



February 13, 2006

Ms. Nancy Morris  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-9303

Re: Proposed Rule Concerning Internet Availability of Proxy Materials  
(Release Nos. 34-52926; IC-27182; File No. S7-10-05)

Dear Ms. Morris:

On behalf of the Securities Industry Association (“SIA”)<sup>1</sup>, we are pleased to submit this response to the request of the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) for comments on the proposed rule relating to Internet Availability of Proxy Materials (the “Proposed Rule”). See Release No. 34-52926 (Dec. 8, 2005) (the “Release”).

#### Executive Summary

- **The SIA supports the Commission’s goals to reduce proxy delivery costs and to enhance shareholder participation in corporate democracy.**
- **The current system for delivering proxies to 80 percent of shareholders -- those holding in “street name” -- has proven to be very efficient and cost-effective. Any changes to that system should be built upon its existing strengths and should not conflict with the current infrastructure. This current system permits shareholders -- not issuers -- to provide brokers standing instructions for delivery of proxy materials for all securities held in each shareholder account. The Proposed Rule conflicts with key aspects of**

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<sup>1</sup> The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA’s primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated \$236.7 billion in domestic revenue and an estimated \$340 billion in global revenues. (More information about SIA is available at [www.sia.com](http://www.sia.com).)

**the current system and alternative approaches to achieve the Commission's goals should be considered.**

- **A proposal that defaults to a notice and electronic access model, with shareholders receiving proxy information from both issuers and intermediaries, risks confusing shareholders and reducing shareholder participation in corporate democracy.**
- **The Proposed Rule will add cost to the current proxy delivery system. It will require additional processes and cause intermediaries to build and maintain additional platforms. Currently, intermediaries pass their costs on to issuers and would expect to continue to do so.**
- **The Commission should urge issuers and intermediaries to work together to build on the current proxy delivery system and do more to educate and encourage shareholders to use electronic delivery processes.**

#### **I. The SIA Supports the Commission's Goals Embodied in the Proposed Rule.**

The SIA supports the objectives identified by the SEC to take advantage of technological developments, the growth of the Internet and electronic communications to lower costs of conducting proxy solicitations. Over the years, the SIA has played an active role in facilitating improvements in the proxy process and it looks forward to contributing to further improvements in the future.

The SIA represents broker-dealers that act as intermediaries between issuers and their investors whose securities are held in the name of brokerage firms (*i.e.*, shareholders that hold in "street name").<sup>2</sup> Broker-dealers maintain strong client relationships with both issuers and beneficial owners. Broker-dealers seek to act in the best interests of all these clients. Broker-dealers and issuers share the goal of sustaining an efficient and effective proxy process. At the same time, broker-dealers want to provide the best service, including the best means for delivering proxy materials, to their beneficial owner customers. The SIA believes that an efficient and effective proxy process -- that serves the interests of beneficial owners -- can only be achieved by a successful partnership between broker-dealers and issuers. The SIA contributes

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<sup>2</sup> These shareholders are referred to in this letter as "beneficial owners." The SIA's comments are generally limited to the effects the Proposed Rule will have on beneficial owners and broker-dealers and therefore we do not address the effects that the Proposed Rule would have on shareholders who are directly registered with the issuer or the issuer's agent. We note that registered record holders constitute approximately 20 percent of total shareholders and approximately 15 percent of total shares outstanding.

In this comment letter, the SIA focuses upon issues raised directly by the SEC rule proposal. We recognize that the proposal can be interpreted to impact a broader set of issues pertaining to the shareholder communications process and we anticipate that some persons providing comments may wish to bring these broader issues into discussion. If that should be the case, we would plan to address those issues by separate letter.

to this partnership by working with individual issuers and with affinity groups representing groups of issuers, as well as other interested parties.<sup>3</sup> For your convenience, we attach as Exhibit I a chart that describes shareholders by categories such as record holders, beneficial owners that hold in street name, institutional investors, and individual investors.

