

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR PARTS 240, 249 and 274**

**[RELEASE NOS. 34-55146; IC-27671; File No. S7-10-05]**

**RIN 3235-AJ47**

**INTERNET AVAILABILITY OF PROXY MATERIALS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule; request for comment on Paperwork Reduction Act burden estimates.

**SUMMARY:** We are adopting amendments to the proxy rules under the Securities Exchange Act of 1934 that 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. Issuers must make copies of the proxy materials available to shareholders on request, at no charge to shareholders. The amendments put into place processes that will 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 amendments may be able to significantly lower the costs of their proxy solicitations that ultimately are borne by shareholders. The amendments also might reduce the costs of engaging in a proxy contest for soliciting persons other than the issuer. The amendments do not apply to business combination transactions. The amendments also do not affect the availability of any existing method of furnishing proxy materials.

**DATES:** Effective Date: March 30, 2007.

Compliance Date: Persons may not send a Notice of Internet Availability of Proxy Materials to shareholders prior to July 1, 2007.

Comment Due Date: Comments on the Paperwork Reduction Act burden estimate should be received on or before March 30, 2007.

**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/final.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto: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 Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

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 its Internet Web site (<http://www.sec.gov/rules/final.shtml>). 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 publicly available.

**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:** We are amending Rules 14a-2,<sup>1</sup> 14a-3,<sup>2</sup> 14a-4,<sup>3</sup> 14a-7,<sup>4</sup> 14a-8,<sup>5</sup> 14a-12,<sup>6</sup> 14a-13,<sup>7</sup> 14b-1,<sup>8</sup> 14b-2,<sup>9</sup> 14c-2,<sup>10</sup> 14c-3,<sup>11</sup> 14c-5,<sup>12</sup> 14c-7,<sup>13</sup> Schedule 14A,<sup>14</sup> Schedule 14C,<sup>15</sup> Form 10-K,<sup>16</sup> Form 10-KSB,<sup>17</sup> Form 10-Q,<sup>18</sup> and Form 10-QSB,<sup>19</sup> under the Securities Exchange Act of 1934<sup>20</sup> and Form N-SAR<sup>21</sup> under the

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<sup>1</sup> 17 CFR 240.14a-2.  
<sup>2</sup> 17 CFR 240.14a-3.  
<sup>3</sup> 17 CFR 240.14a-4.  
<sup>4</sup> 17 CFR 240.14a-7.  
<sup>5</sup> 17 CFR 240.14a-8.  
<sup>6</sup> 17 CFR 240.14a-12.  
<sup>7</sup> 17 CFR 240.14a-13.  
<sup>8</sup> 17 CFR 240.14b-1.  
<sup>9</sup> 17 CFR 240.14b-2.  
<sup>10</sup> 17 CFR 240.14c-2.  
<sup>11</sup> 17 CFR 240.14c-3.  
<sup>12</sup> 17 CFR 240.14c-5.  
<sup>13</sup> 17 CFR 240.14c-7.  
<sup>14</sup> 17 CFR 240.14a-101.  
<sup>15</sup> 17 CFR 240.14c-101.  
<sup>16</sup> 17 CFR 249.310.  
<sup>17</sup> 17 CFR 249.310a.  
<sup>18</sup> 17 CFR 249.308a.  
<sup>19</sup> 17 CFR 249.308b.  
<sup>20</sup> 15 U.S.C. 78a et seq.  
<sup>21</sup> 17 CFR 249.330 and 274.101.

Exchange Act and the Investment Company Act of 1940.<sup>22</sup> We also are adding new Rule 14a-16 under the Exchange Act.

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<sup>22</sup> 15 U.S.C. 80a-1 et seq.

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## **I. Introduction**

On December 8, 2005, we proposed amendments to update the proxy rules to take greater advantage of communications technology by supplementing the existing regulatory framework with an alternative “notice and access” proxy model that could reduce significantly the printing and mailing costs associated with furnishing proxy materials to shareholders.<sup>23</sup> Under the notice and access model that we proposed, an issuer would be able to satisfy its obligations under the Commission’s proxy rules by posting its proxy materials on a 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 those materials. Under the proposal, an issuer relying on the model would be required to provide a requesting shareholder with a copy of the proxy materials in paper or by e-mail, at no charge to the

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<sup>23</sup> Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597]. For purposes of this release only, 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 shareholder meetings, additional soliciting materials, and any amendments to such materials. For purposes of this release, the term does not include materials filed under Rule 14a-12.

shareholder. We proposed that soliciting persons other than the issuer also would be able to rely on the notice and access model.

We received approximately 140 comment letters on the proposed notice and access model from a variety of interested parties, including issuers and their agents, shareholders, intermediaries and their agents, financial printers, manufacturers of mailing products, and academics. There was significant disagreement among the commenters regarding these key issues raised by the proposed model:

- The sufficiency of current Internet access among the U.S. population such that the proposed model would be desirable;<sup>24</sup>
- The effect that the proposed notice and access model might have on levels of proxy voting by shareholders;<sup>25</sup>
- The level of security and privacy on the Internet;<sup>26</sup>

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<sup>24</sup> See, for example, letters suggesting that current rates of Internet access are sufficient from American Bar Association (ABA), America's Community Bankers (ACB), Association of Ameritech SBC Retirees (SBC Retirees), Business Roundtable (BRT), Computershare Ltd. (Computershare), Proxinvest, Gary Tannahill, Hermes, Investment Company Institute (ICI), Securities Transfer Association (STA), and Sullivan & Cromwell. But also see, for example, letters from Association of BellTel Retirees (BellTel Retirees), Todd Collier, Joel Brown, James Davis, Donna Garal, Clark Green, Heather Harper, Frank Inman, William LaFollette, James Phipps, Beth Spletter, Megan Stroinski, and the United States Postal Service (USPS) suggesting that those rates are not sufficient.

<sup>25</sup> Some commenters believed that the proposed model might result in a decline in voting by shareholders. See, for example, letters from Automatic Data Processing, Inc. (ADP), James Angel, Timothy Buchman, State Board of Administration of Florida (Florida State Board), Fund of Stockowners Rights (Stockowners Rights), IR Web Report, and Securities Industry Association (SIA). However, other commenters believed the rules may increase shareholder voting by facilitating the voting process. See, for example, letters from AFL-CIO, Robert Atkinson, Institutional Shareholder Services (ISS), Proxinvest, and Society of Corporate Secretaries and Governance Professionals (SCSGP).

<sup>26</sup> See, for example, letters from James Angel, Todd Collier, James Davis, William LaFollette, Matthew McGuire, and USPS.

- The extent of potential savings to issuers and those conducting proxy contests that choose to rely on the proposed model;<sup>27</sup> and
- Whether the proposed model may make the proxy delivery system, particularly as it relates to beneficial owners holding in street name through their brokers or other intermediaries, too complex.<sup>28</sup>

Several commenters suggested revisions related to the proposed notice and access model, including the following:

- The proposed rules should allow a shareholder to make an election to receive paper copies of the proxy materials with respect to any future solicitations that would remain in place until subsequently revoked by the shareholder;<sup>29</sup>
- An issuer should have to make the proxy card available to shareholders through the same medium it uses to make the proxy statement available to them;<sup>30</sup>
- The Commission should review and simplify the proxy delivery system as a whole rather than addressing the issue of electronic delivery of proxy materials in isolation;<sup>31</sup> and

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<sup>27</sup> See, for example, letters from ADP and Computershare.

<sup>28</sup> See letter from ABA.

<sup>29</sup> See letters from American Business Council (ABC), AFL-CIO, James Angel, CALSTRS, Florida State Board, Ohio Public Employees Retirement System (OPERS), San Diego City Employees' Retirement System (San Diego Retirement), SIA, William Sjostrom, Stocklein Law Group, Swingvote, and Paul Uhlenhop.

<sup>30</sup> See letters from ACB, AFL-CIO, Amalgamated Bank of LongView Funds (Amalgamated Bank), BellTel Retirees, Council of Institutional Investors (CII), Florida State Board, Carl Hagberg, International Brotherhood of Teamsters (Teamsters), National Retiree Legislative Network (NRLN), San Diego Retirement, and Swingvote.

- The New York Stock Exchange (“NYSE”) should review its current schedule of maximum fees that its member firms may charge issuers to forward issuers’ proxy materials to beneficial owners.<sup>32</sup>

Although there was a mixed reaction to the proposal,<sup>33</sup> we believe that current levels of access to the Internet merit adoption of the notice and access model as an alternative to the existing proxy distribution system. In this regard, we note that more than 10.7 million beneficial shareholders already have given their affirmative consent to electronic delivery of proxy materials and approximately 87.8% of shares voted were voted electronically or telephonically during the 2006 proxy season.<sup>34</sup> Moreover, research submitted to us during the comment period indicates that approximately 80% of investors in the United States have access to the Internet in their homes, a greater percentage than we estimated at the proposing stage.<sup>35</sup> Several commenters expressed the view that the current level of Internet usage is sufficiently high to warrant adoption of the proposed notice and access model.<sup>36</sup> Although some commenters did not think that

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<sup>31</sup> See, for example, letters from BRT, Committee of Concerned Shareholders (Concerned Shareholders), Computershare, Carl Hagberg, Mellon, and STA.

<sup>32</sup> See letters from BRT, Computershare, and SCSGP.

<sup>33</sup> It appeared that many commenters opposing adoption mistakenly believed that they would lose the ability to receive paper copies. Others objected to having to request paper copies under the notice and access model. See, for example, letters from Arthur Comings, Dave Few, George Liddell, Robert Link, and Chloris Wolski.

<sup>34</sup> According to data available on the Web site of ADP. See [www.ics.adp.com/release11/public\\_site/about/stats.html](http://www.ics.adp.com/release11/public_site/about/stats.html).

<sup>35</sup> See letter from ADP. At the proposing stage, we estimated that 75% of people in the United States had Internet access, but we did not have an estimate for the percentage of investors with Internet access.

<sup>36</sup> See, for example, letters from ABA, ACB, BRT, Computershare, Hermes, ICI, Proxinvest, SBC Retirees, STA, Sullivan & Cromwell, and Gary Tannahill.

Internet access is sufficiently widespread, particularly among seniors,<sup>37</sup> to warrant implementation of the proposed model at this time,<sup>38</sup> the requirement that any shareholder lacking Internet access, or preferring delivery of a copy of the proxy materials, can make a permanent request to receive a copy of the proxy materials (and all future proxy materials) at no charge should substantially mitigate the concern about Internet access.

Therefore, we are adopting the proposal substantially as proposed. The final rules are intended to allow issuers and other soliciting persons to establish procedures that will promote use of the Internet as a reliable and cost-efficient means of making proxy materials available to shareholders. Among those shareholders who access the proxy materials electronically, the rules also may increase the use of the Internet for voting proxies. An issuer's or other soliciting person's election to follow the notice and access model will be voluntary.<sup>39</sup>

Under the final rules, as discussed in more detail below, an issuer may satisfy its obligation under the Commission's proxy rules to furnish proxy materials to shareholders in connection with a proxy solicitation by posting its proxy materials on a publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and sending a Notice of Internet Availability of Proxy Materials ("Notice") to shareholders at least 40 calendar days before the shareholder meeting date indicating that the proxy

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<sup>37</sup> See, for example, letters from American Association of Retired Persons (AARP), BellTel Retirees, Timothy Buchman, Todd Collier, NRLN, Printing Industries of America (PIA), Stockowners Rights, and Telephone Pioneers of America.

