SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 240, 249 and 274

[RELEASE NOS. 34-52926; IC-27182; File No. S7-10-05]

RIN 3235-AJ47

INTERNET AVAILABILITY OF PROXY MATERIALS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to the proxy rules under the Securities Exchange Act of 1934 that would provide an alternative method for issuers and other persons to furnish proxy materials to shareholders by posting them on an Internet Web site and providing shareholders with notice of the availability of the proxy materials. Copies would be available to shareholders on request, at no cost. The proposed amendments are intended to put into place processes that would provide shareholders with notice of, and access to, proxy materials while taking advantage of technological developments and the growth of the Internet and electronic communications. Issuers that rely on the proposed amendments would be able to lower costs of proxy solicitations that ultimately are borne by shareholders. The proposed amendments also would apply to a soliciting person other than the issuer, which we anticipate might reduce the costs of engaging in a proxy contest. Today's proposals would not apply to business combination transactions. These proposals also would not affect the availability of any existing method of furnishing proxy materials.

DATES: Comments must be received on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-10-05 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number S7-10-05. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Raymond A. Be, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: The Commission today proposes amendments to Rules 14a-2,[1] 14a-3,[2] 14a-4,[3] 14a-7,[4] 14a-8,[5] 14a-12,[6] 14a-13,[7] 14b-1,[8] 14b-2,[9] 14c-2,[10] 14c-3,[11] 14c-5,[12] 14c-7,[13] Schedule 14A,[14] Schedule 14C,[15] Form 10-K,[16] Form 10-KSB,[17] Form 10-Q,[18] Form 10-QSB,[19] and Form N-SAR[20] under the Securities Exchange Act of 1934.[21]

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2 17 CFR 240.14a-3.
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5 17 CFR 240.14a-8.
6 17 CFR 240.14a-12.
7 17 CFR 240.14a-13.
8 17 CFR 240.14b-1.
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12 17 CFR 240.14c-5.
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14 17 CFR 240.14a-101.
15 17 CFR 240.14c-101.
16 17 CFR 249.310.
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19 17 CFR 249.308b.
20 17 CFR 274.101.
21 15 U.S.C. 78a et seq.

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I. Introduction

We are proposing amendments to the proxy rules to update our regulatory framework to take advantage of communications technology and provide an alternative proxy model that could reduce the printing and mailing costs associated with furnishing proxy materials to shareholders.[22] The proposed amendments would provide an alternative method for furnishing proxy materials to shareholders based on a "notice and access" model. Under the proposals, an issuer would be able to satisfy its obligations under the Commission's proxy rules by posting its proxy materials on a specified, publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and providing shareholders with a notice informing them that the materials are available

[22] For purposes of this release, the term "proxy materials" includes proxy statements on Schedule 14A, proxy cards, information statements on Schedule 14C, annual reports to security holders required by Rules 14a-3 and 14c-3 of the Exchange Act, notices of

and explaining how to access those materials.[23] These proposals are intended to establish procedures that would promote use of the Internet as a reliable and cost-efficient means of making proxy materials available to shareholders. The proposed amendments would provide a new alternative to existing methods of furnishing proxy materials, which would not be affected by the proposal.

Shareholders and other persons conducting their own proxy solicitations would be able to rely on the proposed amendments under requirements substantially similar to the requirements that would apply to issuers. As a result, these proposals also would give these shareholders and other persons an alternative method to furnish proxy materials that may have the effect of reducing the cost of engaging in a proxy contest. Because the proposed amendments provide an alternative method for furnishing proxy materials, they would not eliminate the ability of an issuer or other soliciting person to comply with existing methods of furnishing proxy materials. The proposed alternative would not be available to issuers or other soliciting persons in the context of a business combination transaction.

The proposed amendments would require an issuer that is relying on the proposed "notice and access" model to provide a shareholder with a copy of the materials upon request (in paper or by e-mail, as requested). A soliciting person other than the issuer may choose not to provide a copy of its proxy materials to a requesting shareholder if the

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shareholder meetings, additional soliciting materials, and any amendments to such materials.

[23] An issuer also would have to continue to file its proxy materials on the Commission's EDGAR Web site and furnish its annual report to security holders to the Commission pursuant to Rules 14a-3 and 14c-3. These proposed rules do not affect any current Commission filing requirement, except that a soliciting person following the proposed model would be required to file the proposed notice as additional soliciting material under Exchange Act Rule 14a-6(b) [17 CFR 240.14a-6(b)].

person is conducting a conditional "electronic only" proxy solicitation and soliciting proxy authority only from shareholders willing to electronically access the soliciting person's proxy materials.[24]

Under the proposed "notice and access" model, the issuer would be able to send a notice to shareholders (the "Notice of Internet Availability of Proxy Materials" or "Notice") at least 30 days before the meeting, or if no meeting is to be held, at least 30 days before the date the votes, consents, or authorizations may be used to effect a corporate action, indicating that the issuer's proxy materials are available on a specified Internet Web site and explaining how to access those proxy materials. The Notice also would explain the procedure for requesting a copy of the materials, if a shareholder desires such a copy.

As proposed, an issuer or other soliciting person need not rely on the "notice and access" model with regard to all proxy-related materials. The amendments would permit a soliciting person to choose to rely on the proposed model as a means of furnishing some proxy-related documents to shareholders and use other means, such as paper documents, with regard to other proxy-related materials. For example, an issuer could choose to use the "notice and access" model for its proxy statement and to furnish its annual report to security holders (commonly referred to as the "glossy annual report") in paper through the U.S. mail. However, the proposed "notice and access" model would require a

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[24] An issuer would be unlikely to conduct such an "electronic only" proxy solicitation, as it would have an obligation to provide shareholders who are not being solicited with an information statement that complies with Regulation 14C [17 CFR 14c-1 through 14c-101]. In addition, the rules of some trading markets require issuers to solicit proxies from all of their shareholders.

soliciting person to furnish the proxy card together with, and using the same medium as, either the Notice of Internet Availability of Proxy Materials or the proxy statement.[25]

II. Background

We believe that continuing technological developments and the expanded use of the Internet now merit consideration of an alternative method for the dissemination of proxy materials. We also believe that our proposed alternative model could facilitate effective and cost-efficient communications between issuers, shareholders, and intermediaries. We previously published extensive guidance regarding the electronic delivery of materials under the federal securities laws.[26] We believe the proposed alternative model would address the possibility, as identified by market participants, that a significant portion of the difficulties that issuers have encountered in implementing our existing guidance to date has stemmed from shareholders' inattention to requests for consent to electronic delivery rather than an unwillingness to receive documents electronically.[27]

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[25] In the proposed regulatory text at the end of this release, we refer to proxy cards as "forms of proxy" for consistency with existing Commission rules.

[26] Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458] (the "1995 Interpretive Release") provided guidance on electronic delivery of prospectuses, annual reports to security holders and proxy solicitation materials under the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934, and the Investment Company Act of 1940 15 U.S.C. 80a-1 et seq.]. Release No. 33-7288 (May 9, 1996) (the "1996 Interpretive Release") provided guidance on electronic delivery of required information by broker-dealers and transfer agents under the Securities Act, the Exchange Act, and the Investment Company Act. Release No. 33-7856 (Apr. 28, 2000) [65 FR 25843] (the "2000 Interpretive Release") provided guidance on the use of electronic media to deliver documents under the federal securities laws, an issuer's liability for Web site content, and basic legal principles that issuers and market intermediaries should consider in conducting online offerings.

[27] See, for example, the third Q&A in Section J: Which Issuers Are Using Electronic Delivery, in FAQ on Electronic Delivery, available at www.realcorporatelawyer.com/faqs/ed.html.

In 2000, we discussed an "access equals delivery" model and an implied consent model as possible alternatives to the existing electronic delivery conditions. In our 2000 Interpretive Release, we described the "access equals delivery" model as one under which "investors would be assumed to have access to the Internet, thereby allowing delivery to be accomplished solely by an issuer posting a document on the issuer's or a third party's Web site."[28] In that release, we also described the "implied consent" model as one that would allow an issuer to rely on electronic delivery if intended recipients did not affirmatively object when notified of the issuer's or intermediary's intention to deliver documents in an electronic format.

We did not take action regarding either of those models in 2000. With the passage of five years and the increased use of the Internet as a means to quickly, reliably, and inexpensively disseminate information, we think it is again appropriate to consider the effect that technological developments have had on making information available and propose an alternative model for furnishing proxy materials.

More than 10.7 million beneficial shareholders already have given their consent to electronic delivery of proxy materials and approximately 85% of their shares were voted electronically or telephonically during the 2005 proxy season.[29] Moreover, recent data indicates that up to 75% of Americans have access to the Internet in their homes, and that this percentage is increasing steadily among all age groups.[30]

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[28] We note that the "notice and access" model that we are proposing in this release would require both notice and posting of the materials on the Internet. Thus, it would not follow a pure "access equals delivery" model, as described in the 2000 Interpretive Release.

[29] According to data available on the Web site of Automatic Data Processing, Inc. See www.ics.adp.com/release11/public_site/about/stats.html.

[30] See Three Out of Four Americans Have Access to the Internet, Nielsen//NetRatings, March 18, 2004; Robyn Greenspan, Senior Surfing Surges, ClickZNetwork, Nov. 20, 2003 (citing statistics from Neilsen/NetRatings and Jupiter Research). In addition, there

In connection with our recent Securities Offering Reform effort, we adopted new Securities Act Rule 172,[31] which implements an "access equals delivery" model in the context of final prospectus delivery.[32] Under Rule 172, a final prospectus is deemed to precede or accompany a security for sale for purposes of Securities Act Section 5(b)(2)[33] so long as the company offering the security files with the Commission a final prospectus meeting the requirements of Securities Act Section 10(a)[34] as part of the registration statement pursuant to Securities Act Rule 424.[35] Investors will be able to access the electronically filed final prospectus on EDGAR, but no longer will receive a copy unless they request one.[36] Two commenters on the Securities Offering Reform proposing release suggested that we consider proposing similar "access equals delivery" amendments in the context of the proxy rules.[37]

Request for Comment

- Has Internet access become sufficiently widespread to make a "notice and access" model for furnishing proxy materials a viable model?

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is evidence suggesting that the "digital divide" is narrowing. See, for example, Kristen Fountain, Antennas Sprout, and a Bronx Neighborhood Goes Online, The N.Y. Times, June 10, 2004 at G8; Steve Lohr, Libraries Wired, and Reborn, The N.Y. Times, Apr. 22, 2004 at G1. However, studies have varied. One study concluded that only 63% of Americans age 18 or older had Internet access in 2004, and that only 25% of persons over the age of 65 had Internet access in the same year. See Trends 2005 by the Pew Research Center. Nonetheless, these percentages are significantly higher than the approximately 15% of Americans estimated to have Internet access in 1995 and the 48% in 2000. Id.

31 17 CFR 230.172.

32 See Release No. 33-8591 (July 19, 2005) [70 FR 44721].

33 15 U.S.C. 77e(b)(2).

34 15 U.S.C. 77j(a).

35 17 CFR 230.424.

36 See Securities Act Rule 173(d) [17 CFR 230.173(d)].

37 See comment letters on Release No. 33-8501 (Nov. 3, 2004) [69 FR 67392] from the Society of Corporate Secretaries and Governance Professionals and Intel Corporation, available at http://www.sec.gov/rules/proposed/s73804.shtml.

- Is the means by which most shareholders access the Internet sufficient to access lengthy documents such as annual reports, proxy statements, and information statements? Would investors be excessively burdened by having to download and print these documents?
- As technology has progressed, so has the amount of content that can be transmitted electronically. Many Internet Web sites currently use advanced formatting that may not be compatible with, or may substantially slow, dial-up connections. Do shareholders need broadband technology to efficiently download lengthy documents such as annual reports, proxy statements, and information statements? If so, do shareholders have sufficient access to broadband technology to make the proposal described in this release feasible?
- As part of the "notice and access" model, should we require issuers and other soliciting persons to make their proxy materials available in a format that can be readily downloaded by shareholders over dial-up connections? Should we require issuers and other soliciting persons to provide, where available, links to third-party Web sites from which shareholders would be able to download, free of charge, any software necessary to view the documents?
- Do issuers have sufficient bandwidth on their Internet Web sites to handle any anticipated increased traffic? What actions would issuers have to take to ensure that their Internet Web sites have sufficient capacity to handle the increased traffic?

- Should the proposed model instead be based on obtaining a shareholder's consent? If so, what type of consent should be required (e.g., should a shareholder's affirmative consent, implied consent, or other type of consent be required?) and should any disclosure be required in connection with the request for consent? If so, what disclosure should be required?

III. Description of the Proposed Amendments

A. Proposed "Notice and Access" Model for Furnishing of Internet Proxy Materials by an Issuer

The proposed amendments would permit an alternative means for an issuer to furnish proxy materials to all of its shareholders. These proxy materials include:

- notices of shareholder meetings;[38]
- Schedule 14A proxy statements and consent solicitation statements;
- proxy cards;
- Schedule 14C information statements;
- annual reports to security holders;[39]
- additional soliciting materials;[40] and

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38 The notice of a shareholder meeting typically is required under state law. However, issuers traditionally deliver the notice together with the proxy materials. Because we intend for our proposed rules to have no impact on state corporation law obligations, the proposed rules would not permit use of the proposed alternative model if the law in the state in which an issuer is incorporated would not permit reliance on the alternative model.

39 The requirement to furnish annual reports in Rules 14a-3 and 14c-3 under the Exchange Act does not apply to registered investment companies. See 17 CFR 240.14a-3(b) and 240.14c-3(a). The proposals in this release do not apply to the requirement for every registered investment company, at least semi-annually, to transmit reports to shareholders under Section 30(e) of the Investment Company Act of 1940 [15 U.S.C. 80a-29(e)] and the rules thereunder.

40 Our rules permit, but do not require, delivery of additional soliciting materials. See Rule 14a-6(b).

- any amendments to such materials that are required to be furnished to shareholders.

With regard to solicitations other than those in connection with business combination transactions, the proposed amendments would permit all issuers to use the "notice and access" model for all shareholders. The availability of the "notice and access" model would not be determined by any characteristics of either the issuer or the shareholder.

Request for Comment

- Should the "notice and access" model be available with respect to all shareholders of all issuers, or should there be limitations on its use?
- Should the availability of the "notice and access" model depend on the nature of the issuer? For example, should the "notice and access" model be available for all issuers or should its availability depend on the issuer's Securities Act registration statement form eligibility (e.g., Form S-3 eligibility) or the issuer's Exchange Act reporting history (e.g., only those issuers that are current in their Exchange Act reporting)?
- Should the availability of the "notice and access" model depend on the nature of the issuer's investors? For example, should the "notice and access" model be equally available with respect to all shareholders (e.g., institutional versus individual shareholders, more financially sophisticated shareholders versus less financially sophisticated shareholders)?

- Should mutual funds, closed-end funds, business development companies, and other investment companies be permitted to use the "notice and access" model?
- In addressing each of the questions above, commenters are asked to address differences in the degree to which different categories of investors in particular types of issuers have access to, and are prepared to use, the Internet in receiving communications from the issuer.

