

# SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000  
FACSIMILE: 1-212-558-3588  
WWW.SULLCROM.COM

*125 Broad Street*  
*New York, NY 10004-2498*

LOS ANGELES • PALO ALTO • WASHINGTON, D.C.  
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November 13, 2009

Via E-mail: rule-comments@sec.gov.

Elizabeth M. Murphy,  
Secretary,  
Securities and Exchange Commission,  
100 F Street, NE,  
Washington, DC 20549-1090.

Re: Proposed Rules Relating to Internet Availability of Proxy  
Materials (Release No. 34-60825); File No. S7-22-09

Dear Ms. Murphy:

We are pleased to respond to Release No. 34-60825 (the “Proposing Release”), in which the Securities and Exchange Commission (the “Commission”) solicited comments on proposed rule changes that would, among other things, provide flexibility regarding the format and content of the Notice of Internet Availability of Proxy Materials (the “Notice”), permit the Notice to be accompanied by explanatory materials and allow a non-issuer soliciting person to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the Commission.

We support the Commission’s effort to improve the notice and access model in a manner that would reduce shareholder confusion and facilitate shareholder voting. We have set forth our comments on the proposed rules below.

**A. We believe that the proposed rules would facilitate shareholder voting.**

The Commission has proposed to mitigate shareholder confusion regarding the notice and access model and facilitate shareholder voting by providing flexibility in the format and content of the Notice and permitting soliciting persons to accompany the Notice with an explanation of the notice and access model.

In our experience, the Notice tends to confuse shareholders since it looks very similar to a proxy card in format. The proposed rules would permit issuers to format

the Notice to avoid this confusion. We believe that issuers are in the best position to determine how to communicate with their shareholders most clearly, and the proposed rules would enable issuers to do so more effectively and in a less boilerplate manner.

**B. Issuers should be permitted to explain the purpose of the Notice.**

Confusion experienced by shareholders in the voting process may be caused by their lack of understanding of the notice only option. In that regard, we agree with the Commission that the ability to include explanatory materials could help educate shareholders about the proxy voting process and facilitate shareholder participation.

We believe, however, that the wording of proposed Rule 14a-16(f)(2)(iv), which is limited to an explanation of the process for receiving and reviewing proxy materials and voting, is too limited. In keeping with the intent expressed in the Proposing Release to permit issuers to educate shareholders about the notice and access model, we believe that issuers should be permitted to include a more general explanation about the purpose of the communication and the reasons for the issuer's use of the notice only model, rather than a mere explanation of the mechanical process of accessing materials and voting. Accordingly, we would amend Rule 14a-16(f)(2)(iv) to read as follows: "An explanation of the purpose of the Notice of Internet Availability of Proxy Materials, the reasons for an issuer's use of the notice only delivery model and the process of receiving and reviewing the proxy materials and voting as detailed in this section."

**C. The Commission should not impose additional limitations regarding the use of the notice and access model.**

The Commission has requested comments on whether the use of the notice and access model should be subject to additional limitations, including (i) limitations on an issuer's ability to choose which shareholders will receive notice-only or full set delivery, (ii) limitations on an issuer's ability to use the notice-only option based on past shareholder participation levels, (iii) a mandatory requirement for the proposed explanatory materials regarding the proxy solicitation process to be included with the Notice and (iv) a prohibition of the presentation of the soliciting person's voting recommendations in the Notice.

We urge the Commission not to adopt any further limitations regarding the use of the notice and access model and the content of the shareholder communications. Issuers have every incentive to effectively communicate with shareholders and to encourage the exercise by shareholders of their franchise. We believe issuers will be particularly incentivized to increase retail shareholder participation since the amendment of New York Stock Exchange Rule 452 to eliminate discretionary voting by brokers in uncontested director elections. Moreover, the notice and access model is still a relatively new development. Issuers are still experimenting with the notice and access model to

strike the right balance between the shareholders who are solicited through the notice-only option and those solicited through the full set delivery option. In our experience, issuers are trying to calibrate the delivery method by reference to current and historical voting patterns. We believe that this experimentation will, over time, lead to the development of best practices to facilitate investor participation, and do not believe that the Commission should unduly impair this experimentation.