<sup>38</sup> See, for example, letters from BellTel Retirees, Joel Brown, Todd Collier, James Davis, Donna Garal, Clark Green, Heather Harper, Frank Inman, William Lafollette, James Phipps, Beth Spletter, Megan Stroinski, and USPS.

materials are available and explaining how to access those materials.<sup>40</sup> Shareholders must have a means to execute a proxy as of the time on which the Notice is sent.<sup>41</sup> The Notice also must explain how a shareholder can request a copy of the proxy materials and how a shareholder can indicate a preference to receive a paper or e-mail copy of any proxy materials distributed under the notice and access model in the future. An issuer may not send a proxy card along with the Notice; however, 10 calendar days or more after sending the Notice, the issuer may send a proxy card to shareholders.<sup>42</sup> If an issuer chooses to send a proxy card without a copy of the proxy statement under this provision, a copy of the Notice must accompany the proxy card so that recipients will be notified again about the Web site on which the proxy statement is accessible. Finally, the notice and access model may not be used in conjunction with a proxy solicitation related to a business combination transaction.

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<sup>39</sup> In a companion release, the Commission is proposing to require issuers and other soliciting persons to follow a substantially similar model. See Release No. 34-55147.

<sup>40</sup> An issuer or other soliciting person also must continue to comply with Exchange Act Rules 14a-6 [17 CFR 240.14a-6] and 14c-5 [17 CFR 240.14c-5], which require the issuer or other soliciting person to file its proxy statement (or information statement) and additional soliciting material with the Commission. An issuer also must continue to comply with Exchange Act Rules 14a-3(c) [17 CFR 240.14a-3(c)] and 14c-3(b) [17 CFR 240.14c-3(b)], which require an issuer to submit copies of its annual report to security holders to the Commission. The rules that we are adopting in this release do not affect any current Commission filing requirement, except that an issuer or other soliciting person following the notice and access model would be required to file the Notice as additional soliciting material under Exchange Act Rule 14a-6(b) [17 CFR 240.14a-6(b)].

<sup>41</sup> As discussed in more detail in Section II.A.2 of this release, an issuer or any other soliciting person must provide a means for executing proxies available at the time the Notice is sent. It may not wait until it sends a paper or e-mail copy of the proxy card 10 calendar days or more after sending the Notice to provide shareholders with a means to execute a proxy.

<sup>42</sup> An issuer may send a proxy card to shareholders before the conclusion of the 10-day period if the proxy card is accompanied or preceded by a copy, via the same medium, of the proxy statement and annual report to security holders if required by Rule 14a-3(b).

Shareholders and other persons conducting their own proxy solicitations may rely on the notice and access model under requirements substantially similar to the requirements that would apply to issuers. As a result, these rules may have the effect of reducing the cost of engaging in a proxy contest. However, unlike the requirements for an issuer, a soliciting person other than the issuer may selectively choose the shareholders from whom it desires to solicit proxies without the need to send an information statement to all other shareholders.

The new rules do not affect the availability of other means of providing proxy materials to shareholders, such as obtaining affirmative consents for electronic delivery pursuant to existing Commission guidance.<sup>43</sup> Thus, an issuer may rely on affirmative consents to furnish proxy materials to some shareholders, and rely on the notice and access model to furnish the materials to others.

We are making several significant revisions to the proposed notice and access model in response to commenters' concerns. First, the final rules do not permit a proxy card to accompany the Notice as we originally proposed, although the rules do permit an issuer or other soliciting person to send a proxy card 10 calendar days or more after it

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<sup>43</sup> 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. Release No. 33-7288 (May 9, 1996) [61 FR 24644] (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.

sends the Notice, provided that a copy of the Notice or accompanies the proxy card.<sup>44</sup>

Second, we are adopting a requirement that issuers and other soliciting persons send the Notice to shareholders at least 40 calendar days before the shareholder meeting date, rather than 30 calendar days before the meeting, as proposed. We are making this change so that issuers and other soliciting persons will still have at least a 30-day period in which they can send a proxy card to shareholders if they choose to do so.

Third, in addition to the proposed requirement that a shareholder be able to request a paper or e-mail copy of the proxy materials for a particular meeting, the final rules require an issuer to allow shareholders to elect to receive paper or e-mail copies of proxy materials that the issuer will distribute in the future in reliance on the notice and access model. Similarly, intermediaries must allow beneficial owners to elect to receive paper or e-mail copies of any proxy materials that will be distributed in the future in reliance on the notice and access model with respect to all securities held in the beneficial owner's account. Fourth, under the new rules, an intermediary must prepare its own Notice for distribution to beneficial owners.

Fifth, the intermediary's Notice sent to a beneficial owner will direct the owner to request paper or e-mail copies from his or her intermediary, rather than from the issuer. Finally, the final rules do not permit soliciting persons other than the issuer to engage in a conditional solicitation as proposed and, therefore, the rules require such persons to send

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<sup>44</sup> An issuer or other soliciting person may, in the course of a solicitation, send several proxy cards to a shareholder. Under the notice and access model, the Notice must accompany each proxy card sent to a shareholder unless the issuer or other soliciting person sends a proxy statement with, or before, the proxy card and by the same medium as the proxy card is sent.

a copy of the proxy materials upon request from a shareholder to whom they have sent a Notice.

## **II. Description of the Amendments**

### **A. The Notice and Access Model for Issuers**

The notice and access model that we are adopting provides an alternative means for an issuer to furnish proxy materials to its shareholders. These proxy materials include:

- notices of shareholder meetings;
- Schedule 14A proxy statements and consent solicitation statements;
- forms of proxy (i.e., proxy cards);
- Schedule 14C information statements;
- annual reports to security holders;<sup>45</sup>
- additional soliciting materials;<sup>46</sup> and
- any amendments to such materials that are required to be furnished to shareholders.

In the proposing release, we sought comment on whether reliance on the notice and access model should be limited to particular types of issuers, shareholders, or transactions. The only restriction that we proposed was that the rules should not apply to business combination transactions. Commenters in favor of the notice and access model

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<sup>45</sup> The requirement in Exchange Act Rules 14a-3(b) and 14c-3(a) to furnish annual reports to security holders does not apply to registered investment companies [17 CFR 240.14a-3(b) and 240.14c-3(a)]. The rules that we are adopting do not apply to the requirement in Section 30(e) of the Investment Company Act of 1940 [15 U.S.C. 80a-29(e)] and the rules thereunder that every registered investment company transmit reports to shareholders at least semi-annually.

generally supported broad availability of the notice and access model.<sup>47</sup> Therefore, the new rules permit any issuer to use the notice and access model to disseminate its proxy materials to all types of shareholders, whether registered or beneficial owners, and with respect to any solicitation except those related to business combination transactions.

### **1. Notice of Internet Availability of Proxy Materials**

To notify shareholders of the availability of the proxy materials on an Internet Web site, an issuer relying on the notice and access model must send a Notice to shareholders 40 calendar days<sup>48</sup> or more in advance of the shareholder meeting date or, if no meeting is to be held, 40 calendar days or more in advance of the date that consents or authorizations may be used to effect the corporate actions.<sup>49</sup> We believe that it is important for the Notice to be furnished in a way that brings it to each shareholder's attention. Therefore, no other materials may accompany the Notice except for the notice of a shareholder meeting required under state corporation law.<sup>50</sup> An issuer also may combine the Notice with the state law notice unless state law prohibits such combination.

We have extended the proposed 30-day deadline for delivery of the Notice to a 40-day deadline to provide issuers with time to encourage shareholders who have not

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<sup>46</sup> Our rules permit, but do not require, delivery of additional soliciting materials. See Rule 14a-6(b).

<sup>47</sup> See, for example, letters from ABC, ACB, Association of Corporate Counsel (ACC), Proxinvest, SCSGP, STA, and Sullivan & Cromwell.

<sup>48</sup> For purposes of determining this 40-day period under the new rules, the first day of this period would be the day on which the issuer sends the Notice. The 40th day would be the day prior to the meeting date or date of the corporate action.

<sup>49</sup> The Notice could be sent electronically to shareholders who have previously provided affirmative consent, or other evidence to show delivery, pursuant to our earlier guidance on electronic delivery. See the 1995 Interpretive Release and the 2000 Interpretive Release.

<sup>50</sup> The rules also permit a reply card for requesting a paper or e-mail copy of the proxy materials to accompany the Notice.

executed a proxy to participate in the voting process and to provide shareholders with sufficient time to receive the Notice, request copies of the materials, if desired, and review the proxy materials prior to executing a proxy. Under the new rules, an issuer may send a proxy card 10 calendar days or more after sending the Notice. If an issuer chooses to send a proxy card under this provision, a proxy statement and annual report need not accompany the proxy card.<sup>51</sup> However, if a copy of the proxy statement and annual report do not accompany or precede the proxy card, a copy of the Notice must accompany the proxy card so that shareholders can access the specified Web site without referring to the earlier Notice. This 10-day waiting period is designed to provide shareholders with sufficient time to access the proxy materials, or request a copy of the proxy materials, before the issuer sends a proxy card without an accompanying proxy statement and annual report.

If an issuer chooses to follow the notice and access model, the Notice of Internet Availability of Proxy Materials must include the following information in clear and understandable terms:<sup>52</sup>

- 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].**
- **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**

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<sup>51</sup> Of course, an issuer still would be obligated to send a copy of the proxy statement and annual report if a shareholder requests a copy. An issuer also may send a proxy card before the end of the 10-day period if it is accompanied by the proxy statement and annual report.

<sup>52</sup> Appropriate changes must be made to the Notice if the issuer is providing an information statement pursuant to Regulation 14C or seeking to effect a corporate action by written consent.

**important information contained in the proxy materials before voting.**

- **The [proxy statement] [information statement] [annual report to security holders] [is/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] to facilitate timely delivery.”**
- 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 on 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;
- (1) A toll-free telephone number; (2) an e-mail address; and (3) an Internet Web site address where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;
- Any control/identification numbers that the shareholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement and annual report; and

- Information on how to obtain directions to be able to attend the meeting and vote in person.

In response to commenters, we have added certain items to this list of permissible Notice information. First, we are clarifying that the Notice must contain instructions on how to access the proxy card. Such information should include any control or identification numbers necessary for the shareholder to execute a proxy, but may not include a means to execute a proxy, such as a telephone number, which would enable the shareholder to execute a proxy without having access to the proxy statement and annual report.