1. Notice of Internet Availability of Proxy Materials

To notify shareholders of the availability of the proxy materials on the specified Internet Web site, an issuer relying on the proposed "notice and access" model would have to send a Notice of Internet Availability of Proxy Materials to shareholders 30 days or more in advance of the shareholder meeting date or, if no meeting is to be held, 30 days or more in advance of the date that votes, consents, or authorizations may be used to effect the corporate actions to be voted on.[41] The 30-day period is to provide shareholders with sufficient time to receive the Notice, request copies of the materials, if desired, and review the proxy materials prior to voting.[42] We would view the Notice as additional soliciting material that would have to be filed with the Commission pursuant to Rule 14a-6(b) no later than the date it is first sent or given to shareholders.

The proposed Notice of Internet Availability of Proxy Materials and the notice of a shareholder meeting required under state corporation law could be combined together into a single document, unless prohibited by state law. The Notice could not be

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[41] This Notice could be sent electronically under existing permitted methods.

[42] If these proposals are adopted, the Commission staff intends to review its Exchange Act Rule 14a-8 [17 CFR 240.14a-8] shareholder proposal internal processing procedures and

combined with any document other than the state law meeting notice. We believe that it is important for the Notice to be furnished in a way that brings it to each shareholder's attention. Therefore, whether or not combined with the state law meeting notice, the Notice of Internet Availability of Proxy Materials must be sent separately from other types of shareholder communications and may not accompany any materials other than the proxy card and return envelope.[43]

The Notice of Internet Availability of Proxy Materials would have to include the following information in clear and understandable terms:

- A prominent legend in bold-face type that states:

  "Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].[44]

  - **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 shareholders] [proxy card] are available at [Insert Web site 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 that is two weeks or more before the meeting date] to facilitate timely delivery. If you hold your shares through a broker, bank, or other intermediary, you may request delivery of a copy of the proxy**

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timetables, and revise them if necessary, to ensure that issuers are able to comply with the proposed 30-day deadline.

43 As discussed in more detail later in this release, in the case of an intermediary forwarding proxy materials to beneficial owners, a request for voting instructions from the intermediary is the functional equivalent to a proxy card and would be permitted to accompany the Notice.

44 Appropriate changes may be made if the issuer is providing an information statement pursuant to Regulation 14C or seeking to effect a corporate action by written consent.

materials through that intermediary, but it likely will take longer to receive your materials through an intermediary than directly from the company."

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted upon and the issuer's recommendations regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site; and
- (1) A toll-free telephone number, and (2) an e-mail address where the shareholder can request a copy of the proxy materials.

Only the information specified above and, if it is being combined with the state law meeting notice, any information required by state law, could be included in the Notice. To ensure that the Notice is clear and understandable, it would have to meet substantially the same plain English principles as apply to key sections of Securities Act prospectuses pursuant to Securities Act Rule 421(d).[45]

As proposed, an issuer would be permitted to furnish its proxy materials to shareholders by timely furnishing the Notice of Internet Availability of Proxy Materials to them and posting its proxy materials on a publicly accessible Web site. The issuer would have to post its proxy materials on the Web site on or before the time that shareholders receive the Notice. The proxy materials would have to remain accessible on the Web site free of charge through the time of the shareholder meeting to which the

[45] 17 CFR 230.421(d).

proxy materials relate, as discussed below.[46] As noted below, the proposals would impose a separate obligation under the proxy rules on an issuer using the "notice and access" model to provide a copy of the proxy materials to shareholders upon request.[47]

The proposed alternative model would permit an issuer to "household" the Notice of Internet Availability of Proxy Materials pursuant to Rule 14a-3(e),[48] as we propose to amend it. Accordingly, an issuer could send a single copy of the Notice of Internet Availability of Proxy Materials to one or more shareholders residing at the same address if the issuer satisfies all of the Rule 14a-3(e) conditions.[49] The issuer would not have to re-solicit consent from shareholders that already have consented to householding of proxy materials to household the Notice of Internet Availability of Proxy Materials. However, the issuer would have to make available a separate proxy card to each shareholder at the shared address, as required by the current householding rule.[50]

Request for Comment

- Is it appropriate to provide issuers with the alternative of using the "notice and access" model to furnish annual reports and proxy statements or information statements, as proposed? Should we modify the proposed "notice and access" model in any way? If so, how?

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46 See proposed Rule 14a-3(g). If revised proxy materials are required to be furnished to shareholders and the issuer wishes to rely on the proposed alternative model to furnish those revised materials, the issuer would have to furnish another Notice to inform shareholders that those revised proxy materials are available on the specified Web site.

47 See proposed Rule 14a-3(g)(7).

48 17 CFR 240.14a-3(e).

49 If the Notice is sent via e-mail, the householding rules do not permit the sending of only one copy. See Rule 14a-3(e)(1)(ii)(B)(4) [17 CFR 240.14a-3(e)(1)(ii)(B)(4)].

50 Issuers also are required to share a listing of the shareholders that have consented to householding with soliciting shareholders, or afford the benefit of such consents to a soliciting shareholder if the issuer is mailing proxy materials on the shareholder's behalf. See Rule 14a-7(a)(2) [17 CFR 240.14a-7(a)(2)].

- The proposed requirement that an issuer choosing to rely on the "notice and access" model would have to send the Notice of Internet Availability of Proxy Materials to shareholders 30 days or more in advance of the shareholder meeting date is designed to provide sufficient time for a shareholder to request a copy of the proxy materials, if desired, and to review the materials prior to voting. Would the proposed 30-day period achieve this objective? Would a shorter or longer period be more appropriate? If so, please specify the length of the period that would be more appropriate and explain why.
- Are the proposed means by which a shareholder can request a copy of the proxy materials appropriate? Should the issuer's provision of an e-mail address from which shareholders can request copies be optional? Should the rules expressly reference other appropriate means by which shareholders can request a copy of the proxy materials? Should the rules specifically require that the issuer provide shareholders with a postage-paid, pre-addressed reply card to request a copy of the materials?
- Should we permit issuers to household the Notice of Internet Availability of Proxy Materials, as proposed? If not, why not?
- Should we require or permit additional information in the Notice of Internet Availability of Proxy Materials? For example, if the issuer is aware that a proxy contest is being effected, should it be required to indicate in the Notice that such a contest exists? Also, if the issuer recommends a vote in opposition to a shareholder proposal, should it be

required to state that the proxy statement contains the shareholder's statement in support of the proposal? Should we permit the Notice to include a request for the shareholder's affirmative consent to future electronic delivery of the Notice?

- We have proposed that the Notice contain "a clear and impartial identification" of matters to be acted upon. This language mirrors language currently found in Rule 14a-4 related to the proxy card to indicate that such identification should be as brief as it currently is on proxy cards. We also propose that a soliciting party may not include a supporting statement. We have included these proposals because we do not intend the Notice to become a means of persuading shareholders how to vote. Should the rules be more specific regarding the brief and factual nature that we intend for the identification of matters to be acted upon?
- Is the language of the proposed legend appropriate? If not, what should be changed and why?
- Should we permit materials in addition to the proxy card and a return envelope to accompany the Notice of Internet Availability of Proxy Materials? If so, what types of materials should we permit? For investment companies, should we permit a copy of the company's current prospectus or profile to accompany the proxy card and Notice?
- Should we require issuers to apply plain English principles to the Notice of Internet Availability of Proxy Materials, as proposed? If so, should we

apply requirements similar to those in Rule 421(d) or Rule 421(b)[51] under the Securities Act? Should we establish different plain English standards for the Notice? If so, what? Is it unnecessary to apply plain English principles to the Notice, given the brevity of the Notice and factual nature of the information to be included in the Notice?

- Is it appropriate to impose a separate obligation on the issuer under Section 14(a) to provide a copy of the proxy materials to requesting shareholders? If not, are there other options that we should consider to ensure that copies are available to shareholders that desire them? Should an issuer or other soliciting person be permitted to charge a requesting shareholder for a paper copy of the proxy materials?
- Should the proposed rules instead indicate that an issuer does not satisfy its requirement to furnish a proxy or information statement to a shareholder requesting a copy until it provides that copy to the shareholder?
- Should we require the Notice to be filed with the Commission under Rule 14a-6(b), as proposed? Should we create a new EDGAR form type for filing the Notice? Should a special EDGAR form type be created for a Notice regarding the availability of a Schedule 14C information statement? Would it cause confusion if such a Notice is filed under a Regulation 14A rule?

[51] 17 CFR 230.421(b). Rule 421(b) contains plain English requirements that are less stringent than those in Rule 421(d).

- As noted above, the proposed rules would require a second Notice if revised proxy materials are required to be furnished to shareholders and the issuer wishes to rely on the proposed model to do so. Are there other situations in which an issuer should be required to furnish a second Notice?

2. Mechanics of the Proposed "Notice and Access" Model

i. Proxy Card

Under the proposed rules, an issuer would be permitted, but not required, to furnish the proxy card together with the Notice of Internet Availability of Proxy Materials, by means of the same delivery medium.[52] Although the proposed rules would not require the proxy card and the Notice of Internet Availability of Proxy Materials to be furnished together through the same medium, the proxy card would have to either be:

- Furnished together with, and through the same medium as, the Notice of Internet Availability of Proxy Materials; or
- Furnished together with, and through the same medium as, the proxy statement.[53]

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[52] An issuer could use existing permitted methods to furnish both the Notice and the proxy card to shareholders electronically.

[53] The furnishing of the proxy card together with the proxy statement could be accomplished through posting them both on the Internet Web site in accordance with the proposed model.

Request for Comment

- Should the rules, as proposed, permit an issuer to furnish a proxy card and the Notice of Internet Availability of Proxy Materials to shareholders separately and through the use of different media, subject to the proposed limitations? If not, why not?
- Would it be more appropriate to require that the proxy card always be furnished together with and through the same delivery means as the Schedule 14A proxy statement and the annual report to shareholders? For example:
    - If the proxy card was furnished electronically, the proxy statement and annual report to shareholders also would have to be furnished together with the proxy card electronically, regardless of the means by which the Notice of Internet Availability of Proxy Materials was furnished; or
    - If the proxy card was furnished in paper, the proxy statement and annual report to shareholders also would have to be furnished together with the proxy card in paper, regardless of the means by which the Notice of Internet Availability of Proxy Materials was furnished.

  Conversely, should we require that the proxy card always accompany the Notice, regardless of the manner in which the proxy statement and/or the

annual report to shareholders was furnished? Please provide support for your position.

- Exchange Act Rule 14a-6 requires the preliminary filing of the proxy statement and the proxy card.[54] That rule provides an exclusion from the preliminary filing requirement for so-called "plain vanilla" proxy materials that relate to a meeting of security holders at which only a specified list of common matters are to be considered.[55] Those proxy materials may be filed in definitive form only. Would it be more appropriate to require that the proxy card be furnished together with and by the same means as the proxy statement and the annual report to shareholders, regardless of the means by which the Notice of Internet Availability of Proxy Materials is furnished, unless Rule 14a-6 would permit the proxy materials to be filed in definitive form only, or unless the meeting addresses only those matters listed in Rule 14a-6, notwithstanding the exclusion in that rule regarding solicitations in opposition? In either of those situations, would it be appropriate to permit or require the Notice of Internet Availability of Proxy Materials and the proxy card to be furnished

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54 17 CFR 240.14a-6.

55 Exchange Act Rule 14a-6 provides that proxy materials fall within the exclusion if the only matters to be voted on at the meeting are: (1) the election of directors; (2) the election, approval or ratification of accountant(s); (3) a security holder proposal submitted pursuant to Exchange Act Rule 14a-8; (4) the approval or ratification of a plan as defined in Item 402(a)(7)(ii) of Regulation S-K [17 CFR 229.402(a)(7)(ii)]; (5) with respect to an investment company registered under the Investment Company Act of 1940, or a business development company, a proposal to continue, without change, any advisory or other contract or agreement that previously has been the subject of a proxy solicitation for which proxy material was filed with the Commission; and/or (6) with respect to an open-end investment company registered under the Investment Company Act of 1940, a proposal to increase the number of shares authorized to be issued. This

together and by the same means even if the proxy materials and/or the annual report to shareholders were furnished separately and/or through a different means (for example, the Notice of Internet Availability of Proxy Materials and proxy card furnished together in paper and the proxy statement and/or the annual report to shareholders posted on an Internet Web site)?

- Would a shareholder be more or less likely to access and review the proxy statement and annual report before voting if these documents were posted electronically on the Internet Web site, but the proxy card was delivered to shareholders in paper with the Notice?
- Would the proposed model increase issuers' dependency on discretionary broker voting?[56] Would it increase the amount of discretionary voting? Are there circumstances in which brokers or other intermediaries might be uncertain as to their ability to cast discretionary votes (e.g., if a shareholder requests delivery of the proxy materials but has not sent voting instructions 10 days prior to the meeting)? What might be the consequences of such uncertainty? Should there be increased or more prominent disclosure regarding how those discretionary broker votes operate? If so, what added disclosure should be required? Where should such disclosure appear (e.g., on the Notice)?

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56 exclusion from the filing requirement does not apply if the registrant comments upon or refers to a solicitation in opposition in connection with the meeting in its proxy material. See NYSE Rule 452. This rule permits a broker, in specified circumstances, to vote on behalf of a beneficial owner if it has furnished proxy soliciting materials to the beneficial owner and has not received voting instructions.

- Much shareholder voting currently is tabulated through the use of machine readers to identify and verify a shareholder's position. If an issuer posts its proxy card on the Internet Web site along with other proxy materials and permits shareholders to print out the proxy card and return it to the tabulator, should we adopt rules that would require the printout to include bar codes or other identification conducive to the automated processing of votes? Do we need to provide for the ability to include such codes on the Notice?
- If an issuer chooses to post its proxy card on an Internet Web site, what, if any, technological difficulties would this present for voting the proxies? In this regard, please discuss the technology that is available, or may be developed, for posting proxy cards and voting through Internet Web sites. Are additional rule changes necessary to facilitate the use of this technology?
- If an issuer chooses not to send a proxy card with its Notice, should an intermediary be allowed to decide whether to send out a request for voting instructions with the Notice?
- A beneficial owner cannot, in most cases,[57] execute a valid proxy because a beneficial owner is not the holder of record under state law. Instead, a beneficial owner typically submits voting instructions to its intermediary. If an issuer chose to post its proxy card on a Web site with other proxy

[57] A beneficial owner could execute a proxy directly if the intermediary (the holder of record) has appointed the beneficial owner as its proxy with respect to the beneficial owner's shares.

materials, should the rules require the intermediary to establish its own Internet Web site to post its request for voting instructions? Should the proxy materials be placed on that Internet Web site as well? Should the intermediary be required to create its own Notice, or use some other means, to clarify to beneficial owners that they cannot execute the proxy available on the issuer's Web site? Should issuers adopt some means to prevent persons other than holders of record from being able to print or download the proxy card from its Web site?

