proposals would have the significant benefit of providing persons other than the company with a more cost-effective means to undertake their own proxy solicitation. Since competing solicitations likely would begin only after the company's solicitation, the notice for a proxy contest would have to be delivered by the later of 30 days before the meeting or 10 days after the company filed its proxy material. Soliciting persons other than companies do not need to rely on the proposed "notice and access" model, since the Proposals would continue to permit a person other than the company to limit solicitation to shareholders who are willing to electronically access the soliciting person's proxy material.

According to the press release, such limited solicitation would not require delivery of paper or e-mail copies of the proxy material, nor would it require a notice, unless the soliciting person wanted to deliver the proxy card or a request for voting instructions to shareholders, instead of posting it on an Internet website. At the meeting, the SEC staff acknowledged that the current monetary barrier to proxy contests could discourage frivolous contests. However, in the staff's view, it would still take a good deal of effort and other substantial costs to launch a serious proxy contest, and thus the staff did not believe that the Proposals would encourage frivolous contests.

Shareholder Privacy

Commissioner Campos expressed the concern that shareholders might leave an identity trail by accessing proxy material via a registrant's website. The SEC staff acknowledged that this issue is not addressed in the Proposals, but said that it had asked the SEC's Office of Information Technology for assistance on the matter. The staff added that the current regulatory preference for anonymity preservation would not be changed, and that a concerned shareholder would still be able to preserve anonymity by using an intermediary for paper delivery of the material.

Proxy Cards

A subject of extended discussion was whether the proxy card should be kept with the solicitation material on the website, or separated from the proxy statement and delivered together with the notice. There was concern that the card would be filled out by the shareholder without reading the proxy material, although it was noted that this concern exists in both proxy delivery methods, paper and electronic.

On the other hand, if the proxy card is attached to the solicitation material, there is a chance that more shareholders may actually read it. Chairman Cox, the Commissioners, and the SEC staff agreed that the Commission should specifically request comments on this issue. The comment period on the Proposals will end 60 days after the SEC's proposing release is published in the Federal Register.

Conclusion

If the Proposals are adopted early next year, they probably would not be in place in time for the 2006 proxy season. The SEC staff anticipates an effective date in late 2006, which would make the alternative "notice and access" model available for the 2007 proxy season.



This update was authored by Alan Rosenblat (+1 202 261 3332; alan.rosenblat@dechert.com), John O'Hanlon (+1 617 728 7111; john.ohanlon@dechert.com), Keith T. Robinson (+1 202 261 3386; keith.robinson@dechert.com), and Jutta Frankfurter (+1 202 261 3484; jutta.frankfurter@dechert.com).

Additional practice group contacts

For further information, please contact the authors, one of the attorneys listed, or any Dechert LLP attorney with whom you are in regular contact. Visit us at www.dechert.com/financialservices.

Sander M. Bieber

Washington
+1 202 261 3308
sander.bieber@dechert.com

Timothy M. Clark

New York
+1 212 698 3652
timothy.clark@dechert.com

Douglas P. Dick

Newport Beach
+1 949 442 6060
douglas.dick@dechert.com

Ruth S. Epstein

Washington
+1 202 261 3322
ruth.epstein@dechert.com

Susan C. Ervin

Washington
+1 202 261 3325
susan.ervin@dechert.com

Joseph R. Fleming

Boston
+1 617 728 7161
joseph.fleming@dechert.com

Brendan C. Fox

Washington
+1 202 261 3381
brendan.fox@dechert.com

David J. Harris

Washington
+1 202 261 3385
david.harris@dechert.com

Robert W. Helm

Washington
+1 202 261 3356
robert.helm@dechert.com

Jane A. Kanter

Washington
+1 202 261 3302
jane.kanter@dechert.com

Stuart J. Kaswell

Washington
+1 202 261 3314
stuart.kaswell@dechert.com

George J. Mazin

New York
+1 212 698 3570
george.mazin@dechert.com

Jack W. Murphy

Washington
+1 202 261 3303
jack.murphy@dechert.com

John V. O'Hanlon

Boston
+1 617 728 7111
john.ohanlon@dechert.com

Jeffrey S. Poretz

Washington
+1 202 261 3358
jeffrey.poretz@dechert.com

Jon S. Rand

New York
+1 212 698 3634
jon.rand@dechert.com

Keith T. Robinson

Washington
+1 202 261 3386
keith.robinson@dechert.com

Alan Rosenblat

Washington
+1 202 261 3332
alan.rosenblat@dechert.com

Frederick H. Sherley

Charlotte
+1 704 339 3100
frederick.sherley@dechert.com

Patrick W. D. Turley

Washington
+1 202 261 3364
patrick.turley@dechert.com

Brian S. Vargo

Philadelphia
+1 215 994 2880
brian.vargo@dechert.com

David A. Vaughan

Washington
+1 202 261 3355
david.vaughan@dechert.com

Dechert
LLP

www.dechert.com

U.S.

Boston
Charlotte
Harrisburg
Hartford
New York
Newport Beach

Palo Alto
Philadelphia
Princeton
San Francisco
Washington, D.C.

U.K./Europe

Brussels
Frankfurt
London
Luxembourg
Munich
Paris

© 2005 Dechert LLP. All rights reserved. Materials have been abridged from laws, court decisions, and administrative rulings and should not be considered as legal opinions on specific facts or as a substitute for legal counsel.