A shareholder's execution of a proxy via an Internet voting platform indicates that the shareholder has access to the Internet and, as such, is able to access the proxy materials electronically under the new rules. Similarly, if a shareholder executes a proxy via a telephone number placed on the Internet Web site which provides electronic access to the proxy materials, that indicates the shareholder has access to the Internet. However, if a telephone number for executing a proxy is placed on the Notice, there can be no assurance that a shareholder executing a proxy by means of that telephone number has access to the Internet Web site. Accordingly, placing such a telephone number on the Notice is not permitted. A telephone number for executing a proxy may, however, be provided on a proxy card sent to shareholders 10 calendar days or more after the Notice was sent because, by that time, a shareholder is likely to have had sufficient time to access the materials on the Internet or request copies.

Also, in response to comments, we have revised the rules to require an issuer or other soliciting person to include instructions in the Notice about: (1) how a shareholder

can request delivery of copies of proxy materials in paper or by e-mail in the future;<sup>53</sup> and (2) how to attend the shareholder meeting and vote in person. The new rules also require the Notice to include an Internet Web site on which a shareholder can request a copy of the proxy materials, in addition to a toll-free telephone number and an e-mail address for that purpose.

The Notice may include only the information specified above, unless it is being combined with the state law meeting notice, in which case any information required by state law also may be included in the Notice. While not required, to reduce the chance of parties creating false Notices to extract confidential information from shareholders, the Notice also may contain a statement advising shareholders that they are not required to provide any personal information, other than the identification or control number provided in the Notice (if such a number is used), to execute a proxy.

To ensure that the Notice is clear and understandable, it must meet substantially the same plain English principles as apply to key sections of Securities Act prospectuses pursuant to Securities Act Rule 421(d).<sup>54</sup> Both commenters remarking on the plain English aspect of the proposal supported such a requirement.<sup>55</sup>

Several commenters recommended that issuers should be able to include more information in the Notice than we proposed. They suggested that the rules should allow the Notice to incorporate information from the proxy statement and annual report that those commenters believe is the most important information contained in those documents. They believed that presenting this information on the Notice would enable

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<sup>53</sup> See letters from ABA, Mellon Investor Services (Mellon), and SCSGP.

<sup>54</sup> 17 CFR 230.421(d).

<sup>55</sup> See letters from Florida State Board and Proxinvest.

shareholders to make an informed decision based on the Notice alone.<sup>56</sup> We believe that the proxy statement and annual report to security holders represent the information necessary to make an informed voting decision. The Notice is intended merely to make shareholders aware that these proxy materials are available on an Internet Web site; it is not intended to serve as a stand-alone basis for making a voting decision. Because the disclosures in the proxy statement and annual report represent the information necessary for a voting decision, we do not believe it is appropriate to permit issuers and other soliciting persons to present only selected information from the proxy statement or annual report to security holders in the Notice.

The form of the Notice will constitute other soliciting material that the issuer or other soliciting person must file with the Commission pursuant to Rule 14a-6(b)<sup>57</sup> no later than the date on which it is first sent or given to shareholders.<sup>58</sup>

**a. Householding**

Consistent with the proposal, the final rules permit an issuer to “household” the Notice pursuant to Rule 14a-3(e).<sup>59</sup> Accordingly, an issuer could send a single copy of the Notice to one or more shareholders residing at the same address if the issuer satisfies all of the Rule 14a-3(e) conditions.<sup>60</sup> An issuer is not required to re-solicit specific

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<sup>56</sup> See letters from Carl Hagberg, Hermes, and James Reed. For example, one commenter suggested that each proposal be accompanied by the “pros and cons” associated with that proposal. See letter from James Reed. Another commenter recommended that the president’s letter, Management’s Discussion and Analysis and selected financial information be included. See letter from Carl Hagberg.

<sup>57</sup> 17 CFR 240.14a-6(b).

<sup>58</sup> See Rule 14a-16(i) [17 CFR 240.14a-16(i)].

<sup>59</sup> 17 CFR 240.14a-3(e).

<sup>60</sup> If the Notice is sent via e-mail, the householding rules do not permit the sending of only one copy of the Notice to all shareholders in the household. Instead the Notice must be

consent regarding the householding of the Notice from shareholders if it has obtained their consent to householding of proxy materials in the past. However, an issuer following the notice and access model must allow each householded account to execute separate proxies. Therefore, the issuer must provide separate identification or control numbers, if it uses such numbers, to each account at the shared address, as required by the current householding rule.<sup>61</sup> Alternately, an issuer also may send separate Notices for each householded account in a single envelope. Commenters generally supported this aspect of the proposal.<sup>62</sup>

**b. Security and Privacy on the Internet**

Several commenters were concerned about security and confidentiality of shareholder information that may be transmitted over the Internet.<sup>63</sup> We believe that the final rules ameliorate many of these concerns. We address those concerns below.

**i. Theft of Identification or Control Numbers**

Some commenters were concerned that computer hackers may use any identifying information sent to shareholders to access their accounts.<sup>64</sup> The Notice may contain identification or control numbers for executing proxies or providing voting instructions, if

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separately e-mailed to each shareholder. See Rule 14a-3(e)(1)(ii)(B)(4) [17 CFR 240.14a-3(e)(1)(ii)(B)(4)].

<sup>61</sup> 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)].

<sup>62</sup> See letters from BRT, Computershare, Proxinvest, and SCSGP.

<sup>63</sup> See, for example, letters from James Angel, Todd Collier, James Davis, William LaFollette, Matthew McGuire, and USPS.

<sup>64</sup> Record holders could not be subject to such manipulation because they do not hold their securities in a trading account with the company in the same sense as beneficial owners hold their securities in a brokerage account.

an issuer or intermediary uses such numbers. We understand that these numbers, which are in common use today, usually provide the user only with access to execute proxies or provide voting instructions; they do not enable the user to buy or sell securities in a shareholder's account or transfer funds from that account. Thus, more sensitive activities, such as trading securities or transferring funds, could not be performed by someone who has stolen this identifying information. Finally, we note that 85% of shares voted already are voted electronically using such identification or control numbers.

**ii. "Phishing"**

One commenter expressed concern that, if Notices are sent electronically, shareholders may be tricked into disclosing personal information to persons fraudulently purporting to be issuers or intermediaries by fake "phishing" e-mails purporting to be official Notices, but designed to extract personal information from a shareholder.<sup>65</sup> We do not believe that the rules would provide significant opportunity for abuse through phishing for the following reasons.

First, an issuer may send a Notice by e-mail only if the shareholder has affirmatively consented to such delivery. Second, the Notice is not permitted to request any confidential information from the shareholder. Rather, the only confidential information that a shareholder must provide to access the proxy card would be a confidential identification or control number used by many issuers and intermediaries to track votes. As noted above, this number does not provide access to a shareholder's brokerage or bank account or permit the transfer of funds from a shareholder's account. Therefore, the shareholder's account number and other personal financial information

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<sup>65</sup> See letter from William LaFollette.

would not be in jeopardy of being stolen. The rules do permit an issuer or other soliciting person to include on the Notice a protective warning to shareholders, advising them that no personal information other than the identification or control number is necessary to execute a proxy.<sup>66</sup>

**iii. Misuse of Information by Issuers and Other Soliciting Persons**

Other commenters were concerned that issuers themselves, or other soliciting persons, may use shareholder information inappropriately. For example, they were concerned that an issuer may use shareholders' e-mail addresses for purposes other than proxy communications, such as advertising, or sell the e-mail addresses to third parties.<sup>67</sup> As a protective measure, one commenter suggested that the Internet Web site on which the proxy statement is posted should not require installation of cookies on the shareholder's computer as a prerequisite for access to the Web site.<sup>68</sup>

We agree that shareholder information gathered under the amended rules should be used only for the purposes of furnishing proxy materials to shareholders. Thus, we have revised the final rules to clarify that an issuer or its agent must maintain the Internet Web site on which the proxy materials are posted in a manner that does not infringe on the anonymity of a shareholder accessing that Web site.<sup>69</sup> For example, it may not track the identity of persons accessing that Web site to view the proxy statement.<sup>70</sup> In addition, the Web site cannot require the installation of any "cookies" or other software that might

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<sup>66</sup> See Rule 14a-16(f)(3) [17 CFR 240.14a-16(f)(3)].

<sup>67</sup> See letter from Thomas Richardson.

<sup>68</sup> See letter from Bowne & Co.

<sup>69</sup> See Rule 14a-16(k)(1) [17 CFR 240.14a-16(k)(1)].

collect information about the accessing person. Further, the issuer and its agents may not use any e-mail address obtained from a shareholder for the purpose of requesting a copy of proxy materials for any purpose other than to send a copy of those materials to that shareholder. Finally, an issuer may not transfer a shareholder's e-mail address to other persons without the shareholder's express consent, except in connection with the distribution of proxy materials, such as an agent handling the proxy distribution on the issuer's behalf.<sup>71</sup>

## **2. Proxy Card**

Under the notice and access model that we are adopting, an issuer is not permitted to furnish the proxy card together with the initial Notice for a particular solicitation. An issuer following the notice and access model must post the proxy card on the Web site with the proxy statement and any annual report no later than the time at which the Notice is sent to shareholders so that the documents are electronically available at the time shareholders receive the Notice.<sup>72</sup> In addition, on that Web site, the issuer must concurrently provide shareholders with at least one method of executing a proxy vote.<sup>73</sup> We believe that a shareholder who accesses proxy materials on the Internet Web site should be able to execute a proxy as soon as the shareholder is able to electronically access the proxy statement. An issuer may provide a means to execute a proxy through a variety of methods, including by providing an electronic voting platform linked to the

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<sup>70</sup> Of course, the issuer would be permitted to track the identity, by means of the shareholder entering an issuer-provided control/identification number, of persons voting on an electronic platform in order to validate the election results.

<sup>71</sup> See Rule 14a-16(k)(2) [17 CFR 240.14a-16(k)(2)]. Rule 14a-16(k) is not designed to create new duties in private rights of action under the federal securities laws.

<sup>72</sup> See Rule 14a-16(b)(1) [17 CFR 240.14a-16(b)(1)].

<sup>73</sup> See Rule 14a-16(b)(4) [17 CFR 240.14a-16(b)(4)].

Web site where the proxy materials are posted or a telephone number for executing a proxy. Merely providing a shareholder with a means to request a paper proxy card would not be sufficient because a shareholder would not be able to execute a proxy at the time it accesses the proxy materials.

We received a significant number of comments on the aspect of our proposal that would have permitted the proxy card to accompany the Notice. Numerous commenters were concerned that physically separating the card from the proxy statement, as originally proposed, may lead to the type of uninformed voting that the proxy rules are intended to prevent.<sup>74</sup> Some commenters were concerned that issuers may attempt to structure their solicitations in a manner that discourages access to the proxy statement, particularly with respect to shareholder proposals.<sup>75</sup> Others, however, believed that separating the card from the proxy statement would not lead to such problems.<sup>76</sup>

We note these concerns and have revised the rules to require the proxy card to be accessible on the Internet along with the proxy statement and any annual report when the Notice is sent. The issuer may not send a proxy card with its initial Notice. However, we recognize that an issuer may wish to undertake subsequent soliciting activities to encourage shareholders who have not executed a proxy to do so. Currently, issuers often send replacement proxy cards accompanied by additional soliciting materials to shareholders who have not yet voted. To facilitate this re-solicitation process, the rules permit an issuer that is following the notice and access model to send a proxy card 10

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<sup>74</sup> See, for example, letters from ACB, AFL-CIO, Amalgamated Bank, BellTel Retirees, CII, Florida State Board, Carl Hagberg, NRLN, San Diego Retirement, Swingvote, and Teamsters.