- If an intermediary creates its own Notice and directs beneficial owners to its own Internet Web site to obtain proxy materials and the request for voting instructions, should the proxy rules be amended to provide that an issuer would not be required to send copies of its Notice to the intermediaries pursuant to Rule 14a-13? When and how should the intermediary notify the issuer that it will create its own Notice?

ii. Internet Web Site Posting of Proxy Materials

All proxy materials to be furnished through the "notice and access" model, other than additional soliciting materials, would have to be posted on a specified Internet Web site by the time the issuer sends the Notice of Internet Availability of Proxy Materials to shareholders. These materials would have to remain on that Web site and be accessible to shareholders through the time of the related shareholder meeting, at no charge to the shareholder. As discussed above, the Notice must clearly identify the Internet Web site address at which the materials are available. The Internet Web site address must be specific enough to lead shareholders directly to the proxy materials, rather than to the

home page or other section of the Web Site on which the proxy materials are posted, so that shareholders do not have to browse the Web site to find the materials. The Internet Web site that an issuer uses to electronically furnish its proxy materials to shareholders must be a publicly accessible Internet Web site other than the Commission's EDGAR Web site.[58]

There are two primary reasons why we propose not to allow use of the EDGAR Web site for this purpose. First, issuers are not required to furnish their glossy annual reports to the Commission using the EDGAR system.[59] Most issuers, therefore, furnish paper copies of these annual reports to the Commission. Even with respect to the issuers that choose to furnish the annual report to the Commission via EDGAR, they generally omit graphics included in the paper version, such as charts and tables, from their EDGAR submissions.[60] Second, it is our view that electronically posted proxy materials should be presented on the Internet Web site in a format that provides a substantially identical version of those materials, including all charts, tables, graphics, and similarly formatted information, as otherwise furnished to shareholders in a different medium such as paper. Currently, the EDGAR system accepts documents only in ASCII[61] or HTML[62] format. Further, documents filed on EDGAR may omit or describe, but generally do not replicate,

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58 Issuers still would be required to file their proxy materials on the Commission's EDGAR system, except that the annual report to shareholders would continue to be furnished to the Commission. This filing, and the furnishing of the annual report to shareholders, would have to be accomplished by the time the issuer posts the materials on the Web site.

59 Our rules permit, but do not require, issuers to submit the annual report to shareholders electronically on EDGAR. See Rule 101(b)(1) of Regulation S-X [17 CFR 232.101(b)(1)].

60 Item 304 of Regulation S-T [17 CFR 232.304] requires a registrant that omits graphic material to provide a narrative description of the omitted material.

61 ASCII stands for "American Standard Code for Information Interchange."

62 HTML stands for "hypertext markup language."

some disclosures, including charts and graphs.[63] As a result, merely hyperlinking from the specified publicly accessible Internet Web site to the filing on the Commission's EDGAR system would not satisfy the requirement.[64]

Request for Comment

- Should the issuer be able to make its proxy materials electronically available only on the EDGAR Web site? If so, how would it make the glossy annual report electronically available to shareholders?
- Should we require issuers following the proposed model to post all of their proxy materials on the Internet Web site so that those materials would be readily accessible in one place? Should we require companies to electronically post on the Web site any soliciting materials that are disseminated prior to furnishing a proxy statement pursuant to Rule 14a-12?[65]
- Should the rules, as proposed, require proxy materials posted on an Internet Web site to be presented in a format that is substantially identical in appearance to the format used in paper copies of the materials? Are there any advantages to requiring or permitting the proxy materials to be posted electronically in HTML or ASCII format (e.g., would this lessen

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63 The EDGAR system accepts only unofficial copies in PDF format.

64 This requirement is therefore different from the provisions regarding Web site posting of Form 10-K annual reports and materials that are incorporated by reference into certain Securities Act registration statement forms.

65 17 CFR 240.14a-12.

concerns about the ability of shareholders to easily download the materials or speed the downloading process)? Should issuers have to post their proxy materials in both PDF and HTML formats?

- Should there be additional specified requirements regarding the Internet Web site posting of information? For example, should the alternative model specifically prohibit or require: pre-registration by shareholders at the Web site before they are granted access to the proxy materials; the issuer's use of third-party Web sites to host the issuer's proxy materials; or the issuer's use of disclaimers of liability or responsibility for the information?[66]
- Should we require annual reports to security holders to be filed, or furnished, on EDGAR?

iii. Period of Reliance on the Proposed Model

The proposed alternative model for making proxy materials electronically available to shareholders would be effective only with respect to a particular meeting. An issuer's choice to rely on the "notice and access" model for one meeting therefore would not affect its determination of whether to rely on the model for subsequent meetings. Similarly, a shareholder that does not request a copy of the proxy materials for one meeting would not be bound by that decision with respect to any other shareholder meeting. Each time that an issuer chooses to rely on the proposed "notice and access" model for a shareholder meeting, it would have to comply anew with all of the

[66] See our existing guidance on such matters (e.g., Release No. 33-8518 (Dec. 22, 2004) [70 FR 1505] and Release No. 33-8128 (Sept. 5, 2002) [67 FR 58480]).

requirements under that model, including delivery of the Notice and the 30-day notice period.

Request for Comment

- Should a shareholder and/or the issuer be bound by the shareholder's initial decision as to whether or not to request a copy of the proxy materials in subsequent proxy seasons? If so, should the issuer be subject to the 30-day notice period regarding delivery of the Notice of Internet Availability of Proxy Materials in subsequent proxy seasons only with respect to shareholders who made an initial decision to request a copy of the proxy materials (with the result that the issuer could, for example, deliver the Notice to other shareholders 25 days rather than 30 days before the new meeting date)?
- Should an adjournment of a shareholder meeting require the issuer to deliver a second Notice of Internet Availability of Proxy Materials? If so, should the issuer have to deliver that Notice to shareholders at least 30 days before the adjourned meeting date?
- Should an issuer be required to deliver an additional Notice of Internet Availability of Proxy Materials to shareholders whenever state law requires the delivery of a shareholder meeting notice?

iv. State Law Notices

State business and corporation laws typically include shareholder meeting requirements, including meeting notice and voting requirements. The proposed rules are not intended to affect any applicable state law requirement concerning the delivery of any

document related to an annual meeting or proxy solicitation. Thus, to the extent that state law requires a notice of shareholder meeting or proxy materials to be delivered by a particular means, the proposed rules would not alter those requirements.[67] For example, if the state in which an issuer is incorporated requires notices of shareholder meetings or proxy materials to be transmitted directly to shareholders in paper, the proposed rules would not provide an issuer with an option to satisfy its state law obligations by posting those materials on an Internet Web site.

Request for Comment

- Would the proposed rules create any problems or conflicts with state law? If so, how should those problems be resolved?

v. Additional Soliciting Materials

Rules 14a-3, 14c-2 and 14c-3, as we propose to amend them, would require an issuer to post any additional soliciting materials on the same Internet Web site on which the proxy materials are posted no later than the day on which the additional soliciting materials are first sent to shareholders or made public.[68] Beyond the posting of the additional soliciting materials on the Internet Web site, issuers would continue to be able to decide which additional means, if any, would be most effective for disseminating these materials (e.g., direct mailing, e-mail, newspaper publication, etc.).

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[67] Issuers typically include the meeting notices required by state law at the beginning of their proxy statements. The proposal would permit any information necessary to meet such a state law requirement to be combined with the Notice.

[68] Exchange Act Rule 14a-6 currently requires an issuer or other soliciting person choosing to deliver additional soliciting materials to file them with the Commission in the same form as the materials that are sent to shareholders, no later than the date that they are first sent or given to shareholders.

Request for Comment

- Under current rules, issuers are required to file with the Commission additional soliciting materials used after furnishing the proxy statement, but issuers are not required to otherwise furnish them to shareholders. We propose that, under the alternative model, these additional materials be filed with us and posted on the specified Internet Web site. Given an issuer's general interest in seeing that such materials are publicized, would such proposed steps be sufficient, or would it also be appropriate to require a public notice of additional soliciting materials, such as a press release?

3. Requests for Copies of Proxy Materials

Although an issuer could satisfy its requirement to furnish proxy materials through the "notice and access" model, it would have a separate requirement under proposed Rule 14a-3(g)(7) to deliver a copy of the proxy materials to a requesting shareholder.[69] Upon receipt of a request from a shareholder for a copy of the proxy materials from the issuer, the issuer would have to send a copy (in paper or by e-mail, as requested) of the proxy materials to the shareholder within two business days after receiving the request, even if the request is made after the date of the shareholder meeting or corporate action to which the proxy materials relate. When the issuer provides a paper copy of the proxy materials in response to a shareholder request, the issuer would be required to use first class mail or other reasonably prompt means of delivery.

[69] See proposed Rule 14a-3(g)(7).

The proposed requirements that an issuer deliver the Notice of Internet Availability of Proxy Materials at least 30 days before the annual meeting date and respond to a request for a copy of the proxy materials within two business days are designed to provide approximately two weeks for a shareholder to request a copy, receive it, and still have approximately two weeks to review the proxy materials and make an informed voting decision. Under the proposals, however, it is incumbent on the shareholder to request a copy in sufficient time to receive the copy of the proxy materials, review that copy, and vote.

Under the proposals, the shareholder may request its intermediary to obtain and forward a copy of the proxy materials from the issuer on the shareholder's behalf. These procedures are discussed more fully in Section III.B of this release concerning duties of intermediaries.

Request for Comment

- As proposed, it would be the responsibility of a shareholder desiring a copy of the proxy materials to request one in sufficient time to receive the materials before the meeting. Is this appropriate? Should the Notice of Internet Availability of Proxy Materials state a date by which a shareholder desiring a copy must request it a specified number of days in advance of the meeting date (e.g., a shareholder must request a copy no later than 10 or 15 days before the meeting date)? If so, how far in advance of the meeting date should the shareholder have to request a copy? Establishing a deadline by which shareholders must request copies might increase the likelihood that a shareholder will receive materials before the meeting, but

also would reduce the amount of time that shareholders have to make the request. Which of these competing interests, if any, is more important?

- Alternatively, should the proposed rules mandate a minimum period of time after receipt of the Notice of Internet Availability of Proxy Materials during which a shareholder could request a copy of the proxy materials? If so, how long should this period be? Should that period be 15 days, 10 days, or a shorter or longer period?
- Should an issuer have to respond to a request for a copy of the proxy materials made after the annual meeting date, as proposed? If not, why not? If so, should there be any limit on the period after the annual meeting date during which an issuer must respond to a request for a copy?
- Is the proposed two-business-day requirement an appropriate period of time for the issuer to respond to a shareholder's request for a copy of the proxy materials? Should the issuer be required to do so in one business day? Would the issuer need more time, such as three or four business days? If a longer period of time is provided, should the 30-day minimum period between the sending of the Notice and the meeting also be lengthened? If not, why not?
- Is the proposed requirement that an issuer provide requested paper copies by first class mail or other reasonably prompt means appropriate? Should an issuer have to provide the requested paper copy by more expedited means, such as overnight or two-day delivery? Should an issuer have

more time to respond to requests for copies if it sends the Notice more than 30 days prior to the meeting?

- Should the proposed rules provide a mechanism for a shareholder that requests a copy of the proxy materials to indicate that he or she wants to continue receiving a copy of the issuer's proxy materials for every subsequent meeting where the issuer relies on the "notice and access" model until the shareholder subsequently advises the issuer otherwise? For example, should the rules require an issuer and/or intermediary to develop a list of shareholders who always want their materials in paper? If so, why? If not, why not? How would such a system work?
- At the time the proxy materials are being prepared and printed, the issuer is unlikely to have a reliable estimate regarding the number of shareholders that will request copies of the proxy materials, particularly in the issuer's first year of reliance on the "notice and access" model. The issuer would have to maintain or prepare a sufficient supply of paper copies to satisfy all shareholder requests for paper copies. Thus, at least in the first year, when the issuer does not have previous experience with this model, it may have to print an excessive number of paper copies. Should we consider any procedures to mitigate this possibility? If so, what types of procedures would be appropriate?

B. The Role of Intermediaries

1. Background

The process of distributing proxy materials to beneficial owners is considerably more complicated than direct delivery of the materials by an issuer to its record holders.[70] The proxy rules contain three rules, Exchange Act Rule 14a-13, Rule 14b-1 and Rule 14b-2, referred to collectively as the "shareholder communications rules," that impose obligations on issuers and intermediaries to ensure that beneficial owners receive proxy materials and are given the opportunity to vote. Basically, these rules require issuers to send their proxy materials to intermediaries for forwarding to the beneficial owners.

Exchange Act Rule 14b-1 sets forth the obligations of registered brokers and dealers in connection with the prompt forwarding of certain issuer communications to beneficial owners. Rule 14b-2 sets forth similar obligations of banks, associations, and other entities that exercise fiduciary powers. Under these rules, upon request by the issuer, these intermediaries are required to indicate to the issuer within seven business days of receiving the request:

- the approximate number of customers of the intermediary that are beneficial owners of the issuer that are held of record by the intermediary;
- if the issuer has indicated pursuant to Rule 14a-13(a)[71] or 14c-7(a)[72] that it will distribute the annual report to security holders to beneficial owners who have not objected to disclosure to the issuer of their names, addresses,

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70 The discussion in this section of "beneficial owners" refers to beneficial owners whose names and addresses do not appear directly in issuers' stock registers because they hold their stock through a broker, bank, trustee, or similar intermediary.

71 17 CFR 240.14a-13(a).

72 17 CFR 240.14c-7(a).

and securities positions, the number of beneficial owners who have objected to such disclosure;[73] and

- the identity of any agents of the intermediary acting on the intermediary's behalf to fulfill its obligations under the rule.

Pursuant to Rules 14b-1 and 14b-2, within five business days of receiving proxy materials from the issuer, the intermediary must forward the materials to its beneficial owner customers who will not receive those materials directly from the issuer pursuant to Rule 14a-13(c)[74] or Rule 14c-7(c).[75] Beneficial owners typically do not execute proxy cards because, under most state laws, only the record owner (i.e., the intermediary) has the authority to vote on matters before the shareholders. As a result, intermediaries forward the proxy materials along with a request for voting instructions. The request for voting instructions is similar to the proxy card, but is prepared by the intermediary instead of the issuer and the beneficial owner returns his or her voting instructions to the intermediary rather than to the issuer or independent vote tabulator. The intermediary is required to vote the beneficial owner's shares in accordance with the owner's voting instructions when formally executing the proxy card.[76] The intermediary then returns the proxy card to the issuer or independent vote tabulator.

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[73] In the case of bank intermediaries, Rule 14b-2 requires a bank to disclose the number of customers with accounts opened on or before December 28, 1986, who gave affirmative consent to disclosure to the issuer and the number of customers with accounts opened after December 28, 1986, who did not object to such disclosure.

[74] 17 CFR 240.14a-13(c).

[75] 17 CFR 240.14c-7(c).

[76] See Rule 14b-2(b)(3) [17 CFR 240.14b-2(b)(3)].

2. Proposed Amendments

Under the proposed amendments, an intermediary may follow the "notice and access" model only if the issuer requests it to do so and, in such cases, must follow that model. The proposed amendments would revise Rules 14b-1 and 14b-2 to require brokers, banks, and similar intermediaries, at the request of an issuer, to furnish proxy materials, including the Notice of Internet Availability of Proxy Materials, to beneficial owners of the issuer's securities based on the "notice and access" model.[77]

An issuer or other soliciting person relying on the "notice and access" model would have to deliver a sufficient number of copies of its Notice of Internet Availability of Proxy Materials to intermediaries at least five business days prior to the proposed deadline for furnishing the Notice of Internet Availability of Proxy Materials.[78] Thereafter, the process for forwarding the Notice by intermediaries to their beneficial owner customers would be similar to the current process by which intermediaries forward proxy materials to beneficial owners. The intermediary would be required to forward the Notice to beneficial owners within five business days after receipt of the Notice from the issuer or other soliciting person.

At its option, the intermediary may either include its request for voting instructions with the Notice of Internet Availability of Proxy Materials being furnished to

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[77] See proposed amendments to Exchange Act Rules 14b-1 and 14b-2. If an issuer does not request intermediaries to follow the proposed "notice and access" model, an intermediary could, on its own initiative, continue to rely on any existing permitted method of furnishing proxy materials to its beneficial owner customers.