With respect to the proposed explanatory materials, we believe that each issuer should be able to determine whether such explanatory materials would be required based on its shareholder base. Furthermore, we believe that the recommendation of action by a soliciting person is critically important information that should be included in the Notice. In our view, the absence of this information would increase rather than reduce confusion.

**D. The Commission should not suspend the notice and access rules.**

The Commission has also requested comments on whether the notice and access rules should be suspended until a later date so that shareholders could be better prepared for the notice and access model.

We believe that a temporary suspension of the notice and access rules would create greater confusion among shareholders and impair the development of effective market practices in this area. As indicated above, the notice and access model is still a quite new innovation, and many issuers simply have not had the time to determine how to use the notice and access model most effectively. In our experience, issuers are closely monitoring the experiences and practices of market participants in implementing the notice and access model, and we expect that the development of means to use the model effectively will be an iterative process based on continuous experience over the course of the next few years. A suspension would delay this process and would penalize issuers that have dedicated significant resources to implementing the notice and access model. We strongly recommend that the Commission not suspend the notice and access rules.

**E. A non-issuer soliciting person relying on the notice-only option should deliver its Notice to shareholders at least 10 days before the date of the shareholders meeting.**

The Commission has proposed to amend Rule 14a-16(1)(2)(ii) to require a non-issuer soliciting person relying on the notice-only option to send its Notice no later than the filing date of the soliciting person's definitive proxy statement, so long as such soliciting person files a preliminary proxy statement within 10 days of the issuer's filing of its definitive proxy statement. As the Commission notes in the Proposing Release, under the proposed rule, a non-issuer soliciting person relying on the notice-only option

does not have to deliver its Notice by a specific date before the date of the shareholders meeting.

We appreciate the Commission's rationale for modifying the current requirement that a non-issuer soliciting person send its Notice to shareholders no later than 10 days after the issuer first sends its Notice or proxy statement to shareholders. We believe, however, that a non-issuer soliciting person should not be permitted to use the notice-only option to the extent that shareholders would not have sufficient time to access and consider the materials provided by the soliciting person and to obtain paper copies if desired. It seems to us that the Notice should, in all cases, be delivered at least 10 days before the shareholders meeting date. In the event that circumstances develop such that the non-issuer soliciting person's proxy materials are not available at least 10 days before the meeting, then shareholders will be best served by receiving a full set of proxy materials so that their review of the materials in advance of the meeting will not be further delayed.

#### **F. Technical Comments**

The following are technical comments on the proposed rules.

*Proposed Rule 14a-16(d)(2).* We suggest adding a comma following the phrase "on the Internet or by mail."

*Rule 14a-16(n).* Rule 14a-16(n)(4), relating to the full set delivery option, specifies which items that would be required in the Notice need not be included in the proxy materials sent under the full set delivery option. If Rule 14a-16(d) is revised as proposed, conforming changes will need to be made to Rule 14a-16(n)(4). We believe that the easiest way to accomplish this is to delete Rule 14a-16(n)(4), and to replace the words "paragraphs (d) and (n)(4)" in Rule 14a-16(n)(2)(ii) with the following text: "paragraphs (d)(1), (d)(3) and (d)(7)." All the other subparagraphs of Rule 14a-16(d) are either irrelevant to the recipient of a full set of proxy materials or adequately addressed by the requirements as to the content of proxy statements and forms of proxy.

\* \* \*

We appreciate this opportunity to comment on the proposed rules, and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to Robert W. Reeder III (212-558-3755) or Glen T. Schleyer (212-558-7284) in our New York office.

Very truly yours,

/s/ SULLIVAN & CROMWELL LLP