<sup>75</sup> See, for example, letters from AFL-CIO, Florida State Board, and Teamsters.

calendar days or more after sending the Notice. This 10-day waiting period still provides a 30 day period during which an issuer can encourage shareholders to execute a proxy. Any such subsequent solicitation efforts may, but need not, include a copy of the proxy statement and any annual report to security holders. However, if the subsequent communication includes a proxy card, it also must include either a copy of the proxy statement and any annual report or a copy of the Notice.<sup>77</sup>

### **3. Internet Web Site Posting of Proxy Materials**

All proxy materials to be furnished through the notice and access model, other than additional soliciting materials, must be posted on a specified Internet Web site by the time the issuer sends the Notice to shareholders.<sup>78</sup> These materials must remain on that Web site and be accessible to shareholders through the conclusion of the related shareholder meeting, at no charge to the shareholder. As discussed above, the Notice must identify clearly the Internet Web site address at which the proxy materials are available. The Internet Web site address must be specific enough to lead shareholders directly to the proxy materials,<sup>79</sup> 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

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<sup>76</sup> See, for example, letters from ABA, ACC, BRT, Computershare, ISS, New York State Bar Association (NY State Bar), and Proxinvest.

<sup>77</sup> See Rule 14a-16(h) [17 CFR 240.14a-16(h)].

<sup>78</sup> Additional soliciting materials used after the Notice is sent must be posted on the specified Web site no later than the day on which those materials are first sent or given to shareholders.

<sup>79</sup> This Web site could be a central site with prominent links to each of the proxy-related disclosure documents listed in the Notice, as well as proxy materials posted on the Web site after the Notice is sent.

Internet Web site other than the Commission's EDGAR Web site.<sup>80</sup> Commenters agreed that simply providing a link to the proxy materials on EDGAR was insufficient.<sup>81</sup>

Commenters were divided with respect to the type of document format that issuers or other soliciting persons should be required to use to post proxy materials on the Web site. This disagreement centered on whether most shareholders would prefer to be able to print out the document and read the hard copy version or read the document online. The final rules require the electronically posted proxy materials to be presented on the Internet Web site in a format, or formats, convenient for both printing and viewing online.<sup>82</sup> Under technology commonly in use today, this may require posting the materials in two different formats. First, the materials should be posted in a format that provides a version of those materials, including all charts, tables, graphics, and similarly formatted information, that is substantially identical to the paper version of the materials.

In addition, to take better advantage of the capabilities of the Internet, the materials also must be presented in a readily searchable format, such as HTML. This type of format would make the proxy materials easier to read on a computer screen. In addition, such a version may incorporate additional user-friendly features such as hyperlinks from a table of contents to enable shareholders to quickly and easily navigate through the document. Many Internet Web sites today provide documents in dual formats such as this. We believe this requirement will impose minimal burden on issuers.

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<sup>80</sup> An issuer must continue to comply with Rules 14a-6 and 14c-5, which require the soliciting person to file its proxy statement (or information statement) and additional soliciting material with the Commission. An issuer also must continue to comply with Rules 14a-3(c) and 14c-3(b), which require an issuer to submit copies of its annual report to security holders to the Commission. The issuer must comply with these requirements by the time it posts the materials on the Web site.

<sup>81</sup> See letters from James Angel, SCSGP, and Swingvote.

We also believe that, as technology progresses, new formats may be developed that will improve shareholders' ability to print copies and read copies on their screens. Finally, to the extent a shareholder may need additional software to view the document, the Web site must contain a link to enable the shareholder to obtain the software free of charge.<sup>83</sup>

#### **4. Period of Reliance**

The decision by an issuer or other soliciting person to follow the notice and access model is effective only with respect to a particular meeting. An issuer's choice to rely on the notice and access model for one meeting therefore does not affect its determination of whether to rely on the model for subsequent meetings.<sup>84</sup> Similarly, a shareholder that does not request a paper or e-mail copy of the proxy materials for one meeting is not bound by that decision with respect to any other shareholder meeting. Each time an issuer chooses to rely on the notice and access model for a shareholder meeting, it must comply anew with all of the requirements under that model, including delivery of the Notice and the 40-day notice period.

We are adopting one important exception to this general principle. Numerous commenters were concerned that a shareholder desiring a paper or e-mail copy would have to request such a copy every year from each issuer in which he or she owns securities.<sup>85</sup> We agree with commenters that this could be unduly burdensome for a

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<sup>82</sup> See Rule 14a-16(c) [17 CFR 240.14a-16(c)].

<sup>83</sup> See the 1995 Interpretive Release No. 33-7233, at n. 24 and the accompanying text; Release No. 33-8128 (Sep. 16, 2002) [67 FR 58480]; Release No. 33-8230 (May 7, 2003) [68 FR 25788]; and Release No. 33-8518 (Dec. 22, 2004) [70 FR 1505].

<sup>84</sup> To the extent the Commission adopts the universal Internet availability model in companion Release 34-55147, this option will no longer be available to issuers.

<sup>85</sup> See, for example, letters from ABC, AFL-CIO, James Angel, CALSTRS, Florida State Board, OPERS, San Diego Retirement, SIA, William Sjostrom, Stocklein Law Group, Swingvote, and Paul Uhlenhop.

shareholder who owns numerous securities. The commenters recommended that a provision be made that permits a shareholder to make a single election to receive a paper or e-mail copy of the proxy materials on a continuing basis in the future. We agree with those commenters and have revised the rules to enable shareholders to make a permanent election to receive paper or e-mail copies from each issuer.<sup>86</sup>

## **5. State Law Notices**

State business and corporation laws typically set forth shareholder meeting requirements, including meeting notice and voting requirements. The new rules are not intended to affect any applicable state law requirement concerning the delivery of any document related to a shareholder meeting or proxy solicitation. Thus, to the extent that state law requires a notice of shareholder meeting and proxy materials to be delivered by a particular means, the rules do not alter those requirements.<sup>87</sup> For example, if the state in which an issuer is incorporated requires notices of shareholder meetings and proxy materials to be transmitted directly to shareholders in paper, the notice and access model does not provide an issuer with an option to satisfy its state law obligations by posting those materials on an Internet Web site.

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<sup>86</sup> A shareholder that elects to receive paper or e-mail copies may, in the future, revoke that election. However, an issuer may continue to request that shareholder to accept electronic delivery or the notice and access model or seek that shareholder's affirmative consent to electronic delivery. Nothing in the proxy rules prohibits an issuer from structuring incentives to encourage shareholders to accept electronic delivery or the notice and access model.

<sup>87</sup> See Rule 14a-16(e) [17 CFR 240.14a-16(e)]. Issuers typically include the meeting notices required by state law at the beginning of their proxy statements. As discussed previously, the new rules would permit any information necessary to meet a state law requirement to accompany or be combined with the Notice.

## **6. Additional Soliciting Materials**

New Rule 14a-16 and revised Rules 14c-2 and 14c-3 require an issuer to post any additional soliciting materials required to be filed under Rule 14a-6(b) 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.<sup>88</sup> Beyond the posting of the additional soliciting materials on the Internet Web site, issuers may decide which additional means, if any, are most effective for disseminating these materials (e.g., direct mail, e-mail, newspaper publication, etc.).

## **7. Requests for Copies of Proxy Materials**

An issuer that satisfies its requirement to furnish proxy materials through the notice and access model has a separate requirement under Rule 14a-16(j)<sup>89</sup> to deliver a copy of the proxy statement, annual report to security holders (if applicable) and proxy card to a requesting shareholder. Upon receipt of a request from a shareholder for a copy of the proxy statement, annual report, or proxy card, the issuer must send a copy (in paper or by e-mail, as requested) of those proxy materials to the shareholder within three 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. However, under the final rules, an issuer would be obligated to provide copies of the proxy materials only up until one year after the conclusion of the meeting or corporate action to which the materials relate. When the issuer provides a paper copy of the proxy materials

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<sup>88</sup> Exchange Act Rule 14a-6(b) requires an issuer or other soliciting person choosing to deliver additional soliciting materials to file them with the Commission, in the same form that they are sent to shareholders, no later than the date that they are first sent or given to shareholders.

<sup>89</sup> 17 CFR 240.14a-16(j).

in response to a shareholder request, the issuer must use first class mail or other reasonably prompt means of delivery.

A few commenters believed that a requirement to send copies of the proxy statement after the shareholder meeting has been held would be an unnecessary burden.<sup>90</sup> However, the proxy statement contains a portion of the total package of annual disclosure for public companies; in fact, many public companies satisfy their obligation to include information in Part III of the Form 10-K by including the information in their proxy statements and incorporating that information by reference into the Form 10-K.<sup>91</sup> Just as the proxy rules require issuers to undertake in their proxy statements or annual reports to shareholders to provide copies of annual reports on Form 10-K for the most recent fiscal year to requesting shareholders,<sup>92</sup> we believe it is appropriate to require issuers to provide copies of the proxy materials to requesting shareholders even after the shareholder meeting date. However, because the proxy statement (like the Form 10-K) is filed on EDGAR, we believe there should be a limit on the length of the period during which a shareholder may request a copy of the proxy materials from the issuer. Therefore, the final rules require issuers to provide the proxy statement and annual report to security holders only for one year after the conclusion of the meeting to which those materials relate.<sup>93</sup>

We agree with the views of commenters that the proposed two-business day timeframe may be too short for issuers to respond efficiently to paper requests of the

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<sup>90</sup> See letters from BRT and SCSGP.

<sup>91</sup> See Instruction G(3) to Form 10-K, referenced in 17 CFR 249.310.

<sup>92</sup> See Rule 14a-3(b)(10) [17 CFR 240.14a-3(b)(10)].

<sup>93</sup> See Rule 14a-16(j)(3) [17 CFR 240.14a-16(j)(3)].

proxy materials.<sup>94</sup> Further, it is likely that a longer response period that enables an issuer to better cumulate batches of copies would reduce the cost of complying with the rules. However, these concerns must be balanced against our view that requests for copies be handled promptly. Thus, we have extended the response time to three business days.<sup>95</sup>

The requirements that an issuer deliver the Notice at least 40 calendar days before the shareholder meeting date and respond to a request for a copy of the proxy materials within three business days are designed to provide a shareholder with sufficient time to request a copy, receive it, review the proxy materials and make an informed voting decision. Several commenters believed that placing a deadline on shareholders to request copies would be appropriate.<sup>96</sup> We do not believe such a deadline would be appropriate, particularly because the proxy statement is part of the “package” of disclosures we have deemed important for investors, as discussed above. However, under the rules, 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 execute a proxy. The rules require the issuer to insert a date in the Notice by which a shareholder should request a copy to ensure timely delivery.<sup>97</sup>

Finally, we recognize that some issuers may be hesitant to adopt the notice and access model because of the potential dangers of significantly underestimating, or overestimating, the number of paper copies of the proxy materials that will be needed. If

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<sup>94</sup> See, for example, letters from BRT, Computershare, ICI, NY State Bar, SCSGP, SIA, and Sullivan & Cromwell.