**II. The Current Proxy Delivery System for Beneficial Owners Works Well and is Cost-Effective; Any Change Should Utilize the Strengths of the Current System.**

Any changes to the current street name proxy communication system should be built upon the strengths of the existing system and should not conflict with the current infrastructures. Among other things, the current structure allows beneficial owners to select a preferred delivery method for all information relating to each customer account. Standing delivery instructions are provided for each account. Any changes to this structure -- such as allowing each issuer to alter a customer's chosen delivery method on a year-to-year basis -- will disrupt the proxy delivery system and increase the cost for issuers and ultimately for shareholders. The current street name proxy communication system has, in fact, significantly reduced costs. As will be detailed below and in Exhibit II to this letter, in the 2005 proxy season (February 15-May 1), the delivery of over 62.3 million sets of proxy materials were eliminated at a savings of approximately \$370.7 million.<sup>4</sup> Moreover, during the period from 2001 through 2005, broker intermediaries and others increased eliminations of proxy material deliveries to beneficial owners by 16 percent to 39 percent. In calendar year 2005 (as opposed to just the 2005 proxy season), the elimination of proxy material deliveries (through methods described below) resulted in a savings of \$612 million.<sup>5</sup> See Exhibit II.

**A. The Current Proxy Delivery Model for Street Name Securities Works Well and Has Achieved Major Savings to Date.**

Beneficial owners who hold their shares in street name represent approximately 80 percent of total shareholders and represent approximately 85 percent of shares outstanding. The high percentage of ownership in street name reflects the success of several decades of concerted effort among the securities regulators, broker intermediaries, issuers, The Depository Trust & Clearing Corporation, and others. Together, these groups achieved the goal of increasing the efficiency, and decreasing the costs, of processing securities transactions. Among other things, the high percentage of street name ownership enable the U.S. capital markets to process very high volumes of securities transactions on a daily basis with a minimal number of errors and a relatively minimal cost.

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<sup>3</sup> In providing these comments to the Proposed Rule, the SIA has strived to maintain a balanced viewpoint. The SIA has learned in the past that there are a number of perspectives within the issuer, intermediary and investor constituencies that must be considered and brought into balance when recommending changes to the proxy process. Among other things, the size of the issuer, intermediary or investor clearly determines perspective, as does the mix of the shareholder base between institutional and individual investors.

<sup>4</sup> These figures are based upon data published by ADP that states that the average cost per set of proxy materials was \$5.95. ADP recently updated this amount to \$5.33.

<sup>5</sup> This calculation is based upon the \$5.33 average cost per set of proxy materials.

In connection with the street name proxy process, more than 800 nominee broker-dealers and banks have retained ADP Investor Communication Services (“ADP”) to act as their agent in facilitating the integration of data between the 800 nominees and approximately 7300 issuers. The facilitation role performed by ADP has contributed to an extremely efficient proxy system that ensures timely and accurate communications and votes. It has also resulted in significant cost savings.

Intermediaries and issuers have been partnering with ADP for many years to apply technology to the proxy process; the results are impressive. For institutional investors, broker intermediaries have supported ProxyEdge, an ADP electronic proxy management system used by approximately 2500 institutional investors. With ProxyEdge, only one set of proxy materials, rather than multiple sets, is mailed to investors who want paper materials. For investors who have chosen electronic delivery, Proxy Edge sends a URL for the website containing proxy materials (if the materials are available electronically). For example, if a money manager has 200 accounts that hold shares of IBM, ProxyEdge will avoid the delivery of 199 sets of proxy materials and send only one set. During the 2005 proxy season (February 15-May 1, 2005), ProxyEdge eliminated the delivery of almost 6.5 million sets of proxy materials, saving approximately \$38.5 million dollars in postage and printing costs.<sup>6</sup> These savings are further described in Exhibit II, which provides a chart of proxy cost savings by investor type.

Broker intermediaries also have achieved significant cost reductions in the delivery of proxy materials to individual investors. The most significant reduction has been achieved through “specialized processing”, which, in general, eliminates the delivery of multiple sets of proxy materials to investment advisors who have voting authority for multiple retail accounts maintained at a single broker intermediary. Specialized processing is similar to ProxyEdge although it is only effected through accounts maintained at one broker intermediary (as opposed to multiple intermediaries) and it primarily is used in connection with individual, not institutional accounts. In the 2005 proxy season (February 15-May 1, 2005), the use of specialized processing eliminated the delivery of approximately 37.5 million sets of proxy materials, saving over \$223 million in postage and printing costs.

Broker intermediaries have further reduced the number of proxy material mailings through “householding” (*i.e.*, sending a single copy of materials to multiple shareholders residing at the same address) and Internet delivery (*i.e.*, delivering materials electronically to shareholders who have affirmatively consented to such method). Indeed, during the 2005 proxy season, householding resulted in the elimination of over 7.5 million sets of proxy materials, saving approximately \$45 million in postage and printing costs. *See* Exhibit II. Similarly, Internet delivery resulted in the elimination of approximately 10.7 million sets of proxy materials, saving almost \$63.8 million in postage and printing costs. *See* Exhibit II. If it were possible to encourage more beneficial owners to receive proxy materials through the Internet, these costs would be reduced even further.