[78] For issuers, this deadline would be 30 days prior to the shareholder meeting. For soliciting persons other than the issuer, this deadline would be the later of 30 days prior to the shareholder meeting or 10 days after the registrant first sends out its proxy solicitation.

the beneficial owners or post that request on an Internet Web site.[79] If the intermediary chooses to post the request for voting instructions on its own Web site, the intermediary would need to post the issuer's proxy statement, and all other proxy-related material from the issuer's Web site other than the proxy card, on its own Web site so that shareholders would have access to those materials when they access the request for voting instructions. The intermediary also would need to direct beneficial owners to that Web site rather than the issuer's Web site. It could do so either by supplementing the issuer's Notice to inform beneficial owners how to access the Web site or by replacing the issuer's Notice with its own Notice. If the intermediary replaces the issuer's Notice, it would have to make sure that all of the information required to appear in the Notice is included in its own Notice, with appropriate modifications (e.g., references to the request for voting instructions rather than the proxy card). The intermediary would need to make it clear to its beneficial owner customers in its own Notice or in its supplement to the issuer's Notice that they should return voting instructions to the intermediary, rather than execute a proxy card and return it to the issuer or tabulator.

Conversely, the same version of the Notice of Internet Availability of Proxy Materials generally could be delivered to both registered holders and beneficial owners, if the proxy card is delivered together with the Notice to registered holders and a request for voting instructions is delivered together with the Notice to beneficial owners. This would avoid the need for the intermediary to either prepare its own tailored Notice for delivery to its beneficial owner customers, or supplement the issuer's Notice.

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[79] See proposed amendments to Exchange Act Rules 14b-1 and 14b-2.

In summary, the proposed amendments would impose the following responsibilities on intermediaries that are requested to follow the "notice and access" model:

- The intermediary would have to forward the issuer's Notice of Internet Availability of Proxy Materials to beneficial owners, unless it prepares its own Notice;
- If the issuer posts its proxy card on the Web site, the intermediary would have to supplement the issuer's Notice of Internet Availability of Proxy Materials or create and send its own Notice to clarify how beneficial owners can return their voting instructions;
- If the intermediary chooses to post its request for voting instructions on an Internet Web site, it would have to maintain an Internet Web site for posting that request for voting instructions, as well as the issuer's proxy materials, other than the proxy card;
- If the intermediary chooses not to post its request for voting instructions on an Internet Web site, it would have to prepare and send, with the Notice, a copy of the intermediary's request for voting instructions; and
- The intermediary would have to request and forward a copy of the proxy materials from the issuer in response to requests from its beneficial shareholder customers.

Under the proposed "notice and access" model, a beneficial owner could request delivery of a copy of the proxy materials from either the company or the intermediary, at the beneficial owner's option. A concern that may stem from a shareholder requesting

the materials directly from the issuer is that a beneficial owner who has objected to, or not consented to, disclosure of his or her identity to the issuer (commonly referred to as an "objecting beneficial owner" or "OBO") would have to reveal his or her identity to the issuer in connection with a request for a copy of the proxy materials. Therefore, under the proposed rules, a beneficial owner could request a copy of the proxy materials from his or her intermediary, rather than the issuer. If a beneficial owner requests his or her intermediary to obtain copies of the materials, the intermediary would be required to request such copies from the issuer within two business days of receiving the request from the beneficial owner. The intermediary also would have to forward the materials to the beneficial owners within two days after receipt from the issuer. As proposed, the intermediary would be allowed to charge the issuer the cost of forwarding such materials.

Request for Comment

- Should the proposed alternative model be limited to the furnishing of proxy materials by issuers to their record holders? Is it appropriate to allow the issuer to compel the intermediary to undertake the obligations that would be required under the proposed model? Are there practical problems with an issuer's reliance on the proposed "notice and access" model in connection with the furnishing of proxy materials and requests for voting instructions to beneficial owners?
- Should intermediaries or their agents be allowed to use the "notice and access" model regardless of whether the issuer chooses to furnish documents to its record shareholders in reliance on the proposed model?

If so, should the issuer have to supply copies of the proxy materials to intermediaries for forwarding to beneficial owners who request them?

- Should intermediaries be able to use e-mail addresses that they have obtained from their customers for electronic delivery of the Notice of Internet Availability of Proxy Materials even if their customers have not specifically consented to the electronic delivery of proxy materials?
- Is the proposed requirement that the issuer or soliciting party deliver a sufficient number of copies of its Notice of Internet Availability of Proxy Materials to intermediaries at least five business days prior to the proposed deadline for furnishing the Notice of Internet Availability of Proxy Materials appropriate? Would this proposed requirement present special difficulties for a soliciting person other than the issuer, given the differences in the timing requirements for delivery of the Notice if the soliciting person is reacting to the issuer's solicitation?
- Is it appropriate to require the issuer to send copies of the proxy materials to beneficial owners who request copies directly from the issuer? Should the intermediary be required to estimate the number of copies that it is likely to need to satisfy requests from its beneficial owner customers? If so, would the intermediary have a reasonable basis to make such an estimate? Would the flow of copies from issuer to intermediary to beneficial owner be overly time-consuming? Should intermediaries be allotted less time to forward e-mail copies of the proxy materials?

- The issuer might be able to trace the identity of anyone accessing the Web site on which the proxy materials are posted through the use of "cookies" or other technology. Should the rules require that the proxy materials to be accessed by beneficial owners be posted on a Web site that protects the confidentiality of an OBO's identity? If so, should this Web site be separate from the issuer's Web site? Are there other ways to protect the identities of OBOs without placing an excessive burden on issuers or intermediaries?
- Should issuers be permitted to request proof of a person's status as a beneficial owner when they receive requests for copies of their proxy materials? Should we require issuers to provide copies to all persons requesting copies? Keeping in mind that only shareholders would receive the Notice, is there a possibility that the issuer would be unduly burdened by excessive requests for copies?
- Is there a concern that beneficial owners may erroneously attempt to execute a proxy card if the issuer posts its proxy card on the same Internet Web site as the proxy statement? Should the rules separate the voting mechanisms for registered holders and beneficial owners to prevent confusion? Should we require intermediaries to establish their own Web sites to post proxy materials to help prevent any such confusion? Is it likely that intermediaries or third parties will develop Web sites to facilitate use of the "notice and access" model?

- Is it appropriate to permit intermediaries to charge the issuer for forwarding copies? If so, what would be an appropriate fee? Should the beneficial owner desiring to maintain anonymity bear this cost? Should the beneficial owner's intermediary instead bear this cost? Is it reasonable for intermediaries (or their agents) to continue to collect an incentive fee from issuers for each set of proxy materials that they deliver electronically rather than in paper if the Commission adopts the proposed "notice and access model"?[80] Should the incentive fee be a one-time charge (assessed only the first time a paper copy is suppressed) or a recurring fee?
- Should the self-regulatory organizations establish new fees that an intermediary may charge as reasonable for services rendered to an issuer when the issuer relies on the proposed "notice and access" model, if adopted? If so, what type of fee schedule would be appropriate?

C. Proposed "Notice and Access" Model for Furnishing of Internet Proxy Materials by Soliciting Persons Other Than the Issuer

Under the proposed rules, a person other than the issuer who undertakes his or her own proxy solicitation also would be able to rely on the proposed "notice and access"

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[80] For example, the NYSE and some other self-regulatory organizations maintain a schedule of fees that issuers must pay for forwarding of their proxy materials by their member brokers to the brokers' beneficial owner customers. As an example, the NYSE's schedule includes an incentive fee that brokers may collect for eliminating the need to send materials in paper format. For proxy materials, this fee is $0.25 per account for issuers whose shares are held in at least 200,000 beneficial owners' accounts and $0.50 per account for issuers whose shares are held in fewer than 200,000 beneficial owners' accounts. See NYSE Rule 451. Other self-regulatory organizations have adopted similar rules.

model.[81] This situation typically would occur in the context of a proxy contest between a shareholder or other party and management. We anticipate that the proposed rules, if adopted, could provide an alternative that may significantly decrease the cost of a proxy solicitation, given the potential decrease in printing and mailing costs. We also believe that the same arguments that support modifying the existing framework to facilitate an alternative dissemination option for issuers apply equally to soliciting persons other than issuers. There are, however, several important differences in the way the proposed rules would affect soliciting persons other than the issuer that are described below.

Request for Comment

- Should soliciting persons other than the issuer be able to take advantage of the "notice and access" model? Why or why not?

1. Mechanics of Proxy Solicitations by Persons Other Than the Issuer

The current proxy rules treat persons other than the issuer differently from the issuer in a significant respect regarding the provision of information to shareholders about intended corporate actions. Specifically, an issuer must furnish either a proxy statement, if the issuer is soliciting proxies or consents from shareholders, or an information statement pursuant to Section 14(c) of the Exchange Act[82] regarding shareholder meetings where corporate action is to be taken but no proxy authority or consent is sought.

Soliciting persons other than the issuer are not subject to the requirements of Section 14(c). Thus, unlike the issuer, they have no obligation to furnish an information statement to persons from whom no proxy authority is sought. Soliciting persons may

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[81] See proposed Rule 14a-3(g)(8).

[82] 15 U.S.C. 78n(c).

use this mechanism to limit the cost of a solicitation by soliciting proxies only from a select group of shareholders with large holdings. These distinctions from the manner in which issuers must conduct proxy solicitations lead to a variety of possible ways that a person other than the issuer may conduct a proxy contest, some of which are not available to an issuer.

As proposed, a soliciting person other than the issuer may follow the same procedures as the issuer. In particular, it may furnish a Notice and post the proxy statement on an Internet Web site. It also would have the choice of either furnishing the proxy card with the Notice or posting the proxy card with the proxy statement. However, because such a person is not obligated to solicit everyone, it may revise its Notice to clearly explain that it will not provide a copy to any shareholder that requests a copy. In this case, the Notice must clearly state that the person is soliciting only shareholders who are willing to access the proxy materials via the Internet Web site posting.

A soliciting person other than the issuer also could choose to not furnish a Notice to any shareholder. Rather, it may simply post its proxy materials, including the proxy card, on a publicly accessible Internet Web site and direct persons to that Web site by means of communications under Rule 14a-12. Under this scenario, all persons accessing the proxy card also would have accessed the Internet Web site on which the proxy statement was located.

In summary, if we were to adopt the proposed alternative model, a person other than the issuer could conduct a proxy contest in the following manners:

- Furnish a proxy statement and proxy card under existing permitted methods;

- Furnish a Notice and proxy card together, and through the same medium, and post the proxy statement on a Web site;
- Furnish a Notice and post the proxy statement and proxy card together on a Web site; or
- Do not furnish a Notice and post the proxy statement and proxy card together on a Web site.

A soliciting person may use any combination of these options and may rely on Rule 14a-12 to issue soliciting materials prior to furnishing a proxy statement under any of these scenarios. Under the last three options, a soliciting person other than the issuer may either undertake to furnish shareholders with copies upon request, or it may clearly indicate in the Notice, or in the last case, on the Internet Web site, that it will not provide copies upon request and that the solicitation is conditioned on a shareholder accepting the proxy materials via Internet Web site access.

As noted above, such person may effect a solicitation prior to furnishing a proxy statement pursuant to Rule 14a-12. However, if a soliciting person uses a medium such as a press release under Rule 14a-12, it would incur an obligation to furnish a proxy statement at the time a proxy card is provided. In view of the fact that such a person is not obligated to solicit all persons receiving that communication, delivery of a Notice would be required only if the soliciting person sends a proxy card to a shareholder that is not accompanied by a proxy statement. With respect to shareholders not receiving a proxy card from the soliciting person, but who are directed to the Internet Web site by the Rule 14a-12 communication and choose to execute a proxy in favor of the soliciting person, the proxy statement would have accompanied, or preceded, the proxy card. A

person receiving such a request from a shareholder may assume that the shareholder has had access to the proxy statement.[83] Thus, a soliciting person, other than the issuer, could effect a widespread solicitation of proxies without delivering any Notices at all, provided that it does not furnish or provide a means of obtaining a proxy card except on the Web site where its proxy materials are posted.

Request for Comment

- Should the rules, as proposed, permit a soliciting person to furnish a proxy card and the Notice of Internet Availability of Proxy Materials to shareholders separately and through the use of different media, subject to the proposed limitations? If not, why not?
- Would it be more appropriate to require that the proxy card always be furnished together with and through the same delivery means as the Schedule 14A proxy statement? For example:
    - If the proxy card was furnished electronically, the proxy statement also would have to be furnished together with the proxy card electronically, regardless of the means by which the Notice of Internet Availability of Proxy Materials was furnished; or
    - If the proxy card was furnished in paper, the proxy statement also would have to be furnished together with the proxy card in paper,

[83] However, if the press release contains information on how to obtain a proxy card by a means other than at the Web site where the proxy statement will be located along with the proxy card, the soliciting person must ensure that a shareholder is furnished with the proxy statement concurrently, either by furnishing the proxy statement with the proxy card or by posting the proxy statement on a publicly accessible Web site and furnishing the Notice of Internet Availability of Proxy Materials with the proxy card.

regardless of the means by which the Notice of Internet Availability of Proxy Materials was furnished.

Conversely, should we require that the proxy card always accompany the Notice, regardless of the manner in which the proxy statement was furnished? Please provide support for your position.

- Would it be more appropriate to require that the proxy card be furnished together with and by the same means as the proxy statement, regardless of the means by which the Notice of Internet Availability of Proxy Materials is furnished, unless Rule 14a-6 would permit the proxy materials to be filed in definitive form only, or unless the meeting addresses only those matters listed in Rule 14a-6, notwithstanding the exclusion in that rule regarding solicitations in opposition? In either of those situations, would it be appropriate to permit or require the Notice of Internet Availability of Proxy Materials and the proxy card to be furnished together and by the same means even if the proxy materials were furnished separately and/or through a different means (for example, the Notice of Internet Availability of Proxy Materials and proxy card furnished together in paper and the proxy statement posted on an Internet Web site)?
- Under the proposed model, how would a shareholder that is not solicited directly but goes to the soliciting person's Web site vote his or her shares? Should the soliciting person be required, upon request from such shareholder, to provide the shareholder with a means for voting, for example, by providing the shareholder with a personal identification

number or similar unique identifier and form to submit a proxy or voting instructions? Should we adopt rules addressing such voting systems to promote more accurate voting results?

- Under certain exchange rules,[84] a broker is precluded from exercising its voting discretion for shares for which no voting instructions are received (commonly referred to as "broker non-votes") on several types of non-routine matters listed in the rules. Matters that are the subject of a contest are considered non-routine. Staff at the exchanges determine whether a contest exists for purposes of the discretionary broker voting rule based on exchange rules and interpretations. For example, a NYSE interpretation suggests that a person other than the issuer must solicit at least 50% of the issuer's shareholders for a contest to exist under its discretionary broker voting rule. Should the widespread accessibility of a soliciting person's proxy statement and card affect current exchange interpretations?
- Should the proposed rules permit, as the current rules do, a soliciting person other than the issuer to limit its proxy solicitation to shareholders that are willing to access the proxy materials electronically, thus eliminating any need for the soliciting shareholder to send copies? Is this concept of a conditional proxy solicitation feasible? Should such conditional solicitations be limited only to instances where the soliciting person posts the proxy card on an Internet Web site and does not send a

[84] See, e.g., NYSE Rule 452.

copy of the proxy card with the Notice, to ensure that only shareholders who can access the proxy materials can vote?