<sup>95</sup> See letters from Computershare, ICI, and STA.

<sup>96</sup> See letters from Computershare, SCSGP, and Sullivan & Cromwell.

<sup>97</sup> See Rule 14a-16(d)(1) [17 CFR 240.14a-16(d)(1)]. This date is intended to be a recommendation to shareholders to facilitate timely delivery, but does not restrict a shareholder’s ability to request copies after that date.

an issuer underestimates that number, the cost of printing additional copies may be great. Similarly, overestimating that number would lead to unnecessary cost. We note that there is nothing in the rules that would prevent an issuer from sending a shareholder a communication well in advance of a proxy solicitation to determine the shareholder's interest in receiving paper copies.<sup>98</sup> Indeed, such a communication may be used to start creating a list of shareholders that wish to receive paper copies in the future. This may help issuers to estimate the number of paper copies that it needs to print for the solicitation.

## **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.<sup>99</sup> The proxy rules include four rules, Exchange Act Rule 14a-13, Rule 14b-1, Rule 14b-2, and Rule 14c-7 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 participate in the shareholder voting process. Basically, these rules require issuers to send their proxy materials to intermediaries for forwarding to the beneficial owners.

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<sup>98</sup> A communication to shareholders that is limited to explaining the notice and access model generally and determining whether shareholders wish to receive future proxy materials in paper or by e-mail would not be associated with a particular solicitation and therefore would not be considered a Notice under the new rules.

<sup>99</sup> 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 securities through a broker, bank, trustee, or similar intermediary.

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)<sup>100</sup> or 14c-7(a)<sup>101</sup> 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, and securities positions, the number of beneficial owners who have objected to such disclosure;<sup>102</sup> 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 beneficial owners who will not receive those materials directly from the issuer pursuant to Rule 14a-13(c)<sup>103</sup> or Rule 14c-7(c).<sup>104</sup> Beneficial owners typically do not execute proxy cards

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<sup>100</sup> 17 CFR 240.14a-13(a).

<sup>101</sup> 17 CFR 240.14c-7(a).

<sup>102</sup> 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.

<sup>103</sup> 17 CFR 240.14a-13(c).

because, under most state laws, only the record owner (i.e., the intermediary) has the authority to vote on matters presented to shareholders. As a result, intermediaries forward the proxy materials, other than the proxy card, 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.<sup>105</sup> The intermediary then returns the proxy card to the issuer or its vote tabulator.

## **2. Discussion of the Amendments**

Under the 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 amendments 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 a Notice of Internet Availability of Proxy Materials, to beneficial owners of the issuer's securities based on the notice and access model.<sup>106</sup> If an issuer does not request intermediaries to follow the notice and access model, an intermediary could, on its own initiative, continue to rely on any other permitted method of furnishing proxy materials to beneficial owners, including the electronic delivery of proxy materials by affirmative consents, but could not follow the notice and access model on its own initiative. Comments varied on whether an intermediary should be allowed to follow the notice and access model on its own

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<sup>104</sup> 17 CFR 240.14c-7(c).

<sup>105</sup> See Rule 14b-2(b)(3) [17 CFR 240.14b-2(b)(3)].

<sup>106</sup> See Rules 14b-1(d) and 14b-2(d) [17 CFR 240.14b-1(d) and 240.14b-2(d)].

initiative.<sup>107</sup> We believe that the issuer should be allowed to determine the best means for distributing its proxy materials, because the issuer ultimately pays the costs of that distribution.

With respect to beneficial owners, an issuer or other soliciting person relying on the notice and access model must provide the intermediary with all information necessary for the intermediary to prepare its own Notice of Internet Availability of Proxy Materials in sufficient time for the intermediary to prepare and send its Notice to beneficial owners at least 40 days before the meeting date.<sup>108</sup> We understand that issuers, intermediaries and their agents currently coordinate a similar exchange of information to enable intermediaries to prepare and print requests for voting instructions ahead of their receipt of the proxy statement and annual report to security holders for forwarding to beneficial owners.<sup>109</sup> We expect such coordination to continue to facilitate timely preparation of the intermediary's Notice. Therefore, we have not included a specific timeframe in the rules for delivery of this information.<sup>110</sup> Upon receipt of that information, the intermediary or its agent must prepare its own Notice, tailored for the intermediary's

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<sup>107</sup> See, for example, letters from ABA, ACC, Computershare, and SCSGP, supporting issuer control, as opposed to the letters from SIA, Swingvote, and University Bancorp, urging more control by intermediaries.

<sup>108</sup> See Rule 14a-16(a)(2) [17 CFR 240.14a-16(a)(2)].

<sup>109</sup> Our rules set forth a series of timeframes regarding distribution of proxy materials to beneficial owners to facilitate timely delivery of those materials.

<sup>110</sup> Rule 14a-16(a)(2) requires an issuer to provide the information to an intermediary "in sufficient time" for the intermediary to prepare its own Notice. Other soliciting persons would be expected to provide their information to intermediaries in sufficient time to meet their applicable deadlines.

beneficial owner customers.<sup>111</sup> The intermediary must send this Notice to beneficial owners at least 40 calendar days before the date of the shareholder meeting.<sup>112</sup>

The intermediary's Notice will generally contain the same information as an issuer's Notice,<sup>113</sup> with certain revisions to reflect the differences between registered holders and beneficial owners. Specifically, the intermediary's Notice must contain the following information:

- 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].”<sup>114</sup>**
  - **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 security holders] [is/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] to facilitate timely delivery.”**

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<sup>111</sup> An intermediary's Notice prepared in accordance with this rule would be impartial for purposes of Rule 14a-2(a)(1) [17 CFR 240.14a-2(a)(1)] and need not be filed pursuant to Rule 14a-6(b) [17 CFR 240.14a-6(b)] unless an intermediary solicits proxies on its own behalf.

<sup>112</sup> In the case of a Notice of a soliciting person other than the issuer, the intermediary must send the Notice to beneficial owners by the later of: (1) 40 calendar days prior to the meeting; or (2) 10 calendar days after the issuer first sends its proxy materials to investors. See Section II.C of this release.

<sup>113</sup> See Rule 14a-16(d) [17 CFR 240.14a-16(d)].

<sup>114</sup> Appropriate changes must be made to the Notice if the issuer is providing an information statement pursuant to Regulation 14C or if the issuer or other soliciting person is seeking to effect a corporate action by written consent.

- 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 on and the issuer's or other soliciting person's recommendations regarding those matters, but no supporting statements; and
- A list of the materials being made available at the specified Web site.

The intermediary may choose whether to direct beneficial owners to the issuer's Web site or to its own Web site to access the proxy disclosure materials. If it directs beneficial owners to its own Web site, access to that website must be free of charge and may not compromise a beneficial owners' anonymity. If it directs beneficial owners to the issuer's Web site, the intermediary must inform beneficial owners that they can submit voting instructions to the intermediary, but cannot execute a proxy directly in favor of the issuer unless the intermediary has executed a proxy in favor of the beneficial owner. In addition, the intermediary must provide the following information in its Notice, which is similar to the information in the issuer's Notice, but applicable only to beneficial owners:

- (1) A toll-free telephone number of the intermediary or its agent, (2) an e-mail address of the intermediary or its agent, and (3) an Internet Web site of the intermediary or its agent where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;

- Any control/identification numbers that the beneficial owner needs to access his or her request for voting instructions;
- Instructions on how to access the request for voting instructions on the Web site of the intermediary or its agent, provided that such instructions do not enable a beneficial owner to provide voting instructions without having access to the proxy statement and annual report;
- Information on how to obtain directions to be able attend the meeting and vote in person;<sup>115</sup> and
- A brief description, if applicable, of the rules that permit the intermediary to vote the securities if the beneficial owner does not return his or her voting instructions.<sup>116</sup>

The intermediary's Notice must contain instructions on how to access the request for voting instructions on the Web site of the intermediary or its agent. Such information should include any control or identification numbers necessary for the beneficial owner to provide voting instructions. However, the intermediary's Notice cannot include a means, such as a telephone number, which would enable the beneficial owner to provide voting instructions without having access to the proxy statement and annual report. A telephone number that a beneficial owner can use to provide voting instructions may be provided on the Internet Web site on which the request for voting instructions is posted (as well as on a paper request for voting instructions sent to shareholders 10 days or more after the intermediary's Notice was sent). Like an issuer, the intermediary cannot include a

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<sup>115</sup> A beneficial owner wishing to attend the meeting and vote in person must obtain proxy voting authority from the intermediary through which he or she owns the security.

<sup>116</sup> See NYSE Rule 452.

request for voting instructions with its Notice. However, at the issuer's request, the intermediary will be required to send a copy of the request for voting instructions to beneficial owners, provided that 10 days have passed since the intermediary's Notice was first sent. A copy of the intermediary's Notice, or a copy of the proxy statement, must accompany that request for voting instructions.

### **3. Request for Copies by Beneficial Owners**

The intermediary's Notice must provide instructions on how a beneficial owner can request a copy of the proxy materials from the intermediary, rather than from the issuer. Under the new rules, a beneficial owner may not request a paper or e-mail copy directly from the issuer as originally proposed. We are making this revision to the proposal for several reasons. First, an issuer has no means to track the identity and preferences of beneficial owners for future solicitations because these owners are not registered in an issuer's records as shareholders of the company. This tracking can be performed most efficiently by the intermediary because only it maintains records of the beneficial owner's security holdings. Second, the intermediary is able to apply a beneficial owner's request for paper or e-mail copies across all of a beneficial owner's security holdings on an account-wide basis, making it easier for beneficial owners to elect to receive such copies with respect to all of the securities held by the beneficial owner.

If a beneficial owner requests a copy of the materials from the intermediary, the intermediary must in turn request such a copy from the issuer or other soliciting person within three business days of receiving the request from the beneficial owner. The intermediary also would have to forward the materials to the beneficial owners within

three business days after receipt from the issuer or other soliciting person.<sup>117</sup> As originally proposed, the intermediary will be allowed to charge the issuer or other soliciting person for the cost it incurs in forwarding the copy of the proxy materials to the requesting beneficial owner.<sup>118</sup>

We also note that intermediaries typically keep records of whether a beneficial owner has affirmatively consented to electronic delivery of proxy materials on an account-wide basis. That is, a beneficial owner's election for electronic delivery applies to all securities in the beneficial owner's account, rather than to specific issuers. To make it clear to beneficial owners electing to receive copies of the proxy materials on an ongoing basis, the intermediary's Notice must clarify that a permanent election to receive copies of the proxy materials in paper or e-mail will apply to all securities in the beneficial owner's account.<sup>119</sup>

One commenter was concerned that the notice and access model only complicates an already complicated process for transmitting proxy materials to beneficial owners and

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<sup>117</sup> Thus, the intermediary must request the copy from the issuer within three business days of receiving the shareholder's request. Then the issuer must send the copy to the intermediary, which is a record holder or respondent bank under the final rules, within three business days of receiving the intermediary's request. Finally, the intermediary is required to forward the copy to the requesting shareholder within three business days of receiving the copy from the issuer.