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<sup>6</sup> This calculation and the calculations in the following two paragraphs are based upon an average cost of \$5.33 per set of proxy materials.

**B. Alternative Means Should be Considered to Achieve the Objectives of the Proposed Rule.**

The SIA believes that it is possible to achieve the objectives of the Proposed Rule while building on the success of the current proxy delivery system for beneficial owners. To ensure that beneficial owners receive the benefits of a new model, the SIA believes that the following principles should be observed:

- Beneficial owners should be able to select a proxy delivery method on an account-wide, rather than an issuer-by-issuer, basis;
- Beneficial owners should be able to easily indicate their delivery preferences and continue to receive proxy materials as they have in the past with minimal or no effort;
- A beneficial owner's stated delivery preference should remain in effect until the beneficial owner decides otherwise; beneficial owners should not be required to restate preferences every year or for every separate issuer;
- If a beneficial owner does not affirmatively state a delivery preference, any default delivery method should be fair and uniform and should facilitate access to, or delivery of, proxy materials; and
- Communications concerning proxies should continue to be channeled between beneficial owners and intermediaries so as to maintain the efficient and cost effective system to which beneficial owners are accustomed.

Institutional and individual investors that have consented to electronic delivery are receiving proxy materials in accordance with these principles -- and have *already* obtained the efficiencies of a "notice and access" model. Broker intermediaries furnish materials to investors in a manner chosen by the investor -- through the mail or Internet -- on an account-wide basis. Investors that have consented to electronic delivery receive an e-mail -- the functional equivalent of a notice -- containing a request for voting instructions (allowing an investor to vote electronically, on the phone, or by U.S. mail) with a hyperlink to the proxy materials. The use of applications such as ProxyEdge and electronic delivery has resulted in substantial savings. *See* Exhibit II.<sup>7</sup>

The SIA believes the Proposed Rule should be revised to apply the principles set forth above to the remaining group of beneficial owners -- *i.e.*, those individual investors who currently are receiving proxy materials through the U.S. mail. Although the SIA fully supports

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<sup>7</sup> In order to promote the use of electronic media to furnish beneficial owners with proxy materials, the SIA urges the Commission to reconsider the manner by which beneficial owners are required to provide consent to electronic delivery and to address any issues raised by the Electronic Signatures in Global and National Commerce Act.

the use of electronic media to provide information to investors, it believes that it is important to consider the context of the information. For example, if an investor has a direct interest in the information (*i.e.*, it relates to an immediate or concurrent investment decision) that information should be made available quickly and efficiently -- and the Internet is an ideal means to accomplish that goal. If, however, the information is provided in a more passive or indirect context -- *i.e.*, it does not necessarily relate to an immediate or concurrent investment decision -- the Internet may not be the best delivery method for a segment of investors. The SIA believes that proxy materials may, for some investors, fall into the latter category and, as a result, some investors may not have the same interest or motivation to access proxy materials via the Internet.

In accordance with the above principles, the SIA urges the SEC to consider an approach whereby beneficial owners would establish a default delivery method for all proxy materials relating to companies whose securities are held in any one account. Beneficial owners could express their account delivery preferences in a variety of ways. For example, the choice could be made when opening a new account, when broker intermediaries receive updated customer information,<sup>8</sup> or through the joint efforts of issuers and intermediaries. For those investors who do not affirmatively express a delivery preference, a default that facilitates easy access or delivery should be adopted. By allowing beneficial owners to make a choice, rather than imposing an issuer's decision on them, it is more likely that beneficial owners will continue to participate in the corporate democracy system. An approach that allows investors to elect a delivery method would, moreover, be more equitable for those persons who do not have Internet access or who do not want to receive proxy materials in an electronic format. Instead, such shareholders should be allowed to elect to continue to receive printed proxy materials through the U.S. mail.

Finally, to avoid any "disconnects" between the Proposed Rule and the current proxy delivery process, any "notice and access" approach should be based upon the well established delivery infrastructures that have been used by broker intermediaries for years. In general, broker intermediaries code customer accounts to signal whether proxy materials are to be furnished through the U.S. mail or electronically. This coding is maintained on an account-by-account basis, not an issuer-by-issuer basis. For example, if a customer holds shares of IBM and GM in her account, proxy materials would be sent, based upon account coding, through the mail or electronically. It would be expensive and difficult, if not impossible, to code materials relating to IBM to be sent by mail while coding the materials relating to GM to be sent electronically. Moreover, the suggested approach would allow issuers and intermediaries to reasonably estimate the number of printed materials needed.