2. Timeframe for Sending Notice of Internet Availability of Proxy Materials

Currently, soliciting persons generally have no required timeframe regarding the furnishing of proxy materials other than the time necessary to ensure staff review of those materials.[85] As we stated earlier, the proposed 30-day timeframe for the Notice is designed to provide sufficient time for a shareholder to request a copy of the proxy materials, receive that copy, and review it before voting. However, because soliciting persons other than the issuer need not furnish proxy materials to all shareholders, the 30-day timeframe is unnecessary if that soliciting person is conducting an electronic-only solicitation. Thus, provided that the soliciting person complies with all other proxy timing rules, it need not comply with the 30-day timeframe requirement in order to effect an electronic-only proxy solicitation.

If the soliciting person chooses to undertake to provide copies of the proxy materials to shareholders upon request, shareholders should have sufficient time to request, receive, and review those materials prior to voting. However, a solicitation in opposition to the issuer's proposals at a shareholder meeting often is initiated in response to the issuer's proxy statement. As a result, we believe that it may be unfair to impose the same 30-day timeframe on soliciting persons other than the issuer. Therefore, we are proposing that a soliciting person other than the issuer that is following the "notice and access" model, but not conducting an electronic-only solicitation, must send out its

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[85] An exception to this rule applies when a company is incorporating information by reference from another filing in a joint proxy statement-prospectus, in which case the

Notice prior to the later of (1) 30 days prior to the meeting; or (2) ten days after the issuer first sends out its proxy solicitation.

Request for Comment

- A proxy contest often involves a number of communications from both the issuer and the other soliciting person and time may be at a premium in such situations. Would the proposed model provide sufficient time for shareholders who desire copies to obtain materials from a soliciting person other than the issuer in the context of a proxy contest? We note that it would take more time for the delivery of proxy materials to beneficial owners through intermediaries than for delivery of the materials directly by the soliciting person to record owners.
- Should a soliciting person other than the issuer conducting an electronic-only solicitation be required to comply with a specified timeframe for sending its materials? If so, what should that timeframe be?
- Should a soliciting person other than the issuer that is following the "notice and access" model, but not conducting an electronic-only solicitation, be required to provide the materials to solicited shareholders within the proposed timeframe? Would ten days after the issuer first sends its solicitation be sufficient time for a soliciting person other than the issuer to prepare its soliciting materials? Would a shorter period, such as five days or five business days, be sufficient?

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prospectus must be sent to shareholders no later than 20 business days prior to the meeting. See General Instruction A.2 to Form S-4.

3. Content of the Notice of Internet Availability of Proxy Materials of a Soliciting Person Other Than the Issuer

The content of the Notice of Internet Availability of Proxy Materials sent by a soliciting person other than the issuer could be different from that of the issuer. First, if a soliciting person other than the issuer chooses to conduct an electronic-only solicitation, it need not provide instructions on how to obtain a copy. In lieu of such disclosure, the legend on the Notice must clearly state that the proxy solicitation is contingent on the shareholder being willing to accept access to the proxy statement electronically.

Also, a solicitation in opposition may be launched before the issuer has sent its own proxy statement. Thus, the full agenda may not be known at the time that the opposing person sends its Notice. In such a case, the person soliciting in opposition would be required to include the agenda items in the Notice only to the extent known.

Finally, there may be circumstances in which the person soliciting in opposition may provide a partial proxy card, that is, a proxy card soliciting proxy authority only for the agenda items in which the soliciting person is interested. Typically, such a proxy would revoke any previous proxy granted and, as is the case today, the shareholder may lose his or her ability to vote on matters other than those presented on the soliciting person's card. To prevent a shareholder from unknowingly invalidating his or her vote on those other matters, a person soliciting in opposition that sends such a card would be required to indicate clearly on its proxy card that execution of that card may invalidate the shareholder's earlier vote on the other matters reflected on the issuer's proxy card.

Request for Comment

- Are there other instances when the Notice of a soliciting person other than the issuer should differ from the issuer's Notice?

- Should the rule require specific language that a soliciting person other than the issuer must insert in its Notice under these conditions? If so, what language would be appropriate?
- If the soliciting person is not aware of the full agenda for the meeting when it sends its Notice, should it be required to disclose on the Notice that the proxy card and Notice may not contain all matters to be acted upon? Should we require such a soliciting person to amend its proxy card to contain all items in the agenda?
- Is there another way to ensure that shareholders learn that executing a partial proxy card would invalidate their votes on other matters? If so, what additional requirements would be necessary?

4. Shareholder Lists and the Furnishing of Proxy Materials by the Issuer

Exchange Act Rule 14a-7 sets forth the obligation of issuers either to provide a shareholder list to a requesting shareholder or to send the shareholder's proxy materials on the shareholder's behalf. That rule provides that the issuer has the option to provide the list or send the shareholder's materials, except when the issuer is soliciting proxies in connection with a going-private transaction or a roll-up transaction.[86] As proposed, if the issuer is providing its shareholder list to a soliciting person, the issuer would be required to include any electronic delivery information that it already has obtained from shareholders, including information about shareholders that have affirmatively consented

[86] See Exchange Act Rule 14a-7(b) [17 CFR 240.14a-7(b)]. If the issuer is soliciting proxies in connection with a going-private transaction or a roll-up transaction, the shareholder has the option to request the shareholder list or have the issuer send its materials.

to electronic delivery as well as shareholders that have requested copies of the issuer's proxy materials if the issuer is relying on the "notice and access" model.[87]

If the issuer is sending the soliciting person's proxy materials, the proposed amendments would require the issuer to share the benefit of any affirmative consent to electronic delivery of proxy statements that it has obtained from shareholders. If the soliciting person requests that the issuer follow the "notice and access" model, the soliciting person would be responsible for providing the issuer with copies of its proxy card and/or Notice of Internet Availability of Proxy Materials, if the soliciting person chooses to deliver the proxy card and/or the Notice in paper. In that case, the issuer would have to send the soliciting person's proxy card and/or Notice of Internet Availability of Proxy Materials with reasonable promptness after receipt from the soliciting person. An issuer could not decide on its own whether to send a soliciting person's materials in paper or electronically.

Request for Comment

- Under the "notice and access" model, should the issuer be required to share affirmative consents to electronic delivery that the issuer already has obtained from its shareholders with persons conducting their own proxy solicitations? Under the "notice and access" model, should the issuer be required to share information with soliciting persons regarding shareholders who have requested copies?
- If the issuer chooses to send proxy materials on behalf of a soliciting person, should the soliciting person have the right to direct the issuer to

[87] See proposed Note 3 to Exchange Act Rule 14a-7.

comply with a particular means of doing so, such as the "notice and access" model?

- If the issuer relied on the "notice and access" model in a previous proxy season, should it be required to share information with a soliciting person about the number of shareholders who requested copies in a past season?

5 The Role of Intermediaries

Intermediaries generally furnish proxy materials to beneficial owners on behalf of soliciting persons other than the issuer under the conditions set forth in Exchange Act Rules 14b-1 and 14b-2.[88] Although intermediaries historically have transmitted a soliciting person's proxy materials in reliance on the procedures set forth in Rules 14b-1 and 14b-2, these two rules do not explicitly address an intermediary's obligations with respect to the forwarding of a soliciting person's proxy materials. The proposed amendments would clarify that intermediaries are obligated to send proxy materials on behalf of soliciting persons other than the issuer.

Request for Comment

- Should we revise Rules 14b-1 and 14b-2 to explicitly require intermediaries to send proxy or other soliciting materials on behalf of soliciting persons other than issuers? Are such revisions necessary or appropriate even if we do not adopt the "notice and access" proposal?

D. Business Combination Transactions

We are proposing that the "notice and access" model not be available with regard to proxy materials related to a business combination transaction, which includes

[88] See Randall S. Thomas & Catherine T. Dixon, Aranow & Einhorn on Proxy Contests for Corporate Control, at §8.03(C) (3d ed. 2001).

transactions covered by Rule 165 under the Securities Act,[89] as well as transactions for cash consideration requiring disclosure under Item 14 of Schedule 14A. Business combination transactions constitute highly extraordinary events for some companies and frequently involve an offering of securities that must be registered under the Securities Act and require delivery of the prospectus.[90] They also typically involve proxy statements of considerable length and complexity. Thus, we are proposing that the rules would not apply in connection with a business combination transaction.

Request for Comment

- Should the proposed "notice and access" model be available for transactions involving business combination transactions? Why or why not?
- Business combination transactions sometimes are the object of a proxy contest. Would this prohibition unnecessarily harm the ability of persons opposed to the transaction to undertake an efficient contest?
- Exchange Act Rule 13e-3[91] imposes certain requirements on issuers that are undertaking what are commonly referred to as "going-private transactions" or "Rule 13e-3 transactions." Should the "notice and access" model not be available with regard to proxy materials related to those transactions?

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89 17 CFR 230.165. This prohibition would extend to persons who solicit proxies that are not parties to the transaction and any proxy materials in opposition to the transaction.

90 Such transactions were excluded from the provisions in our securities offering reform initiative. See Release No. 33-8591 (July 19, 2005) [70 FR 44271].

91 17 CFR 240.13e-3.

- Should the "notice and access" model not be available in other types of transactions? For example, should it apply to roll-up transactions, liquidations of assets, or reverse stock splits?
- Are there other matters to which the proposed "notice and access" model should not apply? For registered investment companies, are there any types of matters (e.g., changes in investment adviser or management and distribution fee increases) to which the proposed model should not apply?

IV. Conforming and Correcting Revisions to the Proxy Rules

The proposed rules reflect numerous amendments to terms used in the current proxy rules to explicitly accomodate the "notice and access" model. The changes are as follows:

- We propose to substitute the term "send" and other tenses of the verb for the term "mail" and its other tenses to avoid any misunderstanding that "mail" means only paper delivery through the U.S. mail system.[92]
- We propose to clarify that the term "address" includes an electronic mail address.[93]

Furthermore, we propose to clarify the use of the term "annual report(s)" in the proxy rules by changing all references to either "annual report(s) to security holders" or "annual report(s) on Form 10-K and/or Form 10-KSB," as appropriate.[94] Finally, we are

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92 Proposed Rules 14a-4(c)(1), 14a-8(e)(2), 14a-8(e)(3), 14a-8(m)(3), 14a-13(a)(5), 14a-13(c), 14b-1(c)(2)(ii), 14b-2(c)(2)(ii), 14c-5(a) and 14c-7(a)(5). Also Note 2 to proposed Rule 14a-13(a), Instruction 2 to paragraph (d)(2)(ii)(L) of Item 7 of proposed Rule 14a-101, Note 2 to proposed Rule 14c-7(a) and Instruction 1 to Item 4 of proposed Rule 14c-101.

93 Proposed Rules 14a-7(f), 14a-13(e), 14b-1(a)(2) and 14b-2(a)(4).

94 Proposed Rules 14a-3(b)(1), 14a-3(b)(10), 14a-3(b)(13), 14a-3(e)(1)(i), 14a-3(e)(1)(i)(A), 14a-3(e)(1)(i)(B), 14a-3(e)(1)(i)(C), 14a-3(e)(1)(i)(E), 14a-3(e)(1)(ii)(A),

proposing to update Rule 14a-2 and Forms 10-Q, 10-QSB, 10-K, 10-KSB, and N-SAR to update outdated references to Exchange Act Rule 14a-11, which the Commission rescinded in 1999.[95]

V. Paperwork Reduction Act

A. Background

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[96] We are submitting the proposals to the Office of Management and Budget for review in accordance with the PRA.[97] The proposals would not affect existing collections of information. The proposed Notice of Internet Availability of Proxy Materials, if adopted, would constitute a new collection of information under the Exchange Act to be used by issuers and other persons soliciting proxies to provide notice to shareholders that they are relying on the "notice and access" model with regard to the proxy materials referenced in the Notice.

The rules regarding the Notice would be adopted pursuant to the Exchange Act. The hours and costs associated with preparing, filing, and sending the Notice would constitute reporting and cost burdens imposed by that collection of information. An

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14a-3(e)(1)(ii)(B)(2), 14a-3(e)(1)(ii)(B)(2)(ii), 14a-3(e)(1)(ii)(B)(2)(iii), 14a-3(e)(1)(ii)(B)(3), 14a-3(e)(1)(iii), 14a-3(e)(2), 14a-3(e)(2)(i), 14a-3(e)(2)(ii), 14a-12(c)(1), 14b-1(b)(2), 14b-1(c)(2)(ii), 14b-1(c)(3), 14b-2(b)(3), 14b-2(c)(2)(ii), 14b-2(c)(4), 14c-2(a)(2), 14c-3(a)(1) and 14c-3(c). Also Note to paragraph (e)(1)(i)(B) of proposed Rule 14a-3, Note D(3) to proposed Rule 14a-101, Note G(1) to proposed Rule 14a-101, Instruction 1 to paragraph (d)(2)(ii)(L) of Item 7 of proposed Rule 14a-101, paragraph (e)(2) of Item 14 of proposed Rule 14a-101, Item 23 of proposed Rule 14a-101, paragraph (a), (b), (c) and (d) of Item 23 to proposed Rule 14a-101, Note 1 to paragraph (b)(2) of proposed Rule 14b-1, Note 1 to paragraph (b)(3) of proposed Rule 14b-2, section heading to proposed Rule 14c-3, Item 5 of proposed Rule 14c-101 and paragraph (a), (b), (c) and (d) of Item 5 of proposed Rule 14c-101.

95 See Release No. 33-7760 (Oct. 22, 1999) [64 FR 61408].

96 44 U.S.C. 3501 et seq.

97 44 U.S.C. 3507(d) and 5 CFR 1320.11.

agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

B. Summary of Proposed Amendments

The proposed rules would apply only if an issuer or other soliciting person voluntarily chooses to furnish its proxy materials to shareholders electronically in reliance on the proposed alternative model. We do not know the number of issuers and other soliciting persons that will choose to take advantage of this alternative. However, in light of the significant cost savings that an issuer or other soliciting person may realize by furnishing its proxy materials under the alternative model, we expect that the alternative model would be used for most proxy solicitations. In addition, because we think that the proposals may reduce the cost of effecting a proxy contest, we expect that more persons may conduct proxy contests. We do not know the extent to which the number of proxy contests may increase if these amendments are adopted. We request comment and supporting empirical data, for purposes of the PRA, on the number of issuers and other persons that would choose to furnish their proxy materials in reliance on the proposed "notice and access" model.

Compliance with the proposed requirements would be mandatory only if an issuer chooses to use the proposed "notice and access" model to furnish its proxy materials to shareholders. There would be no mandatory retention period for the information disclosed, and responses to the disclosure requirements would not be kept confidential. Also, under the proposals, a person other than the issuer has the option to effect a proxy solicitation under the "notice and access" model without preparing a Notice of Internet Availability of Proxy Materials, so long as the soliciting person does not deliver a proxy

card or request for voting instructions to shareholders. We request comment on the extent to which soliciting persons other than the issuer would choose to conduct solicitations in this manner.

The proposed Notice of Internet Availability of Proxy Materials is required to include the following prominent legend in bold-face type and other information described below:

> **"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**[98]
>
> - **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 shareholders] [proxy card] are available at [Insert Web site 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 that is two weeks or more before the meeting date] to facilitate timely delivery. If you hold your shares through a broker, bank, or other intermediary, you may request delivery of a copy of the proxy materials through that intermediary, but it likely will take longer to receive your materials through an intermediary than directly from the company."**

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;

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[98] Appropriate changes may be made if the issuer is providing an information statement pursuant to Regulation 14C or seeking to effect a corporate action by written consent.