<sup>118</sup> See NYSE Rule 465. We note that a Proxy Working Group established by the NYSE is reviewing the NYSE's current schedule of the specific maximum fees that NYSE member firms can charge an issuer under our rules requiring issuers to reimburse intermediaries for their reasonable direct and indirect expenses for forwarding proxy materials. We intend to work closely with the NYSE to evaluate the types of revisions that may be appropriate in light of our adoption of the notice and access model, including revision of existing fees as well as the creation of any new fees that may be reasonable under the notice and access model. Although NYSE Rule 465 applies only to NYSE member firms, other national securities exchanges have a similar rule and fee schedule. Non-broker intermediaries, such as banks, also rely on the fee schedule as an industry standard.

may confuse shareholders.<sup>120</sup> Other commenters recommended that the Commission review the proxy delivery process as a whole, rather than layer this model over the existing distribution regime.<sup>121</sup> Although the Commission is sensitive to these concerns, a complete review of the proxy system at this time would only delay the potential benefits to issuers and shareholders offered by the notice and access model. As we gain additional experience with these rules, we will consider whether more extensive revisions to the proxy rules are warranted.

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

- The intermediary must prepare its own Notice and deliver this Notice to its beneficial owners after receiving the meeting information from the issuer or other soliciting person;
- The intermediary must send its Notice to beneficial owners at least 40 days prior to the meeting;
- The intermediary must post its request for voting instructions on an Internet Web site;
- The intermediary must maintain records of beneficial owners who make a permanent election to receive paper or e-mail copies of the proxy materials for all securities held in the beneficial owner's account; and

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<sup>119</sup> See Rules 14b-1(d)(4)(iii) and 14b-2(d)(4)(iii) [17 CFR 240.14b-1(d)(4)(iii) and 240.14b-2(d)(4)(iii)].

<sup>120</sup> See letter from ABA.

<sup>121</sup> See, for example, letters from BRT, Concerned Shareholders, Computershare, Carl Hagberg, Mellon, and STA.

- The intermediary must request a copy of the proxy materials from the issuer or other soliciting person within three business days after receiving a request from its beneficial owner customer and must forward that copy to the beneficial owner customer within three business days after receiving the copy from the issuer or other soliciting person.

### **C. Soliciting Persons Other Than the Issuer**

Under the amendments, a person other than the issuer who undertakes his or her own proxy solicitation also can rely on the notice and access model. This situation typically would occur in the context of a proxy contest between a shareholder and management. We anticipate that the notice and access model will provide an alternative that may decrease significantly the printing and mailing costs associated with a proxy solicitation. 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.

Several commenters supported extending the notice and access model to such parties.<sup>122</sup> However, some commenters were concerned about the possibility of abuse of the model by shareholders conducting nuisance contests.<sup>123</sup> These commenters recommended that the availability of the model be limited for soliciting persons other than the issuer.<sup>124</sup> The proposed limitations included requiring the solicitation of all shareholders,<sup>125</sup> requiring soliciting persons other than the issuer to provide copies of

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<sup>122</sup> See, for example, letters from CALSTRS, Computershare, and Swingvote.

<sup>123</sup> See, for example, letters from Glen Buchbaum.

<sup>124</sup> See, for example, letters from ABA, ACC, BRT, ICI, ISS, Sullivan & Cromwell, and Swingvote.

<sup>125</sup> See letters from BRT and Swingvote.

their proxy materials upon request,<sup>126</sup> and imposing a minimum shareholding requirement in order for a soliciting person to take advantage of the model.<sup>127</sup> Although the amendments would reduce the cost of a proxy contest, they do not eliminate all costs, such as costs of preparing the soliciting materials, legal fees, proxy solicitor fees, and other significant soliciting expenses. We believe these surviving costs should discourage frivolous contests.

Although the mechanics of a solicitation under the notice and access model for a person other than the issuer are similar to those incurred by an issuer, we describe below several important differences in the way the amendments affect soliciting persons other than the issuer.

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

The proxy rules currently treat persons other than the issuer differently from the issuer in a significant respect regarding the provision of information to shareholders regarding intended corporate actions. Specifically, an issuer must furnish to each shareholder 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<sup>128</sup> 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 shareholders from whom no proxy authority is sought. As a result, soliciting

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<sup>126</sup> See letter from ABA.

<sup>127</sup> See letters from ABA, ICI and Sullivan & Cromwell.

<sup>128</sup> 15 U.S.C. 78n(c).

persons can limit the cost of a solicitation by soliciting proxies only from a select group of shareholders, such as those with large holdings, without furnishing other shareholders with any information. This enables a person other than the issuer to conduct a proxy contest in a variety of ways, some of which are not available to an issuer. The amendments that we are adopting relate only to the means of furnishing information to shareholders, and thus do not affect a soliciting person's ability to effect such targeted solicitations.

Under the new rules, a soliciting person other than the issuer may follow the same procedures as the issuer.<sup>129</sup> In particular, it may furnish a Notice and post the proxy statement on an Internet Web site. As with an issuer, such a soliciting person may not include a proxy card with the Notice. It may, however, send a proxy card to the shareholders it is soliciting without a proxy statement 10 calendar days or more after initially sending the Notice to them, if the proxy card is accompanied either by a copy of the proxy statement or by another copy of the Notice.

A soliciting person other than the issuer may selectively solicit shareholders under the notice and access model, just as it could under the current proxy rules (e.g., the soliciting person could choose to send the Notice only to certain shareholders, such as those owning more than a specified number of shares). As we discuss in more detail below, we have made revisions to Rule 14a-7 that will enable a soliciting person to distinguish between shareholders who have requested paper copies of the proxy materials

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<sup>129</sup> As with the case of an issuer, the soliciting person also may solicit shareholders concurrently by any other means, for example, by sending a proxy statement and proxy card to certain shareholders.

and those who have not.<sup>130</sup> Under the notice and access model, a soliciting person other than the issuer may choose to send a Notice only to those shareholders who have not requested paper copies of the proxy materials.

In the proposing release, we proposed a provision that would have permitted a soliciting person other than the issuer to send a Notice that would condition the solicitation on a shareholder's willingness to access the proxy materials on an Internet Web site. One commenter suggested that a soliciting person should not be permitted to condition its solicitation in this manner and should have to provide a copy of its proxy statement to a requesting shareholder.<sup>131</sup> We are persuaded that a shareholder receiving a Notice reasonably may conclude that he or she is entitled to receive a copy of the materials. Therefore, the final rules require a soliciting person other than an issuer to send a paper or e-mail copy of the proxy statement to any requesting shareholder to whom it has sent a Notice.<sup>132</sup>

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

A solicitation in opposition to the issuer's proposals to be voted on at a shareholder meeting often is not initiated until after the issuer has filed its proxy statement. As we noted in the proposing release, we therefore believe that it may be unfair to apply the same timeframe for distributing the Notice to soliciting persons as the

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<sup>130</sup> 17 CFR 240.14a-7.

<sup>131</sup> See letter from ABA.

<sup>132</sup> The proposing release also discussed the possibility of an electronic-only solicitation in which the soliciting person publishes a communication pursuant to Rule 14a-12 [17 CFR 240.14a-12], but does not send any Notices to shareholders. We are not adopting the electronic-only option that we discussed in the proposing release as part of the notice and access model. However, as noted in the final rules, the amendments do not affect the

timeframe that applies to issuers. Therefore, the amendments require a soliciting person other than the issuer that is following the notice and access model to send out its Notice by the later of: (1) 40 calendar days prior to the meeting; or (2) 10 calendar days after the issuer first sends out its proxy statement or Notice to shareholders. This is substantially the same requirement we proposed, except that we have changed the proposed 30-day deadline to 40 days to conform it to our revision of the deadline for issuers.

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

The content of the Notice sent by a soliciting person other than the issuer could be different from the content of the issuer's Notice. For example, if a solicitation in opposition is launched before the issuer has sent its own proxy statement or Notice, the full shareholder meeting agenda may not be known to the soliciting person at the time it sends its Notice to shareholders. In such a case, the soliciting person must include the agenda items in its Notice only to the extent known.<sup>133</sup>

Also, there may be circumstances in which a person soliciting proxies in opposition to the issuer 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 rather than for all of the items, or presenting only a partial slate of directors. Typically, such a proxy would revoke any previously-executed proxy and the shareholder may lose his or her ability to vote on matters or directors 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 is presenting such a

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availability of any existing means by which an issuer or other person may furnish proxy materials under the proxy rules.

card to shareholders must indicate clearly on its Notice whether execution of that card will invalidate the shareholder's earlier vote on the other matters or directors reflected on the issuer's proxy card.

#### **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.<sup>134</sup> Under the amendments, if the issuer is providing its shareholder list to a soliciting person, the issuer would be required to indicate which of those shareholders have permanently requested paper copies of proxy materials.<sup>135</sup> The proposed rules would have required an issuer to share all information about its shareholders regarding electronic delivery. We have decided to limit this requirement.

One commenter was concerned that a requirement to share information on affirmative consents may violate the issuer's privacy policies and the terms of the consent agreement between the issuer and shareholder.<sup>136</sup> The commenter also was concerned about divulging employees' internal company e-mail addresses. We agree with this

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<sup>133</sup> See Rule 14a-16(l)(3)(i) [17 CFR 240.14a-16(l)(3)(i)].

<sup>134</sup> 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.

<sup>135</sup> See proposed Note 3 to Exchange Act Rule 14a-7.

<sup>136</sup> See letter from SCSGP.

comment and are not adopting that aspect of the proposal. However, the new rules do require an issuer to share information regarding whether a shareholder has made a permanent election to receive paper copies of the proxy materials. Such disclosure would not necessitate disclosure of a shareholder's e-mail address. In addition, a shareholder who has made a permanent election to receive paper copies of the issuer's proxy materials might reasonably expect to receive paper copies of proxy materials from other soliciting persons. Once that shareholder has made a permanent election, he or she should not be required to ask again for a paper copy of proxy materials.<sup>137</sup>

Similarly, if, under Rule 14a-7, the issuer elects to send the soliciting person's proxy materials, the amendments require the issuer to refrain from forwarding the other soliciting person's Notice to any shareholder who has made a permanent election to receive paper copies.<sup>138</sup> 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 Notice for all shareholders to whom it intends to provide a Notice. In that case, the issuer would have to send the soliciting person's Notice 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. If the other soliciting person wishes to send a proxy card to shareholders 10 or more days after it first

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<sup>137</sup> As noted above, this election would be effective until a shareholder revokes that election.