The suggested approach would reduce the number of requests for printed materials that issuers and intermediaries receive. This, in turn, would reduce the staff that intermediaries would be required to maintain. If the Proposed Rule is adopted, broker intermediaries will need to be prepared to respond to requests for printed proxy materials from their beneficial owner

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<sup>8</sup> As you know, broker intermediaries request customers to update account information and investment objectives at least every 36 months in accordance with Rule 17a-3(a)(17) of the Securities Exchange Act of 1934.

customers. It is, however, difficult, if not impossible, to foresee the number of issuers that will adopt the model and the number of beneficial owners that will request proxy materials from their intermediaries. Nevertheless, broker intermediaries will need to dedicate a sufficient number of employees to respond to any customer requests received during the limited proxy season. Moreover, broker intermediaries will need to maintain systematic infrastructures that would support this function (e.g., a call center, an Internet site where beneficial owners could place such requests, an operations system that would allow a broker's representative to systematically signal proxy material delivery in one-off situations). Establishing and maintaining such an infrastructure would, of course, add to the expense of maintaining the proposed "notice and access" model. In addition, and in connection with responding to these individual requests, the cost of postage probably would increase because intermediaries would be unable to take advantage of bulk mailing rates. The approach that we are proposing would, however, reduce the costs involved in responding to requests from beneficial owners.

Accordingly, the SIA urges the Commission to consider alternative approaches consistent with the principles set forth above in order to achieve the goals of the Proposed Rule while facilitating the participation of beneficial owners in the corporate democracy process.

### **III. The Proposed Rule has the Potential to Confuse Beneficial Owners and Reduce Participation in Corporate Democracy.**

The proposed "notice and access" model, as currently drafted, has the potential to confuse beneficial owners and reduce participation in the corporate democracy process because it will change the way beneficial owners receive proxy materials. The proposal, as currently drafted, also will place an unreasonable burden on some segments of the individual investor community.

#### **A. The Proposed Rule will Complicate the Process and Multiply the Steps Required for Beneficial Owners to Vote.**

A hypothetical application of the Proposed Rule reveals that a significant segment of individual investors will be unreasonably burdened in accessing proxy materials. Some individual investors presumably will receive the Notice of Internet Availability of Proxy Materials (the "Notice"), go online, review the proxy materials, and vote if they are inclined to do so. Other individual investors, however, will be forced to repeatedly take action – for each separate issuer -- to receive proxy materials via their preferred delivery method -- or they will simply not participate in the corporate democracy process. For example, a large segment of investors presumably will receive the Notice and decide they want the full set of proxy materials sent to them via U.S. mail or electronic mail. For each issuer, they will have to call the issuer or their intermediaries to request the materials. Persons in this group could, however, face quite a challenge. For example, if a beneficial owner holds 30 publicly traded securities and 15 of the issuers of those securities opted to use the "notice and access" model, then according to the Proposed Rule, the beneficial owner will have to contact 15 issuers -- every year -- to request the proxy materials. As a result, a number of these individuals may decide that it is not worth their time or effort to request the proxy materials and will not vote or, conceivably, will vote on an

uninformed basis because they did not read the materials. Accordingly, the SIA encourages the Commission to adopt a model that builds on the current system for beneficial owners and will encourage individual investors to continue to participate in the corporate democracy process.

In addition, the Proposed Rule will make it more difficult for beneficial owners without access to the Internet to receive their proxy materials. Indeed, the Release cites to data that estimate that 25 percent of Americans do not have Internet access in their homes.<sup>9</sup> This group of investors should not be disadvantaged -- and potentially disenfranchised -- because they do not use the Internet.

#### **B. The Proposed Rule Will Increase Discretionary Broker Voting.**

The Release poses the question of whether the Proposed Rule will increase issuers' dependency on discretionary broker voting and whether it will increase the amount of discretionary voting. *See* Release § III(A)(2)(i) at 23. The SIA believes the answer to both questions is yes.