- A clear and impartial identification of each separate matter intended to be acted upon and the issuer's recommendations regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site; and
- (1) A toll-free telephone number and (2) an e-mail address where the shareholder can request a copy of the proxy materials.

All of this information is information that the issuer or other soliciting person would have readily available because it determines matters such as the date of the shareholder meeting and information that shareholders can use to request copies of the proxy materials. The Notice may be combined with any notice of shareholder meeting required by state law. We estimate the annual burdens that would be required to prepare and transmit a Notice of Internet Availability of Proxy Materials to be approximately 1.5 reporting hours. We estimate that 75% of the burden is prepared by the company and that 25% of the burden is prepared by outside counsel retained by the company at an average cost of approximately $300 per hour.[99] We received 7,301 filings on Schedule 14A and 681 filings on Schedule 14C during our 2005 fiscal year. These numbers include filings related to annual and special meetings prepared by issuers and other soliciting persons, but not those related to business combination transactions because the proposals exclude those transactions. Assuming that all issuers and other soliciting persons elected to follow the proposed "notice and access" model, we would expect

[99] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number, and the estimated PRA cost burdens have been rounded to the nearest $100. In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $300 as the cost of outside professionals that assist issuers and security holders (or security holder groups) in preparing these disclosures.

7,982 Notices of Internet Availability of Proxy Materials to be filed annually.[100] We estimate that the total annual reporting burden would be approximately 8,979 hours[101] and that the annual cost would be approximately $897,900[102] for the services of outside professionals.

The above estimates are conservative because there is no reliable way to predict how many issuers or other soliciting persons will choose to furnish proxy materials pursuant to the proposed amendments. We request comment and supporting empirical data on the number of issuers and other soliciting persons that would choose to furnish proxy materials using the proposed "notice and access" model and the burden and cost of preparing and sending the Notices necessary to comply with the proposed model. We also request comment and supporting empirical data on the current cost of sending copies of proxy materials, the cost savings expected as a result of furnishing proxy materials under the proposed alternative model, and the number or percentage of shareholders who would request copies of these materials. Finally, we request comment on the expected increase, if any, of the number of proxy contests that would be conducted by soliciting persons other than the issuer if the Commission adopts the proposals.

C. Solicitation of Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we solicit comments to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) evaluate the accuracy of our estimate of the burden of the proposed collection

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100 7,301 notices for 14A filers + 681 notices for 14C filers = 7,982 total notices.

101 7,982 notices x 1.5 hours per notice x .75 = 8,980 hours.

102 7982 notices x $300/hr x 1.5 hr/notice x .25 = $897,975.

of information; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303, with reference to File No. S7-10-05. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-10-05, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE, Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. Cost-Benefit Analysis

A. Background

We are proposing revisions to the proxy rules under the Exchange Act to enable issuers to take advantage of technological advances in recent years to more efficiently furnish proxy materials to shareholders. We expect that these proposals, if adopted, may

lead to significant cost reduction for proxy solicitations. The costs of issuer solicitations ultimately are borne by shareholders.

B. Summary of Proposals

The proposals provide an alternative "notice and access" model that would permit an issuer to furnish proxy materials by posting them on a specified, publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and providing shareholders with a notice informing them that the materials are available and explaining how to access them. Under this alternative model, shareholders may request copies of the proxy materials from the issuer.

Issuers would be able to request intermediaries to follow similar procedures to forward proxy materials to beneficial owners. In addition, shareholders and other persons conducting their own proxy solicitations may follow the alternative model, permitting them to rely on the amendments under the same general requirements that would apply to issuers.

C. Benefits

Possible benefits of the proposed amendments include the following: (1) more rapid dissemination of proxy information to shareholders over the Internet; (2) reduced printing and mailing costs for issuers and their shareholders; and (3) reduced costs for other soliciting parties engaging in proxy contests. We expect potential cost reductions in printing and mailing and a possible decrease in the costs associated with proxy contests to be the most significant economic benefits.

Automatic Data Processing, Inc. ("ADP") handles the vast majority of proxy mailings to beneficial owners.[103] During the 2005 proxy season, ADP handled 3,596 distributions of proxy materials to shareholders, representing a total of approximately 152.3 million items of proxy material processed. Currently, issuers typically prepare and print paper copies to accommodate all record and beneficial holders who do not consent to electronic delivery. For each paper copy, we understand that average postage is approximately $0.95 and average printing and paper costs are approximately $5.00.

ADP estimates that, during the 2005 proxy season,[104] over 62.3 million proxy material mailings were suppressed through a variety of means, including householding and existing electronic delivery methods. During the 2005 proxy season, this resulted in a savings of almost $371 million to issuers. During that season, ADP mailed 90 million paper proxy items to beneficial owners. Based on this number, we estimate that issuers and other soliciting persons spent, in the aggregate, $535.5 million in postage and printing fees alone to distribute paper proxy materials.[105] These numbers reflect the cost of approximately one-third of all mailings conducted by ADP in 2005. The data we have reflects only 3,596, or 30%, of the total 12,304 proxy mailings processed by ADP from May 1, 2004 through May 1, 2005. We do not have data on the size of the mailings performed outside of the 2005 proxy season.

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103 Because mailings to record holders are handled by a wide variety of parties including transfer agents and issuers themselves, we do not have an aggregated estimate of the number of mailings to record holders during 2005. However, we expect savings per mailing would roughly correspond to savings with respect to beneficial owners.

104 According to ADP data, the proxy season extends from February 15 to May 1, during which time nearly one-third of all proxy solicitations are conducted.

105 90 million mailings x $5.95/mailing = $535.5 million.

Although we expect the savings to be significant, the full potential for savings would be reduced by several factors. First, some issuers and other soliciting persons might not elect to follow the proposed model. Second, to the extent that some shareholders do not have access to the Internet or receive paper copies of proxy materials from the company, the savings in printing and mailing costs would be reduced.

Third, issuers likely will project the number of paper copies they need to print before all shareholders must decide whether they want to receive copies under the proposed rule. The requirement that issuers supply requesting shareholders with copies within two business days would limit issuers' ability to reduce printing costs by causing them to have to maintain inventories of paper copies. We expect that, in the first year after adoption of the proposed amendments, issuers would face the highest level of uncertainty about the continued use of paper proxy materials. We expect that, as issuers gain familiarity with the continued use of paper materials and as shareholders become more comfortable with receiving disclosures via the Internet, the number of paper copies will decline, as will issuers' tendency to print more copies than ultimately are requested. We do not currently have estimates for the number of paper copies of the proxy materials that would have to be furnished to shareholders, but we invite comments that would be useful in constructing such estimates.

Issuers may be able to use additional information about shareholder voting to reduce uncertainty about shareholder demand for paper materials. During the 2005 proxy season, only 44% of accounts were voted by beneficial owners. Thus, 56%, or 84.8 million accounts, did not return requests for voting instructions. However, shareholders not voting represented a disproportionately low percentage (31.5%) of shares held

beneficially. These accounts represent a cost of approximately $504.6 million in postage and printing costs. In light of the fact that these shareholders chose not to vote, we suspect that a significant number of them would not request copies of the proxy materials. We further expect that issuers would take such data into account to increase cost savings beginning in the first year that they follow the proposed model.

The proposed amendments may reduce costs of persons other than the issuer conducting their own proxy solicitations. Under the proposed amendments, persons other than the issuer also could rely on the "notice and access" model but, unlike issuers, may not be required to deliver a Notice of Internet Availability of Proxy Materials to shareholders. Furthermore, persons other than the issuer would be able to limit the scope of proxy solicitations to shareholders who are willing to access proxy materials electronically. We expect that the flexibility afforded to persons other than the issuer under the proposed amendments would substantially reduce what has traditionally been viewed as the high cost of engaging in proxy contests, thereby increasing the effectiveness and efficiency of proxy contests as a corporate control mechanism.

Some of the benefits from the proposed amendments may arise from a reduction in the environmental costs of the proxy solicitation process. Currently, proxy solicitation involves the use of a significant amount of paper and printing ink. Paper production and consumption can adversely affect the environment, such as through its use of chemicals such as bleaching agents, printing ink (which contains toxic metals), and cleanup washes. To the extent that paper producers internalize these costs and the costs are reflected in the price of paper and other materials consumed during the proxy solicitation process, our

evaluation of the benefits reflects the elimination of adverse environmental consequences under the proposed amendments.

The benefits from reducing the use of paper in the proxy solicitation process also depend on the extent to which shareholders choose to print their own paper copies of proxy materials after accessing them over the Internet. We invite comments and data to shed light on the extent to which the tendency of investors to request paper or print out their own paper copies may affect the benefits from reducing printing and paper usage under the proposal.

D. Costs

Issuers and other persons soliciting proxies will have to follow the proposed amendments, if adopted, only if they elect to furnish proxy materials pursuant to the "notice and access" model. No issuer or person soliciting a proxy will be required to furnish proxy materials under the "notice and access" model. Furthermore, under the proposed amendments, shareholders can request copies of the proxy materials. We expect that the availability of multiple options for furnishing proxy materials will limit the costs of the proposed amendments to issuers and shareholders by enabling such parties to avoid relatively expensive alternatives and to choose ones that are most efficient under particular circumstances.

Savings to issuers and other soliciting persons would be reduced by the cost of printing and sending Notices. If Notices are sent by mail, the mailing costs may vary widely among parties. Postage rates likely would vary from $0.0012 to $0.37 per Notice mailed, depending on numerous factors. Shareholders obtaining proxy materials online would incur any necessary costs associated with navigating to the Web site on which the

materials are posted and locating the materials on the Web site. In addition, some shareholders may choose to print out the posted materials, which will entail paper and printing costs. We request comment on the magnitude of these potential costs and whether there are any other additional potential costs, including whether any such costs would affect different classes of shareholders differently.

The proposed amendments will require an intermediary such as a bank, broker-dealer, or other association to follow the "notice and access" model if an issuer so requests. An intermediary that follows the "notice and access" model will be required to forward the issuer's Notice of Internet Availability of Proxy Materials to beneficial owners, but it will be able to include the Notice along with a request for voting instructions. Since intermediaries already incur costs from delivering requests for voting instructions, we do not expect the involvement of intermediaries in forwarding the Notice to significantly affect the costs associated with the rule.

Under certain circumstances, an intermediary may need to post proxy materials and requests for voting instructions on its own Internet web site and prepare its own notification to instruct beneficial owners to respond to the request for voting instructions rather than responding to the issuer via a proxy card. These undertakings may increase the costs to intermediaries. We solicit comment on the magnitude of such costs.

Under the "notice and access" model, a beneficial owner could request a copy of proxy materials from an intermediary rather than from the issuer. The costs to an intermediary of collecting and processing requests from beneficial owners may be significant, particularly if the intermediary receives the requests of beneficial owners associated with many different issuers that specify different methods of furnishing the

proxy. We expect that these processing costs will be highest in the first year after the proposal adoption but will subsequently decline as intermediaries develop the necessary systems and procedures and as beneficial owners increasingly become comfortable with accessing proxy materials online. We invite comments on the nature and magnitude of these processing costs and on whether smaller broker-dealers will be unable to take advantage of economies of scale in processing.

The proposed model would require only minimal added disclosures in the form of a Notice of Internet Availability of Proxy Materials to shareholders, informing them that the proxy materials are available at a specified Internet Web site. For purposes of the PRA, we estimate that the total added cost for the amendments, assuming every soliciting person, including issuers, elected to follow the proposed procedures, would be approximately $2,020,475.[106]

E. Request for Comments

We seek comments and empirical data on all aspects of this Cost-Benefit Analysis. Specifically, we ask the following:

- Would issuers be willing to furnish proxy materials pursuant to the proposed alternative model? If so, what proportion of issuers would be expected to follow the proposed alternative model?
- Would soliciting persons other than issuers be willing to furnish proxy materials pursuant to the proposed alternative model? If so, what

[106] For purposes of the PRA, we estimate that issuers would spend a total of $897,975 on outside professionals to prepare this disclosure. We also estimate that issuers would spend a total of 8,980 hours of issuer personnel time preparing this disclosure. We estimate the average hourly cost of issuer personnel time to be $125, resulting in a total cost of $1,122,500 for issuer personnel time. This results in a total cost of $2,020,475 for all issuers.

proportion of these persons would be expected to follow the proposed alternative model?

- What added costs would issuers incur if they choose to follow the proposed alternative model? Of those costs, which would be one-time costs and which would be annual costs?
- What cost savings would issuers realize if they choose to follow the proposed alternative model? Of those savings, which would be one-time savings and which would be annual savings?
- Are there any other one-time or annual costs or benefits that we should consider?
- What proportion of shareholders would be expected to request paper copies? What proportion of beneficial owners would likely request paper copies from intermediaries rather than from issuers?
- What costs would intermediaries incur as a result of processing objecting beneficial owners' requests for proxy materials? Would smaller broker-dealers be precluded from taking advantage of economies of scale in processing such requests?
- Does the requirement that issuers provide copies of the proxy materials give rise to inefficiencies? Specifically, because requests for proxy materials might come over time, a bulk mailing method may not be available to issuers. Furthermore, under the proposals, issuers would have to deliver copies of the proxy materials by first class mail or equivalent

means of delivery. To what degree would this increase the per-unit cost to the issuer?

- To what degree would the cost of proxy contests be reduced by these proposals? What are the other costs of such contests?
- What effect might these proposals have on shareholder participation in the proxy process? Would reducing the financial barriers to conducting proxy contests lead to improved corporate governance? Conversely, might parties use the proposals to conduct nuisance contests?
- Will the proposed amendments likely affect the ease of investor communications? What evidence related to this issue should we consider in evaluating the net benefit of the proposals?
- Would the proposals increase, reduce, or have no effect on the voting returns from shareholders? Would issuers be more dependent on discretionary broker votes? Should there be increased or more prominent disclosure regarding how those discretionary broker votes operate? What added disclosure should be required? Where should such disclosure appear (e.g., on the Notice)?
- The rules do not require shareholders to print out copies of the proxy materials. However, shareholders may incur costs if they choose to print out the materials. We solicit comment on the costs that may be associated with shareholders choosing to print out copies.

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[107] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rules are intended to provide an alternative for issuers and other soliciting persons that could reduce the cost of soliciting proxies and sending information statements regarding shareholder meetings. Currently, under our rules, a public company subject to Section 14 of the Exchange Act must furnish shareholders with an annual report and proxy statement, or an information statement if proxy authority is not being solicited. The primary means for satisfying this obligation historically has been the mailing of paper copies of the proxy materials.

Section 3(f) of the Exchange Act[108] and Section 2(c) of the Investment Company Act of 1940[109] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We anticipate that the proposed rules, if adopted, would increase efficiency at public companies. Currently, many issuers must devote a significant amount of time and resources to proxy mailings. However, the proposed rules may impose added burdens on intermediaries to respond to requests for copies of the proxy materials and, under certain

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[107] 15 U.S.C. 78w(a)(2).
[108] 15 U.S.C. 78c(f).
[109] 15 U.S.C. 80a-2(c).

circumstances, to maintain their own Internet Web sites on which to post their request for voting instructions.

We request comment regarding the degree to which our proposed amendments would have competitively harmful effects on public companies, and how we could best minimize those effects. We also request comment on any disproportionate cross-sectional burdens among the firms affected by our proposals that could have anti-competitive effects.