<sup>138</sup> The other soliciting person could, of course, provide paper copies of the proxy statement and proxy card to the issuer for forwarding to those shareholders who have elected to receive paper copies.

sends the Notice, the issuer would be required to forward those proxy cards in a similar fashion.<sup>139</sup>

## **5. The Role of Intermediaries With Respect to Solicitations by Persons Other Than the Issuer**

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.<sup>140</sup> 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. As proposed, the amendments clarify that intermediaries are obligated to send proxy materials on behalf of soliciting persons other than the issuer.

### **D. Business Combination Transactions**

As adopted, the notice and access model is not available with regard to proxy materials related to a business combination transaction, which includes transactions covered by Rule 165 under the Securities Act,<sup>141</sup> as well as transactions for cash consideration requiring disclosure under Item 14 of Schedule 14A. Several commenters<sup>142</sup> agreed that business combination transactions constitute highly extraordinary events for some issuers and frequently involve an offering of securities that

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<sup>139</sup> As noted above, the issuer may alternatively provide the other soliciting person with a list of shareholders pursuant to Rule 14a-7.

<sup>140</sup> See Randall S. Thomas & Catherine T. Dixon, *Aranow & Einhorn on Proxy Contests for Corporate Control*, at §8.03(C) (3d ed. 2001).

<sup>141</sup> 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.

<sup>142</sup> See, for example, letters from ABA, Hermes, and Sullivan & Cromwell.

must be registered under the Securities Act and require delivery of the prospectus.<sup>143</sup> They also typically involve proxy statements of considerable length and complexity. Other commenters nonetheless believed that the model should be extended to such transactions.<sup>144</sup> They noted that even more savings may be realized by extending the model to such larger documents. The Commission desires to gain more experience with the notice and access model before extending it to business combination transactions. Based on our experience with the model once it is being used for more straightforward corporate actions, we will consider at a later date whether it is appropriate to extend the model to business combination transactions.

#### **E. Compliance Date and Monitoring**

No issuer may send a Notice to shareholders before July 1, 2007. Issuers and intermediaries typically hire third parties to handle the logistics of proxy distribution. These companies will require time to adjust their systems to accommodate the notice and access model. Therefore, an issuer may not use the new model for meetings before August 10, 2007 because of the 40-day deadline. Similarly, if an issuer's meeting will be on or after August 10, 2007, it may only send the Notice on or after July 1, 2007, even if the issuer wishes to send the Notice more than 40 days prior to the meeting date.

We desire to track the industry's experience with the notice and access model to determine whether the rules are achieving their intended purposes. However, we do not currently intend to impose a requirement for issuers and other parties to provide us with

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<sup>143</sup> The prospectus delivery requirements applicable to business combination transactions were not impacted by our securities offering reform initiative because such transactions were excluded. See Release No. 33-8591 (July 19, 2005) [70 FR 44271].

<sup>144</sup> See, for example, letters from BRT, CALSTRS, Computershare, ICI, ISS, McData Corp, NY State Bar, Swingvote, SCSGP, William Sjostrom, and University Bancorp.

data and experiences with the model. We welcome information from issuers and all other parties involved in the proxy distribution process about their experience with the notice and access model on a voluntary basis. Such information would include itemized costs of proxy solicitation before and after adoption of the model, shareholder voting data before and after adoption, the number of copies requested, and any problems encountered with implementing the program. Although such information may be aggregated with the data and experiences of others and presented to the public, we do not intend to divulge the identity of responding parties.

#### **IV. Conforming and Correcting Revisions to the Proxy Rules**

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

- We 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.<sup>145</sup>
- We clarify that the term “address” includes an electronic mail address.<sup>146</sup>

Furthermore, we 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.<sup>147</sup> Finally, we are

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<sup>145</sup> 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 Rule 14a-13(a), Instruction 2 to paragraph (d)(2)(ii)(L) of Item 7 of Rule 14a-101, Note 2 to Rule 14c-7(a) and Instruction 1 to Item 4 of Rule 14c-101.

<sup>146</sup> Rules 14a-7(f), 14a-13(e), 14b-1(a)(2) and 14b-2(a)(4).

<sup>147</sup> 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),

updating Rule 14a-2 and Forms 10-Q, 10-QSB, 10-K, 10-KSB, and N-SAR to revise outdated references to Exchange Act Rule 14a-11, which the Commission rescinded in 1999.<sup>148</sup>

## V. Paperwork Reduction Act

### A. Background

The amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).<sup>149</sup> We published a notice requesting comment on the collection of information requirements in the proposing release, and submitted requests to the Office of Management and Budget for approval in accordance with the PRA.<sup>150</sup> These requests were approved by OMB. Some of the revisions that we are making to the original proposal affect these collections of information. We will submit requests for approval of the revisions to OMB. We are requesting comment in this release with respect to these revisions.

The titles for the collections of information are:<sup>151</sup>

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

<sup>148</sup> See Release No. 33-7760 (Oct. 22, 1999) [64 FR 61408].

<sup>149</sup> 44 U.S.C. 3501 *et seq.*

<sup>150</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>151</sup> In the proposing release, we described the proposed Notice of Internet Availability of Proxy Materials as a new collection of information, rather than a part of our existing collections of information related to Regulations 14A and 14C. However, we subsequently submitted to OMB a PRA analysis based on revisions to the Regulation

Regulation 14A (OMB Control No. 3235-0059)

Regulation 14C (OMB Control No. 3235-0057)

An 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 Amendments**

The amendments will apply to a particular issuer or other soliciting person only if the issuer or soliciting person voluntarily chooses to rely on the notice and access model. However, if the issuer or soliciting person opts to rely on the new alternative model, compliance with the components of the model is mandatory. The Notices, the proxy materials posted on the Web site, and copies of the proxy materials sent in response to shareholder requests will not be kept confidential.

The Notice must 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].<sup>152</sup>**

- **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 security holders] [is/are] available at [Insert Web site address].**

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14A and Regulation 14C collections. Based on our burden estimates associated with the Notice, the collection of information approved by OMB related to revisions to existing collections of information (Regulations 14A and 14C) and therefore we refer to those collections of information in this PRA discussion.

<sup>152</sup> Appropriate changes must be made to the Notice if the issuer is providing an information statement pursuant to Regulation 14C or seeking to effect a corporate action by written consent.

- **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] to facilitate timely delivery.”**
- 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 or other soliciting person’s recommendations regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- (1) A toll-free telephone number; (2) an e-mail address; and (3) an Internet Web site address where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;
- Any control/identification number that the shareholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement and annual report; and
- Information on how to obtain directions to be able to attend the meeting and vote in person.

Intermediaries must provide a similar notice to beneficial owners. We expect that all of the factual information required to appear in the Notice will become available as part of the ordinary preparations for a shareholder meeting.

### **C. Comments on PRA Estimates**

We requested comment on the PRA analysis contained in the proposing release. In the proposing release, we estimated the annual burden for an issuer or other soliciting person to prepare a Notice to be approximately 1.5 hours. We estimated that 75% of the burden would be prepared by the issuer and that 25% of the burden would be prepared by outside counsel retained by the issuer at an average cost of approximately \$300 per hour.<sup>153</sup> Based on our receipt of 7,301 filings on Schedule 14A and 681 filings on Schedule 14C during our 2005 fiscal year, we estimated that 7,982 Notices would be filed annually, assuming that all issuers and other soliciting persons elected to follow the proposed notice and access model.<sup>154</sup> We further estimated that the total annual reporting burden would be approximately 8,980 hours.<sup>155</sup> Using the revised \$400 average cost for retaining outside counsel, we are adjusting our annual cost estimate to approximately \$1,197,300,<sup>156</sup> which reflects the outside counsel cost.

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<sup>153</sup> 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. At the proposing stage, we used an estimated hourly rate of \$300.00 to determine the estimated cost to public companies of executive compensation and related disclosure prepared or reviewed by outside counsel. We recently have increased this hourly rate estimate to \$400.00 per hour after consulting with several private law firms. The cost estimates in this release are based on the \$400.00 hourly rate. We request comment on this estimated hourly rate.

<sup>154</sup> 7,301 notices for 14A filers + 681 notices for 14C filers = 7,982 total notices.

<sup>155</sup> 7,982 notices x 1.5 hours per notice x .75 = 8,980 hours.

<sup>156</sup> 7982 notices x \$400/hour x 1.5 hours/notice x .25 = \$1,197,300.

Although the notice and access model is an alternative to the existing model for the distribution of proxy materials to shareholders, and reliance upon it will be optional, we based our reporting burden and cost estimates on the assumption that all issuers or other soliciting persons in fiscal year 2005 would have relied on the notice and access model even though we realized that this would result in an overestimation of hour and cost burdens. The new alternative is voluntary, so the percentage of issuers and soliciting persons that will choose to rely on the new model is uncertain.

In response to commenters' remarks, we revised the proposal to require issuers to permit shareholders to make permanent elections to receive proxy materials in paper or by e-mail. An issuer must maintain records as to which of its shareholders have made such an election. Many issuers already maintain similar records to keep track of their shareholders who have affirmatively consented to electronic delivery consistent with past Commission guidance,<sup>157</sup> as well as their shareholders who have consented to householding of proxy materials pursuant to Rule 14a-3(e).<sup>158</sup> For purposes of the PRA, we estimate that a typical issuer will spend an additional five hours per year, or a total of 39,910 hours for all issuers subject to the proxy rules, to maintain these records.<sup>159</sup> Because this is an internal recordkeeping requirement, we do not expect a cost for hiring outside counsel.

The final rules also require an intermediary to prepare its own Notice. This Notice would be substantially the same as an issuer's Notice, but will be modified by the

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<sup>157</sup> See the 1995 Interpretive Release.

<sup>158</sup> 17 CFR 240.14a-3(e).

<sup>159</sup> 7,982 filings with an estimated one filing per issuer or soliciting person x 5 hours = 39,910 hours.

intermediaries to provide information that is relevant to beneficial owners rather than registered holders. According to ADP, it processes more than 95% of proxy materials that are sent to beneficial owners on behalf of intermediaries, reducing the need to create multiple intermediary Notices. In addition, the issuer or other soliciting person will provide the majority of information required in the intermediary's Notice. Therefore, we estimate that the burden to prepare an intermediary's Notice will be approximately one hour, or a total annual burden of 7,982 hours for all proxy solicitations.<sup>160</sup>

Intermediaries must also maintain records to keep track of which beneficial owners have made a permanent election to receive proxy materials in paper or by e-mail. Like issuers, intermediaries already maintain records of shareholders' affirmative consents to electronic delivery and householding of proxy materials. In addition, intermediaries maintain records as to whether their beneficial owner customers have objected, or not objected, to disclosure of their identities to the issuer. Like issuers, we believe this will result in an annual burden of 39,910 hours for intermediaries.