If a broker intermediary has not received a beneficial owner's voting instructions by the tenth day preceding a shareholder meeting date, the broker intermediary may, as an accommodation to an issuer, cast a discretionary broker vote on matters that are deemed to be routine pursuant to New York Stock Exchange rules. As the Proposed Rule is currently drafted, it places a large burden on investors who do not want to, or cannot, access proxy materials via the Internet. As discussed above, this raises the possibility that a greater number of beneficial owners will opt out of the corporate democracy process -- and, as a result, broker intermediaries will have the ability to vote an increased number of shares. In turn, issuers probably will need brokers to vote those shares more frequently in order to reach a quorum or, in the alternative, issuers will need to hire proxy solicitation firms to compile enough votes to meet quorum requirements. The use of proxy solicitation firms would, of course, undermine one basis of the Proposed Rule -- to reduce the cost of the proxy process.

Moreover, in response to the Commission's request for comment, the SIA believes that the Proposed Rule, as currently drafted, may cause uncertainties among brokers as to whether they have the ability to vote shares. Under the Proposed Rule, broker intermediaries will have no means to know whether beneficial owners have accessed proxy materials from issuers. This will increase uncertainties as to the number of investors that intend to vote. In addition, the legend<sup>10</sup> in the Notice of Internet Availability should state that an intermediary will have the right to cast a discretionary broker vote if it has not received a customer's voting instructions 10 days prior to

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<sup>9</sup> Release §II at 8.

<sup>10</sup> The SIA disagrees with the following sentence in the proposed legend: "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 is likely to take you longer to receive your materials through an intermediary than directly from the company." Contrary to what this sentence suggests, broker intermediaries provide proxy materials to their beneficial owners in a timely and efficient fashion.

the shareholders meeting. This would, in effect, notify beneficial owners that their votes would be void unless received by that date.

**C. Issuers Should Be Required to Maintain Certain Restrictions on Their Websites to Protect the Proxy Voting Process.**

It would be inappropriate to prohibit beneficial owners from visiting an issuer's website, but it is important that any SEC rule provide mechanisms to ensure (i) that only record holders -- not beneficial owners holding in street name -- be able to request or access proxy cards from the issuer and (ii) that the privacy rights of beneficial owners who visit an issuer's website are protected.

First, it is, of course, of paramount importance that the sanctity of the voting process be protected. By prohibiting issuers from providing proxy cards to beneficial owners who hold in street name, the Commission would reduce the risk that beneficial owners would receive and execute proxy cards instead of -- or in addition to -- intermediary voting instructions. The assurance of accurate proxy voting is the foundation of corporate democracy and the Proposed Rule should not unintentionally undermine the integrity of the voting process. Indeed, the SIA has been working closely with the New York Stock Exchange (the "NYSE") and others to ensure that the tabulation of investor votes is managed to ensure accuracy, and we are concerned that these efforts may be damaged if beneficial owners have access to proxy cards. *See generally* Letter to Anand Ramtahal of the NYSE from Donald D. Kittell of the SIA, dated Apr. 26, 2005 ([http://www.sia.com/2005\\_comment\\_letters/6136.pdf](http://www.sia.com/2005_comment_letters/6136.pdf)). Moreover, if a beneficial owner were to submit a proxy card in lieu of voting instructions, it would be impossible for intermediaries to accurately reconcile votes in a manner designed to ensure that overvoting does not occur. Accordingly, precautions must be taken to ensure that this does not happen.

Second, any changes to the proxy delivery system should be designed to protect the privacy rights of beneficial owners. To meet that goal, issuers should be prohibited from using cookies or other surveillance mechanisms to identify persons that access proxy materials on an issuer's website. This is of particular concern for persons who object to having their identities revealed to issuers ("objecting beneficial owners" or "OBOs"). Although the number of OBOs vary from issuer to issuer, approximately 31 percent of brokerage account owners object to revealing their identities. *See* Exhibit I. Accordingly, the SIA believes that the Proposed Rule should prohibit issuers from requesting proof of a person's status as a beneficial owner and should prohibit issuers from using any means to identify such persons. Indeed, issuers should only be allowed to request record holders to identify themselves.