VIII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Exchange Act that would provide an alternative model for issuers and other persons soliciting proxies to satisfy certain of their obligations under the Commission's proxy rules. The proposed alternative is intended to put into place processes that would ensure notice and access to proxy materials while taking advantage of technological developments and the growth of the Internet and electronic communications. The alternative that would be provided by the proposed amendments also could lower the costs of proxy solicitations that ultimately are borne by shareholders.

A. Reasons for the Proposed Action

The cost of conducting a proxy solicitation often is significant. As Internet access and computer usage have increased throughout the nation, the Commission believes it is time to propose rules that would provide issuers with an alternative model for meeting their proxy disclosure requirements in a manner that facilitates use of modern Internet and computer technologies.

B. Objectives

The primary objective of the proposed amendments is to improve the ability of issuers and other soliciting persons to take advantage of modern technologies to furnish proxy materials to shareholders. The increased use of such technologies holds the promise of reducing the costs of soliciting proxies. Under the Exchange Act, issuers generally must furnish either a proxy statement or an information statement and annual report to shareholders in advance of shareholder meetings. The costs of such distributions ultimately are borne by shareholders. In addition, extension of the proposed alternative model to soliciting persons other than the issuer would reduce the cost of conducting solicitations in opposition to the issuer's proxy solicitation.

The proposals could lower the cost to issuers and other soliciting persons while improving the ability of shareholders to participate meaningfully in the proxy process. These decreased costs may improve corporate governance by increasing management's accountability and responsiveness and providing shareholders with increased power to direct corporate policy. This may, in turn, enhance the value of shareholders' investments.

C. Legal Basis

We are proposing amendments to the forms and rules under the authority set forth in Sections 3(b), 10, 13, 14, 15, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and Section 20(a), 30, and 38 of the Investment Company Act of 1940, as amended.

D. Small Entities Subject to the Proposed Rules

The proposals would affect issuers that are small entities. Exchange Act Rule 0-10(a)[110] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 2,500 public companies, other than investment companies, that may be considered small entities.

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[111] Approximately 175 registered investment companies meet this definition. Moreover, approximately 65 business development companies may be considered small entities.

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

E. Reporting, Recordkeeping and Other Compliance Requirements

No issuer would be required to follow the proposed "notice and access" model. However, we expect that many issuers would choose to follow the proposed model because of the substantial cost savings that an issuer may realize. These issuers likely would include many small issuers.

If an issuer chooses to follow the model, it would be required to prepare, file, and disseminate a Notice of Internet Availability of Proxy Materials. The required disclosure in the Notice is information that would be readily available to the issuer. An issuer

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110 17 CFR 240.0-10(a).

111 See Rule 0-10 under the Investment Company Act of 1940 [17 CFR 270.0-10].

would be required to provide copies of the proxy materials to requesting shareholders and maintain a Web site on which to post the proxy materials.

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or duplicate the proposed rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following amendments:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation or simplification of disclosure for small entities; and
- An exemption for small entities from coverage under the proposals.

The Commission has considered a variety of reforms to achieve its regulatory objectives. We believe that the current proposals are the most cost-effective approach for all public companies, including small entities.

The proposed amendments, if adopted, would provide an alternative model that would reduce the burden on all issuers, including small entities, that choose to employ the alternative. They are designed to permit issuers and other soliciting persons to minimize the cost of a proxy solicitation in a manner that is consistent with investor protection. We believe that, at this time, requiring less than the proposed amendments require would

significantly increase the likelihood that shareholders may become disenfranchised from the voting process. Therefore, we do not believe it would be appropriate to make special provisions to further ease the burden on small entities.

Because the proposed amendments are designed to provide an alternative means that would reduce the burden on all issuers, an exemption from the proposed amendments or separate requirements for small entities would not be beneficial to small entities. The establishment of any differing compliance or reporting requirements or timetables or any exemptions for small business issuers may not be in keeping with the objectives of the proposed rules or the purposes of Section 14 of the Exchange Act.

H. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
- How to quantify the impact of the proposed rules.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

IX. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[112] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

X. Statutory Basis and Text of Proposed Amendments

The amendments are proposed pursuant to Sections 3(b), 10, 13, 14, 15, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and Sections 20(a), 30, and 38 of the Investment Company Act of 1940, as amended.

List of Subjects

17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

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[112] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, and 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend §240.14a-2 by:

a. Removing the authority citation following the section;

b. Removing the period and adding a semicolon at the end of paragraph (b)(3)(ii); and

c. Revising paragraph (b)(3)(iv).

The revision reads as follows:

§240.14a-2 Solicitations to which §240.14a-3 to §240.14a-15 apply.

* * * * *

(b) * * *

(3) * * *

(iv) The proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of §240.14a-12(c); and

* * * * *

3. Amend §240.14a-3 by:

a. Revising paragraphs (a), (e)(1)(i), the introductory text of paragraphs (e)(1)(ii)(A) and (e)(1)(ii)(B)(2), paragraphs (e)(1)(ii)(B)(2)(ii), (e)(1)(ii)(B)(2)(iii), (e)(1)(ii)(B)(3), (e)(1)(iii), and (e)(2);

b. Revising the term "annual report" to read "annual report to security holders" in paragraph (b)(13), and

c. Adding paragraphs (e)(3) and (g).

The revisions and additions read as follows:

§240.14a-3 Information to be furnished to security holders.

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with:

(1) A publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A (§240.14a-101);

(2) A publicly-filed preliminary or definitive proxy statement, in the form and manner described in paragraph (g), containing the information specified in Schedule 14A (§240.14a-101); or

(3) A preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 (§239.25 or §239.34 of this chapter) or Form N-14 (§239.23 of this chapter) and containing the information specified in such Form.

* * * * *

(e)(1)(i) A registrant will be considered to have delivered an annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials to all security holders of record who share an address if:

(A) The registrant delivers one annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, to the shared address;

(B) The registrant addresses the annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, to the security holders as a group (for example, "ABC Fund [or Corporation] Security Holders," "Jane Doe and Household," "The Smith Family"), to each of the security holders individually (for example, "John Doe and Richard Jones") or to the security holders in a form to which each of the security holders has consented in writing;

Note to paragraph (e)(1)(i)(B): Unless the company addresses the annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials to the security holders as a group or to each of the security holders individually, it must obtain, from each security holder to be included in the householded group, a separate affirmative written consent to the specific form of address the company will use.

(C) The security holders consent, in accordance with paragraph (e)(1)(ii) of this section, to delivery of one annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable;

(D) With respect to delivery of the proxy statement, the registrant delivers, together with or subsequent to delivery of the proxy statement, a separate proxy card for each security holder at the shared address; and

(E) The registrant includes an undertaking in the proxy statement to deliver promptly upon written or oral request a separate copy of the annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as

applicable, to a security holder at a shared address to which a single copy of the document was delivered.

(ii) Consent. (A) Affirmative written consent. Each security holder must affirmatively consent, in writing, to delivery of one annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable. A security holder's affirmative written consent will only be considered valid if the security holder has been informed of:

* * * * *

(B) * * *

(2) The registrant has sent the security holder a notice at least 60 days before the registrant begins to rely on this section concerning delivery of annual reports to security holders, proxy statements or Notices of Internet Availability of Proxy Materials to that security holder. The notice must:

* * * * *

(ii) State that only one annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, will be delivered to the shared address unless the registrant receives contrary instructions;

(iii) Include a toll-free telephone number, or be accompanied by a reply form that is pre-addressed with postage provided, that the security holder can use to notify the registrant that the security holder wishes to receive a separate annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials;

* * * * *

(3) The registrant has not received the reply form or other notification indicating that the security holder wishes to continue to receive an individual copy of the annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, within 60 days after the registrant sent the notice; and

* * * * *

(iii) Revocation of consent. If a security holder, orally or in writing, revokes consent to delivery of one annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials to a shared address, the registrant must begin sending individual copies to that security holder within 30 days after the registrant receives revocation of the security holder's consent.

* * * * *

(2) Notwithstanding paragraphs (a) and (b) of this section, unless state law requires otherwise, a registrant is not required to send an annual report to security holders or proxy statement to a security holder if:

(i) An annual report to security holders and a proxy statement for two consecutive annual meetings; or

(ii) All, and at least two, payments (if sent by first class mail) of dividends or interest on securities, or dividend reinvestment confirmations, during a twelve month period, have been mailed to such security holder's address and have been returned as undeliverable. If any such security holder delivers or causes to be delivered to the registrant written notice setting forth his then current address for security holder communications purposes, the registrant's obligation to deliver an annual report to security holders or a proxy statement under this section is reinstated.

(3) A consent to household the annual report to shareholders and proxy statement shall be deemed to be a consent to household a Notice of Internet Availability of Proxy Materials pursuant to paragraph (e)(1)(ii) of this section.

* * * * *

(g)(1) A registrant may furnish a proxy statement pursuant to paragraph (a) of this section, or an annual report to security holders pursuant to paragraph (b) of this section, to a security holder by sending the security holder a Notice of Internet Availability of Proxy Materials 30 days or more prior to the shareholder meeting date, or if no meeting is to be held, 30 days or more prior to the date the votes, consents or authorizations may be used to effect the corporate action, and complying with all other requirements of this paragraph (g). All proxy materials identified in the Notice of Internet Availability of Proxy Materials must be publicly accessible, free of charge, at the Web site address specified in the Notice of Internet Availability of Proxy Materials on the date that the Notice of Internet Availability of Proxy Materials is sent to the security holder and such materials must remain available on that Web site until the time of the meeting of security holders; provided, however, that any additional soliciting materials sent to security holders or made public after the Notice of Internet Availability of Proxy Materials has been sent must be made publicly accessible at the specified Web site address no later than the day on which such materials are first sent to security holders or made public. The Web site address relied upon for compliance under this paragraph (g) may not be on the Commission's EDGAR system. The publicly accessible proxy materials must be substantially identical to the copies of such proxy materials, including all graphics, charts and tables, that would otherwise be furnished pursuant to this section.

Note to paragraph (g)(1): If the registrant chooses to have an intermediary forward its Notice of Internet Availability of Proxy Materials to beneficial owners pursuant to §240.14a-1 or §240.14a-2, it must provide that intermediary with copies of the Notice of Internet Availability of Proxy Materials at least five business days prior to the deadline by which it must furnish such notices to the registrant's holders of record.

(2) The Notice of Internet Availability of Proxy Materials must contain the following:

(i) A prominent legend in bold-face type that states:

"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].

1. 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.

2. The [proxy statement] [information statement] [annual report to shareholders] [proxy card] [is/are] available at [Insert Web site address].

3. 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 that is two weeks or more before the meeting date] to facilitate timely delivery. If you hold your shares through a broker, bank, or other intermediary, you may request delivery of a copy of the proxy materials through that intermediary, but it likely will

take longer to receive your materials through an intermediary than directly from the company.";

(ii) The date, time, and location of the meeting, or if corporate action is to be taken by written consent, the earliest date on the corporate action may be effected;

(iii) A clear and impartial identification of each separate matter intended to be acted upon and the soliciting person's recommendations regarding those matters, but no supporting statements;

(iv) A list of the materials being made available at the specified Web site; and

(v)(A) A toll-free number; and

(B) An e-mail address where the security holder can request a copy of the proxy materials.

(3) The Notice of Internet Availability of Proxy Materials may not be incorporated into, or combined with, another document, except that it may be incorporated into or combined with a notice of shareholder meeting required under state law. Whether or not combined with the state law meeting notice, the Notice of Internet Availability of Proxy Materials must be sent separately from other types of shareholder communications and may not accompany any materials other than the proxy card and return envelope. The Notice of Internet Availability of Proxy Materials may contain only the information required by paragraph (g)(2) of this section and any additional information that is required by state law to be included in a notice of shareholders meeting; provided that, if the registrant is conducting a consent solicitation, it may revise the information required in the Notice of Internet Availability of Proxy Materials to reflect that fact.

(4) Plain English. (i) To enhance the readability of the Notice of Internet Availability of Proxy Materials, the registrant must use plain English principles in its organization, language, and design.

(ii) The registrant must draft the language in the Notice of Internet Availability of Proxy Materials so that at a minimum it substantially complies with each of the following plain English writing principles:

(A) Short sentences;

(B) Definite, concrete, everyday words;

(C) Active voice;

(D) Tabular presentation or bullet lists for complex material, whenever possible;

(E) No legal jargon or highly technical business terms; and

(F) No multiple negatives.

(iii) In designing the Notice of Internet Availability of Proxy Materials, the registrant may include pictures, logos, charts, or other design elements so long as the design is not misleading and the required information is clear.

(5) The registrant may, at its discretion, choose to furnish some proxy materials in paper and other proxy materials electronically pursuant to this paragraph (g). The registrant may send the Notice of Internet Availability of Proxy Materials and the form of proxy together through the same delivery medium. The form of proxy may not be furnished pursuant to this paragraph (g) except by:

(i) Being furnished together through the same delivery medium with the Notice of Internet Availability of Proxy Materials; or

(ii) Being furnished together through the same delivery medium with the proxy statement complying with Schedule 14A (§240.14a-101) (which can be accomplished through posting on the Internet Web site in accordance with this paragraph (g)).

(6) The Notice of Internet Availability of Proxy Materials shall be filed with the Commission pursuant to §240.14a-6(b) no later than the date it is first sent or given to shareholders.

(7) Obligation to provide copies. (i) The registrant must send, at no cost and by U.S. First Class mail or other reasonably prompt means, a paper copy of the proxy materials to any shareholder requesting such a copy within two business days after receiving a request for a paper copy.

(ii) The registrant must send, at no cost and via e-mail, an electronic copy of the proxy materials to any shareholder requesting such a copy within two business days after receiving a request for an electronic copy via e-mail.

(8) A person other than the registrant may solicit proxies pursuant to the conditions imposed on registrants by this paragraph (g) provided:

(i) A soliciting person other than the registrant need not send a Notice of Internet Availability of Proxy Materials to anyone other than security holders to whom that person sends a form of proxy, if any.

(ii) If a soliciting person other than the registrant intends to provide copies of the soliciting materials by any means other than Web site access, any Notice of Internet Availability of Proxy Materials must be sent by the later of:

(A) 30 days prior to the shareholder meeting date or, if no meeting is to be held, 30 days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or

(B) 10 days after the registrant first sends its proxy solicitation.

(iii) If a soliciting person other than the registrant intends to furnish copies of the soliciting materials only by posting the materials on an Internet Web site, any Notice on Internet Availability of Proxy Materials must state clearly that the soliciting person will not provide copies of the soliciting materials and that the solicitation is conditioned on the security holder agreeing to access the soliciting materials via the specified Web site.

(iv) Content of Notice of Internet Availability of Proxy Materials in certain situations. (A) If a soliciting person other than the registrant conditions its proxy solicitation on the security holder agreeing to access the soliciting materials via the specified Web site, the Notice need not contain instructions regarding how to request copies.

(B) If, at the time the Notice is sent, a soliciting person other than the registrant is not aware of all matters intended to be acted upon, the Notice must provide a clear and impartial identification of each separate matter to the extent known by the soliciting person at the time that the Notice is first sent to security holders and a clear statement that there may be additional agenda items of which the soliciting party is not aware.

(C) If a soliciting person other than the registrant sends a form of proxy not containing all matters intended to be acted upon, the Notice must clearly state that

execution of the form of proxy may invalidate a security holder's prior vote on matters not presented on the form of proxy.

(9) This paragraph (g) shall not apply to a proxy solicitation in connection with a business combination transaction, as defined in §230.165 of this chapter.