**D. Beneficial Owners' Access to Proxy Voting Materials Should Be Provided by Intermediaries.**

According to the Proposed Rule, a beneficial owner may request delivery of proxy materials from either the company or the intermediary, at the beneficial owner's option. The SIA believes that it is important that the rule ensure that issuers do not provide proxy cards to

beneficial owners but instead only allow broker intermediaries to provide requests for voting instructions to beneficial owners.<sup>11</sup>

As a preliminary matter, and as discussed above, only intermediaries should provide voting materials to beneficial owners so that the integrity of the voting process is not undermined. In addition, the SIA is concerned that the “notice and access” proposal may cause confusion among beneficial owners because, if an investor requests proxy materials from an issuer, then those materials will not be delivered -- in one envelope or within one e-mail -- with requests for voting instructions. If proxy materials and voting instructions are delivered separately, beneficial owners may misplace the voting instructions or be otherwise inconvenienced to such an extent that they do not participate in the proxy process. This could, effectively, disenfranchise persons who request materials from issuers, rather than intermediaries. Such disenfranchisement presumably would have the largest impact upon individual beneficial owners and that, in turn, could skew voting results in favor of institutional investors. Moreover, intermediaries should be allowed to send out a request for voting instructions with a Notice -- even if the issuer chooses not to send a proxy card with the Notice to its record holders.

#### **IV. The Proposed Rule has the Potential to Increase the Cost of Proxy Delivery.**

The proposal, as currently drafted, will increase the cost of proxy delivery because it will require broker intermediaries to implement additional operations and decision-making processes. Any such costs should be borne by issuers because such communications are for the benefit of issuers, not intermediaries.

##### **A. The Proposed Rule Would Require Duplicative Costs.**

In the long term, the SIA believes that a “notice and access” model should reduce the cost of providing proxy materials to beneficial owners. This is especially true if intermediaries are able to take advantage of existing infrastructures. Nevertheless, the Commission should not assume that implementing a “notice and access” model will immediately reduce costs; on the contrary, it is likely that costs would increase, at least during the first few years, because intermediaries will need to build, maintain, and staff certain duplicative infrastructures.

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<sup>11</sup> In the Release, the Commission raises the question of whether broker intermediaries should be required to establish their own websites to post proxy materials for customers. The SIA does not believe that this should be a *requirement*; rather, a broker intermediary should have the option to establish its own website based upon its own analysis of its customers’ needs, its operational capabilities, and other factors. In any event, at this time, it appears likely that broker intermediaries will employ third parties, such as ADP, to develop websites, as necessary, to facilitate the use of a “notice and access” model. The development and maintenance of such sites will, of course, involve conversion costs as well as on-going maintenance costs. To ensure that such websites remain current, issuers should be required to notify promptly intermediaries of any updates or changes to proxy materials so that intermediaries and their agents can keep websites up-to-date.

For example, broker intermediaries may need to employ staff to customize or supplement issuers' notices. Given that it will be difficult, if not impossible, to predict the number of issuers that will elect to use the "notice and access" model, broker intermediaries will not be able to estimate the number of people that will be needed to fulfill this function. Accordingly, this inability to foresee how to allocate resources could cause the cost of proxy delivery to rise. Another example of a potentially large expense involves establishing and maintaining an infrastructure to respond to requests by beneficial owners for delivery of proxy materials. As previously discussed, broker intermediaries would need to provide a staff to fulfill this function during the limited proxy season and would need to establish and maintain some sort of operations system to signal proxy material delivery on an individualized basis. In this regard, it is also important to remember that intermediaries might not be able to take advantage of bulk mail rates because they will be sending such materials on a one-off basis rather than in bulk.

**B. Intermediaries Will Incur Additional Costs Handling Materials from Soliciting Persons Other Than Issuers.**

To the extent that soliciting persons other than issuers are able to take advantage of the "notice and access" model, they should be required to use the same infrastructure for proxy delivery by intermediaries as issuers use. Any alternative that requires intermediaries to maintain two or more infrastructures to accommodate different requirements for issuers and others will only increase the cost and decrease the efficiency of proxy delivery, all to the disadvantage of shareholders. Indeed, the model should be designed to ensure that proxy solicitations by persons other than issuers do not create any additional burdens on intermediaries. Moreover, any rule that is enacted should provide intermediaries with sufficient time to fulfill their obligations to deliver materials of non-issuer persons.

**V. The Commission Should Urge Issuers and Intermediaries to Work Together to Build on the Current Proxy Delivery System and Do More to Educate and Encourage Shareholders To Use Electronic Delivery Processes.**

The proxy delivery system depends on coordination and cooperation between issuers and intermediaries but the Proposed Rule does not reflect that fact. The SIA believes that the "notice and access" model should be redesigned to encourage issuers and intermediaries to continue as partners in the proxy delivery process. As noted earlier, the SIA urges the Commission to consider that intermediaries -- not issuers -- use a proven, efficient model to deliver proxy materials to approximately 80 percent of all shareholders and that the model sorts delivery methods by investor account, not by issuer. The Proposed Rule should be modified to incorporate and address the existing model.

**A. The Proposed Rule Should Encourage Issuers to Coordinate with Intermediaries Regarding Changes That Will Affect Those Intermediaries.**

Numerous aspects of the Proposed Rule will result in actions taken by issuers creating costs and burdens for intermediaries. For example, the costs of a "notice and access" model will be greater if issuers are able to use the "notice and access" model one year but return to the

traditional model the next because this will require broker intermediaries to maintain duplicative delivery systems by issuer. As an alternative, the Commission should encourage issuers and intermediaries to work together to improve the proxy delivery process. Among other things, issuers and intermediaries could jointly develop programs to encourage shareholders to consent to electronic delivery of issuer communications.

**B. Intermediaries Should Have Flexibility in Determining Whether to Create Their Own Notices of Internet Availability of Proxy Materials.**

The Proposed Rule contemplates that, if an issuer requests an intermediary to follow the “notice and access” model, the intermediary may post the request for voting instructions on an Internet site if the intermediary supplements or creates its own Notice. The SIA believes that many broker intermediaries may, to assist their own customers, supplement or customize issuers’ notices. Nevertheless, and in response to the Commission’s request for comment, the SIA believes that, if an intermediary decides to provide its own Notice to beneficial owners, an issuer should still be required to provide the intermediary with the Issuer’s Notice in sufficient time for the intermediary to prepare a supplement or replacement of the Issuer’s Notice. Indeed, it is quite likely that broker intermediaries will use at least some of the information contained in an Issuer’s Notice to prepare their own Notices. Accordingly, an issuer should be required to notify broker intermediaries that it intends to use the “notice and access” model as soon as possible and should further provide information that the broker will need to prepare its own notice on a timely basis.

**C. Issuers and Intermediaries Should Be Encouraged to Coordinate to Assure that an Adequate Number of Proxy Materials are Available to Beneficial Owners Quickly.**

Under the Commission’s proposal, if a beneficial owner requests his or her intermediary to provide proxy materials, the intermediary would be required to forward the materials within two days after such materials are received from the issuer. The SIA is concerned that this two-day requirement may not be feasible -- especially if the number of requests for proxy materials is underestimated. In other words, if an issuer underestimates the demand for hard copy proxy materials and, as a result, provides intermediaries with an insufficient amount of materials, then intermediaries may not be able to meet the two day requirement.<sup>12</sup> This could, in turn, result in beneficial owners receiving materials only *after* the voting date. It is possible that such disenfranchisement could result in shareholder lawsuits. Intermediaries may be “caught in the middle” between issuers and shareholders in any such litigation even if they have forwarded materials immediately upon late receipt from issuers.

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<sup>12</sup> In connection with the question raised in the Release concerning whether intermediaries should be allotted less time to forward copies of proxy materials via electronic mail, the SIA believes that, although it may take less time to forward copies electronically, it would be better to establish, without reference to delivery method, one standard time requirement for forwarding materials.

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In response to the Commission's request for comment, the SIA further believes that, if an issuer decides to use the "notice and access" model, issuers still should be required to supply -- and pay for -- copies of proxy materials for forwarding to beneficial owners who request them because it is in the issuer's interest to provide access to issuer communications in accordance with its shareholders' preferences.

## **VI. Conclusion**

The SIA reiterates its support for the goals of the Proposed Rule but respectfully urges the Commission and its staff to give careful consideration to the concerns discussed herein. In particular, the SIA urges the Commission to build on the current successful model for proxy delivery to beneficial owners in taking any steps to improve the proxy delivery process. The SIA would be happy to discuss any of the comments contained herein with you in greater detail. If you have any questions, please contact Dennis C. Hensley or Madeleine J. Dowling of Sidley Austin LLP at (212) 839-5300 or the undersigned.