(10) This paragraph (g) provides a non-exclusive alternative by which an issuer or other person may furnish a proxy statement pursuant to paragraph (a) of this section or an annual report to security holders pursuant to paragraph (b) of this section to a security holder. This paragraph (g) does not affect the availability of any other means by which an issuer or other person may furnish a proxy statement pursuant to paragraph (a) of this section or an annual report to security holders pursuant to paragraph (b) of this section to a security holder.

4. Amend §240.14a-4 by:

a. Removing the authority citation following the section;

b. Revising the word "mailed" to read "sent" in the first sentence of paragraph (c)(1); and

c. Revising the word "mails" to read "sends" in the last sentence of paragraph (c)(1).

5. Amend §240.14a-7 by:

a. Revising paragraph (a)(2)(i) and (a)(2)(ii); and

b. Adding paragraphs (a)(2)(iii) and (f) and Note 3 to §240.14a-7.

The revisions and additions read as follows:

§240.14a-7 Obligations of registrants to provide a list of, or mail soliciting material to, security holders.

* * * * *

(a) * * *

(2) * * *

(i) Send copies of any proxy statement, form of proxy, or other soliciting material, including a Notice of Internet Availability of Proxy Materials (as defined in §240.14a-3(g)), furnished by the security holder to the record holders, including banks, brokers, and similar entities, designated by the security holder. A security holder may designate only record holders who have not requested copies of the registrant's soliciting materials. A sufficient number of copies must be sent to the banks, brokers, and similar entities for distribution to all beneficial owners designated by the security holder. If the registrant has received affirmative written or implied consent to deliver a single proxy statement to security holders at a shared address in accordance with the procedures in §240.14a-3(e)(1), a single copy of the proxy materials furnished by the security holder shall be sent to that address. Upon request by a soliciting security holder, the registrant must send the proxy materials furnished by the security holder electronically to all record holders designated by the security holder who have provided the registrant with an affirmative consent to electronic delivery of proxy materials via means permitted by such consent. The registrant shall send the security holder material with reasonable promptness after tender of the material to be sent, envelopes or other containers therefore, postage or payment for postage and other reasonable expenses of effecting such distribution. The registrant shall not be responsible for the content of the material; or

(ii) Deliver the following information to the requesting security holder within five business days of receipt of the request:

(A) A reasonably current list of the names, addresses and security positions of the record holders, including banks, brokers and similar entities holding securities in the same class or classes as holders which have been or are to be solicited on management's behalf, or any more limited group of such holders designated by the security holder if available or retrievable under the registrant's or its transfer agent's security holder data systems;

(B) The most recent list of names, addresses and security positions of beneficial owners as specified in §240.14a-13(b), in the possession, or which subsequently comes into the possession, of the registrant;

(C) The names of security holders at a shared address that have consented to delivery of a single copy of proxy materials to a shared address, if the registrant has received written or implied consent in accordance with §240.14a-3(e)(1);

(D) The names of security holders who have consented to electronic delivery of proxy materials and the information related to such consent that enables the requesting security holder to deliver the proxy materials electronically; and

(E) The names of security holders who, on the date that the registrant receives the request, have requested copies of the proxy materials, pursuant to §240.14a-3(g)(7).

(iii) All security holder list information shall be in the form requested by the security holder to the extent that such form is available to the registrant without undue burden or expense. The registrant shall furnish the security holder with updated record holder information on a daily basis or, if not available on a daily basis, at the shortest reasonable intervals; provided, however, the registrant need not provide beneficial or record holder information more current than the record date for the meeting or action.

* * * * *

(f) Definition of address. Unless otherwise indicated, for purposes of this section, address means a street address, a post office box number, an electronic mail address, a facsimile telephone number or other similar destination to which paper or electronic documents are delivered, unless otherwise provided in this section.

Notes to §240.14a-7.

* * * * *

3. If the registrant is sending the requesting security holder's materials under §240.14a-7, and if the requesting security holder requests that the materials be sent electronically, the registrant shall send copies of those materials electronically pursuant to the requirements of §240.14a-3(g); provided, however, that the requesting security holder's materials comply with all the requirements of §240.14a-3(g).

6. Amend §240.14a-8 by revising the word "mail" to read "send" in the last sentence of paragraph (e)(2) and in paragraph (e)(3) and the word "mails" to read "sends" in the introductory text of paragraph (m)(3).

7. Amend §240.14a-12 by revising the term "annual report" to read "annual report to security holders" in the heading of paragraph (c)(1) and the first sentence of paragraph (c)(1).

8. Amend §240.14a-13 by:

a. Revising the word "mailing" to read "sending" in paragraph (a)(5) and the word "mail" to read "send" in Note 2 following paragraph (a) and in paragraph (c), each time it appears; and

b. Adding paragraph (e).

The addition reads as follows:

§240.14a-13 Obligation of registrants in communicating with beneficial owners.

* * * * *

(e) Definition of address. Unless otherwise indicated, for purposes of this section, address means a street address, a post office box number, an electronic mail address, a facsimile telephone number or other similar destination to which paper or electronic documents are delivered, unless otherwise provided in this section.

9. Amend §240.14a-101 by:

a. Revising the term "annual report" to read "annual report on Form 10-K or Form 10-KSB" in Instruction 1 to paragraph (d)(2)(ii)(L) of Item 7;

b. Revising the word "mail" to read "send" in Instruction 2 to paragraph (d)(2)(ii)(L) of Item 7;

c. Revising the term "annual report" to read "annual report to security holders" in the introductory text and paragraphs (a), (b), and (c) of Item 23; and

d. Revising the term "annual reports" to read "annual reports to security holders" in paragraph (d) of Item 23 each time it appears.

10. Amend §240.14b-1 by:

a. Revising the last sentence of the introductory text of paragraph (a), paragraphs (a)(1), (a)(2), (b)(2) before the Note, and (c)(2)(i);

b. Revising the term "annual reports" to read "annual reports to security holders" in paragraphs (c)(2)(ii) and (c)(3);

c. Revising the term "annual report" to read "annual report to security holders" in paragraph (c)(2)(ii);

d. Revising the word “mail” to read “send” in paragraph (c)(2)(ii); and

e. Adding paragraph (d).

The revisions and additions read as follows:

§240.14b-1 Obligation of registered brokers and dealers in connection with the prompt forwarding of certain communications to beneficial owners.

(a) Definitions. * * * In addition, as used in this section, the following definitions apply:

(1) Registrant. The issuer of a class of securities registered pursuant to section 12 of the Act (15 U.S.C. 78l) or an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

(2) Address. A street address, a post office box number, an electronic mail address, a facsimile telephone number or other similar destination to which paper or electronic documents are delivered, unless otherwise provided in this section.

(b) * * *

(2) The broker or dealer shall, upon receipt of the Notice of Internet Availability of Proxy Materials, proxy, other proxy soliciting material, information statement, and/or annual reports to security holders from the registrant or other soliciting person, forward such materials to its customers who are beneficial owners of the registrant’s securities no later than five business days after receipt of the proxy material, information statement or annual reports to security holders.

* * * * *

(c) * * *

(2) * * *

(i) Its obligations under paragraphs (b)(2), (b)(3) and (d) of this section if the registrant or other soliciting person, as applicable, does not provide assurance of reimbursement of the broker's or dealer's reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2), (b)(3) and (d) of this section; or

* * * * *

(d) If a registrant or other soliciting person has provided the broker or dealer with copies of a Notice of Internet Availability of Proxy Materials which provide instructions on requesting copies of the soliciting materials for forwarding to its beneficial owner customers, upon receipt of such request from a beneficial owner customer, the broker or dealer shall:

(1) Request a copy of the soliciting materials from the registrant, in the form requested by the beneficial owner customer, within two business days after receiving the customer's request; and

(2) Forward a copy of the soliciting materials to the beneficial owner customer, in the form requested by the beneficial owner customer, within two business days after receiving the materials from the registrant.

11. Amend §240.14b-2 by:

a. Adding paragraphs (a)(4) and (d);

b. Revising the introductory text of paragraph (b)(3) and paragraph (c)(2)(i);

c. Revising the term "annual reports" to read "annual reports to security holders" in paragraph (c)(2)(ii) and (c)(4);

d. Revising the term “annual report” to read “annual report to security holders” in paragraph (c)(2)(ii); and

e. Revising the word “mail” to read “send” in paragraph (c)(2)(ii).

The additions and revisions read as follows:

§240.14b-2 Obligation of banks, associations and other entities that exercise fiduciary powers in connection with the prompt forwarding of certain communications to beneficial owners.

(a) * * *

(4) The term address means a street address, a post office box number, an electronic mail address, a facsimile telephone number or other similar destination to which paper or electronic documents are delivered, unless otherwise provided in this section.

(b) * * *

(3) Upon receipt of the Notice of Internet Availability of Proxy Materials, proxy, other proxy soliciting material, information statement, and/or annual reports to security holders from the registrant or other soliciting person, the bank shall forward such materials to each beneficial owner on whose behalf it holds securities, no later than five business days after the date it receives such material and, where a proxy is solicited, the bank shall forward, with the other proxy soliciting material and/or the annual report to security holders, either:

* * * * *

(c) * * *

(2) * * *

(i) Its obligations under paragraphs (b)(2), (b)(3), (b)(4) and (d) of this section if the registrant or other soliciting person, as applicable, does not provide assurance of reimbursement of its reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2), (b)(3), (b)(4) and (d) of this section; or

* * * * *

(d) If a registrant or other soliciting person has provided the bank with copies of a Notice of Internet Availability of Proxy Materials which provide instructions on requesting copies of the soliciting materials for forwarding to its beneficial owner customers, upon receipt of such request from a beneficial owner customer, the bank shall:

(1) Request a copy of the soliciting materials from the registrant, in the form requested by the beneficial owner customer, within two business days after receiving the customer's request; and

(2) Forward a copy of the soliciting materials to the beneficial owner customer, in the form requested by the beneficial owner customer, within two business days after receiving the materials from the registrant.

12. Amend §240.14c-2 by:

a. Revising paragraph (a); and

b. Adding paragraph (d).

The revision and addition read as follows:

§240.14c-2 Distribution of information statement.

(a)(1) In connection with every annual or other meeting of the holders of the class of securities registered pursuant to section 12 of the Act or of a class of securities

issued by an investment company registered under the Investment Company Act of 1940 that has made a public offering of securities, including the taking of corporate action by the written authorization or consent of security holders, the registrant shall transmit to every security holder of the class that is entitled to vote or give an authorization or consent in regard to any matter to be acted upon and from whom proxy authorization or consent is not solicited on behalf of the registrant pursuant to Section 14(a) of the Act:

(i) A written information statement containing the information specified in Schedule 14C (§240.14c-101);

(ii) A publicly-filed information statement, in the form and manner described in §240.14c-3(d), containing the information specified in Schedule 14C (§240.14c-101); or

(iii) A written information statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 (§239.25 or §239.34 of this chapter) or Form N-14 (§239.23 of this chapter) and containing the information specified in such Form.

(2) Notwithstanding paragraph (a)(1) of this section:

(i) In the case of a class of securities in unregistered or bearer form, such statements need to be transmitted only to those security holders whose names are known to the registrant; and

(ii) No such statements need to be transmitted to a security holder if a registrant would be excused from delivery of an annual report or a proxy statement under Rule 14a-3(e)(2) (240.14a-3(e)(2)) if such section were applicable.

* * * * *

(d) A registrant may transmit an information statement to security holders pursuant to paragraph (a) of this section by satisfying the requirements set forth in §240.14a-3(g); provided, however, that the registrant may revise the information required in the Notice of Internet Availability of Proxy Materials to reflect the fact that the registrant is not soliciting proxies for the meeting. This paragraph (d) provides a non-exclusive alternative by which a registrant may transmit an information statement pursuant to paragraph (a) of this section to a security holder. This paragraph (d) does not affect the availability of any other means by which a registrant may transmit an information statement pursuant to paragraph (a) of this section to a security holder.

13. Amend §240.14c-3 by:

a. Removing the authority citation following this section;

b. Revising paragraphs (a)(1) and (c), and

c. Adding paragraph (d).

The revisions and addition read as follows:

§240.14c-3 Annual report to be furnished security holders.

(a) * * *

(1) The annual report to security holders shall contain the information specified in paragraphs (b)(1) through (b)(11) of §240.14a-3.

* * * * *

(c) A registrant will be considered to have delivered a Notice of Internet Availability of Proxy Materials, annual report to security holders or information statement to security holders of record who share an address if the requirements set forth

in §240.14a-3(e)(1) are satisfied with respect to the Notice of Internet Availability of Proxy Materials, annual report to security holders or information statement, as applicable.

(d) A registrant may furnish an annual report to security holders pursuant to paragraph (a) of this section by satisfying the requirements set forth in §240.14a-3(g). This paragraph (d) provides a non-exclusive alternative by which a registrant may furnish an annual report pursuant to paragraph (a) of this section to a security holder. This paragraph (d) does not affect the availability of any other means by which a registrant may furnish an annual report pursuant to paragraph (a) of this section to a security holder.

* * * * *

14. Amend §240.14c-5 by revising the word "mailed" to read "sent" in the second sentence of the introductory text of paragraph (a).

15. Amend §240.14c-7 by revising paragraph (a)(5) before the Note and the word "mail" to read "send" in Note 2 following paragraph (a).

The revision reads as follows:

§240.14c-7 Providing copies of material for certain beneficial owners.

(a) * * *

(5) Upon the request of any record holder or respondent bank that is supplied with Notices of Internet Availability of Proxy Materials, information statements and/or annual reports to security holders pursuant to paragraph (a)(3) of this section, pay its reasonable expenses for completing the sending of such material to beneficial owners.

* * * * *

16. Amend §240.14c-101 by revising:

a. The word "mailing" to read "sending" in Item 4, Instruction 1;

b. The phrase “annual report” to read “annual report to security holders” in the introductory text and paragraphs (a), (b), and (c) of Item 5 each time it appears; and

c. The phrase “annual reports” to read “annual reports to security holders” in paragraph (d) of Item 5 each time it appears.

PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934

17. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq., 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

18. Amend Item 4 to “Part II - Other Information” of Form 10-Q (referenced in §249.308a) by revising paragraph (d) to read as follows:

Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-Q

* * * * *

Part II - Other Information

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders.

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

19. Amend Item 4 to "Part II - Other Information" of Form 10-QSB (referenced in §249.308b) by revising paragraph (d) to read as follows:

Note: The text of Form 10-QSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-QSB

* * * * *

Part II - Other Information

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders.

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

20. Amend Item 4 to Part I of Form 10-K (referenced in §249.310) by revising paragraph (d) to read as follows:

Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-K

* * * * *

Part I

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders.

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

21. Amend Item 4 to Part I of Form 10-KSB (referenced in §249.310b) by revise paragraph (d) to read as follows:

Note: The text of Form 10-KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-KSB

* * * * *

Part I

* * * * *

Item 4. Submission of Matters to a Vote of Security Holders.

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

22. The authority citation for Part 274 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

* * * * *

23. Amend Sub-Item 77C to "Instructions to Specific Items" of Form N-SAR (referenced in §§ 249.330 and 274.101) by revising paragraph (d) to read as follows:

Note: The text of Form N-SAR does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N-SAR

* * * * *

Instructions to Specific Items

* * * * *

SUB-ITEM 77C: Submission of matters to a vote of security holders

* * * * *

(d) Describe the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

By the Commission.

Jonathan G. Katz
Secretary

December 8, 2005