Sincerely,

Donald D. Kittell

cc: The Honorable Christopher Cox  
The Honorable Cynthia A. Glassman  
The Honorable Paul S. Atkins  
The Honorable Roel C. Campos  
The Honorable Annette L. Nazareth

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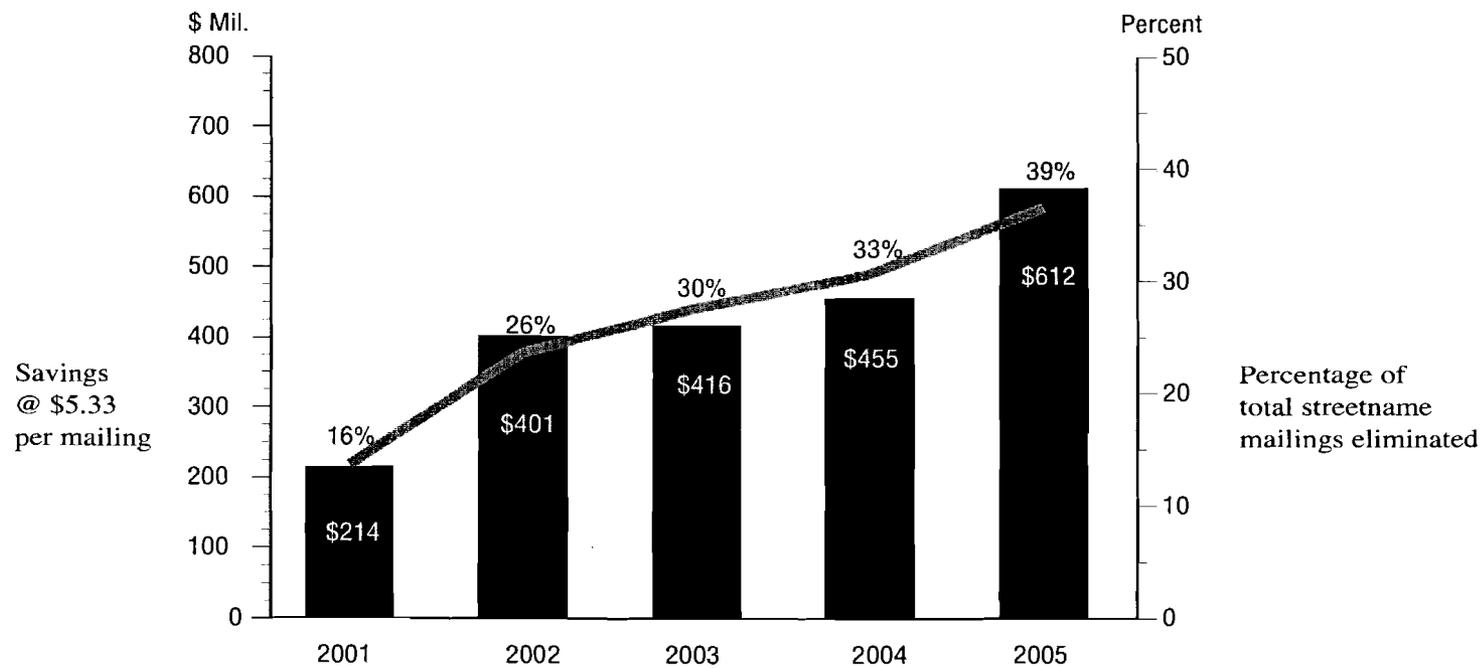
SHAREHOLDER COMMUNICATIONS MODEL

	<u>Shareholders</u>	<u>Shares</u>
	%	%
I. <u>Registered directly with issuer</u>	21.510	15.450
II. <u>In Street Name</u>		
(1) <u>Institutional</u>		
- objecting	5.432	48.328
- non-objecting	<u>.604</u>	<u>5.370</u>
- TOTAL	<u>6.036</u>	<u>53.698</u>
(2) <u>Individual</u>		
- objecting	25.964	8.321
- non-objecting	<u>46.490</u>	<u>22.531</u>
- TOTAL	<u>72.454</u>	<u>30.852</u>
<u>TOTAL Street Name</u>		
- objecting	31.396	56.649
- non-objecting	<u>47.094</u>	<u>27.901</u>
- TOTAL	<u>78.490</u>	<u>84.550</u>
<u>TOTAL Shareholders/Shares</u>	<u>100.000</u>	<u>100.000</u>

NOTES:

- (1) Registered vs streetname allocation based on ADP data for 2005.
- (2) Institutional vs individual allocation based on ADP data for 2005.
- (3) OBO vs NOBO allocation based on ADP data for 2005 for NYSE companies. (use 40% of shareholders and 67% of shares are OBO).
- (4) Assume 10% of institutional shareholders and shares are NOBO.

# Savings to Issuers Streetname Proxy Distributions



**Savings result from:**

- Investment Management & Specialized Processing
- Institutional Processing (Proxy Edge)
- Internet (Proxy Vote)
- Householding and Consolidation