We did not receive any comments on the percentage of issuers and persons likely to rely on the notice and access model, nor did we receive any comments on our burden and cost estimates associated with preparing the Notice. However, several corporate commenters indicated that some issuers might be reluctant to rely on the notice and access model due to a concern that the costs of fulfillment of requests for paper copies under the model might offset some of the potential savings that they could realize from

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<sup>160</sup> 7,982 notices x 1 hour per notice = 7,982 hours. We do not include a cost to intermediaries for hiring outside counsel because we expect that the substantive contents of an intermediary's Notice would be provided by the issuer or other soliciting person. The estimates assume that ADP will continue to process over 95% of the proxy solicitations on behalf of intermediaries, thereby eliminating the need for each intermediary to prepare a separate Notice.

the model. We have revised the proposed model to address some of these concerns about fulfillment of requests for paper copies, but it is still difficult to predict the number of issuers and soliciting persons that will rely on the model. Therefore, we are not revising the original estimates that assume that all issuers and soliciting persons will rely on the notice and access model. As a result, these burden estimates likely are overstated. We will adjust them after we have actual experience with the notice and access model. We request comment on all of our hourly and cost burden estimates.

Any member of the public may direct to us any comments concerning these burden and cost estimates and any suggestions for reducing the burdens and costs. Persons who desire to submit comments on the collections of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Nancy M. Morris, 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 the OMB by us 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. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

## **VI. Cost-Benefit Analysis**

### **A. Background**

The amendments to the proxy rules enable issuers to take advantage of technological advances that have occurred in recent years to more efficiently furnish proxy materials to shareholders. We expect that these amendments will lead to significant cost reduction for proxy solicitations. The costs of solicitations ultimately are borne by shareholders. We are sensitive to the costs and benefits that result from our rules. In this section, we examine those costs and benefits.

Issuers and other persons soliciting proxies must comply with the rule amendments only if they elect to furnish proxy materials pursuant to the notice and access model. No issuer or person conducting a proxy solicitation will be required to follow the notice and access model. We expect that an issuer or other soliciting person will follow the model only if it believes that it will experience cost savings as a result. We expect that having a choice among alternative models for furnishing proxy materials will limit the costs of the amendments by enabling issuers and other soliciting persons to choose one that is most efficient and cost effective under the issuer's or other soliciting person's particular circumstances.

### **B. Summary of Amendments**

The amendments provide an alternative notice and access model that permits an issuer to furnish its proxy materials to shareholders by posting them on a 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 paper or e-mail copies of the proxy materials at no charge from the issuer.

Under the amendments, an issuer can require intermediaries to follow similar procedures when forwarding the issuer's proxy materials to beneficial owners. In addition, shareholders and other persons conducting their own proxy solicitations may follow the alternative model, under the same general requirements that apply to issuers. However, such persons will be able to limit their solicitations to shareholders who have not requested paper copies of the proxy materials from an issuer in connection with the issuer's solicitation.

### **C. Benefits**

The benefits to investors of the amendments include the following: (1) more rapid dissemination of proxy information to shareholders using the Internet; and (2) reduced printing and mailing costs for issuers, as well as other soliciting persons engaging in proxy contests. We expect that the reductions in printing and mailing costs and the potential decrease in the costs of proxy contests to be the most significant sources of economic benefit to investors of the amendments.

In terms of paper processing alone, the benefits of the rule amendments are limited by the volume of paper processing that would occur otherwise. As we noted in the proposing release, Automatic Data Processing, Inc. (ADP) handles the vast majority of proxy mailings to beneficial owners.<sup>161</sup> ADP publishes statistics that provide useful background for evaluating the likely consequences of the rule amendments. ADP

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<sup>161</sup> We expect savings per mailing to record holders to roughly correspond to savings per mailing to beneficial owners.

estimates that, during the 2006 proxy season,<sup>162</sup> over 69.7 million proxy material mailings were eliminated through a variety of means, including householding and existing electronic delivery methods. During that season, ADP mailed 85.3 million paper proxy items to beneficial owners. ADP estimates that the average cost of printing and mailing a paper copy of a set of proxy materials during the 2006 proxy season was \$5.64. We estimate that issuers and other soliciting persons spent, in the aggregate, \$481.2 million in postage and printing fees alone to distribute paper proxy materials to beneficial owners.<sup>163</sup> Approximately 50% of all proxy pieces mailed by ADP in 2005 were mailed during the proxy season.<sup>164</sup> Therefore, we estimate that issuers and other persons soliciting proxies from beneficial owners spent approximately \$962.4 million in 2006 in printing and mailing costs.<sup>165</sup>

Based on the assumption that 19% of shareholders will choose to have paper copies sent to them when an issuer relies on the notice and access model, we estimate that the amendments could produce annual paper-related savings ranging from \$48.3 million (if issuers who are responsible for 10% of all proxy mailings choose to rely on the notice and access model) to \$241.4 million (if issuers who are responsible for 50% of all proxy mailings choose to rely on the notice and access model).<sup>166</sup> This estimate excludes the

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<sup>162</sup> According to ADP data, the 2006 proxy season extended from February 15, 2006 to May 1, 2006.

<sup>163</sup> 85.3 million mailings x \$5.64/mailing = \$481.2 million.

<sup>164</sup> According to ADP, in 2005, 90,013,175 of 179,833,774, or 50%, of proxy pieces were mailed during the 2005 proxy season.

<sup>165</sup> \$481.2 million / 50% = \$962.4 million.

<sup>166</sup> This range of potential cost savings depends on data on proxy material production, home printing costs, and first-class postage rates provided by Lexecon and ADP, and supplemented with modest 2006 USPS postage rate discounts. The fixed costs of notice and proxy material production are estimated to be \$2.36 per shareholder. The variable costs of fulfilling a paper requests, including handling, paper, printing and postage, are

effect of the provision of the amendments that will allow shareholders to make a permanent request for paper copies. That provision will enable issuers and other soliciting persons to take advantage of bulk printing and mailing rates for those requesting shareholders, and therefore should reduce the on-demand costs reflected in these calculations.<sup>167</sup>

We estimate that approximately 19% of shareholders will request paper copies. Commenters provided alternate estimates. For example, Computershare, a large transfer agent, estimated that less than 10% of shareholders would request paper copies.<sup>168</sup> According to a survey conducted by Forrester Research for ADP, 12% of shareholders report that they would always take extra steps to get their proxy materials, and as many as 68% of shareholders report that they would take extra steps to get their proxy materials in paper at least some of the time. The same survey also finds that 82% of shareholders report that they look at their proxy materials at least some of the time. These survey results suggest that shareholders may review proxy materials even if they do not vote.

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estimated to be \$6.11 per copy requested. Assumptions about percentages of shareholders requesting paper copies are derived from Forrester survey data furnished by ADP and adjusted for the reported likelihood that an investor will take extra steps to get proxy materials. Our estimate of the total number of shareholders is based on data provided by ADP and SIA. According to SIA's comment letter, 78.49% of shareholders held their shares in street name. We estimate that the total number of proxy pieces mailed equals the number of pieces mailed to beneficial shareholders by ADP in 2005 divided by 78.49%, which equals  $179,833,774 / 78.49\%$ , or 229,116,797.

<sup>167</sup> ADP commissioned a study by Lexecon to provide estimates for the total net cost/savings of the amendments to issuers. Lexecon's study relied on 2005 postage rates with no first-class mail discounts and a higher share of color printing at home than we assume above. It estimated that if all issuers adopt the notice and access model, if 9% of shareholders choose to print the materials at home, and 19% choose to have paper copies sent to them, then the amendments would produce a net savings of \$205 million for issuers in the aggregate. However, if 20% of shareholders chose to print and 39% chose to request paper copies, the amendments would produce a net cost of \$181 million. See Lexecon comment letter for more details.

<sup>168</sup> See letter from Computershare.

During the 2005 proxy season, only 44% of accounts were voted by beneficial owners. Put differently, 56%, or 84.8 million accounts, did not return requests for voting instructions. Our estimate that 19% of shareholders will request paper copies reflects the diverse estimates suggested by the available data.

Although we expect the savings to be significant, the actual paper-related benefits will be influenced by several factors that we estimate will become less important over time. First, some issuers and other soliciting persons will likely not elect to follow the alternative model. We estimate that issuers who are responsible for between 10% and 50% of all current proxy mailings will adopt the notice and access model during the first year of implementation of the amendments. Several commenters noted that some issuers may not be willing to try the model the first year, but rather will opt to wait and monitor the experience of other issuers that do try the model. Second, to the extent that some shareholders request paper copies of the proxy materials, the benefits of the amendments in terms of savings in printing and mailing costs will be reduced. Issuers are concerned that the cost per paper copy would be significantly greater if they have to mail copies of paper proxy materials to shareholders on an on-demand basis, rather than mailing the paper copies in bulk. Thus, if a significant number of shareholders request paper, the savings will be substantially reduced. Third, after adopting the notice and access model, issuers may face a high degree of uncertainty about the number of requests that they may get for paper proxy materials and may maintain unnecessarily large inventories of paper copies as a precaution. 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 are likely to decline, as will issuers' tendency to

print many more copies than ultimately are requested. This will lead to growth in paper-related savings from the rule amendments over time.

Additional benefits will accrue from reductions in the costs of proxy solicitations by persons other than the issuer. Under the amendments, persons other than the issuer also can rely on the notice and access model, but will be able to limit the scope of their proxy solicitations to shareholders who have not requested paper copies of the proxy materials. We expect that the flexibility afforded to persons other than the issuer under the amendments will reduce the cost of engaging in proxy contests, thereby increasing the effectiveness and efficiency of proxy contests as a source of discipline in the corporate governance process.

The effect of the amendments of lessening the costs associated with a proxy contest will be limited by the persistence of other costs, even under the notice and access model. One commenter noted that a large percentage of the costs of effecting a proxy contest go to legal, document preparation, and solicitation fees, while a much smaller percentage of the costs is associated with printing and distribution of materials.<sup>169</sup> However, other commenters suggested that the paper-related cost savings that can be realized from the rule amendments are substantial enough to change the way many contests are conducted.<sup>170</sup>

Finally, some benefits from the amendments may arise from a reduction in what may be regarded as the environmental costs of the proxy solicitation process.<sup>171</sup>

Specifically, proxy solicitation involves the use of a significant amount of paper and

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<sup>169</sup> See letter from ADP.

<sup>170</sup> See letters from CALSTRS, Computershare, ISS, and Swingvote.

<sup>171</sup> See letter from American Forests.

printing ink. Paper production and distribution can adversely affect the environment, due to the use of trees, fossil fuels, 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 dollar estimates of the paper-related benefits reflect the elimination of these adverse environmental consequences under the amendments.

#### **D. Costs**

An issuer's decision to use the notice and access model will introduce several new costs into the process of proxy distribution, including the following: (1) the cost of preparing, producing, and sending the Notice to shareholders; (2) the cost of processing shareholders' requests for copies of the proxy materials and maintaining their permanent election preferences; and (3) the cost to shareholders of printing proxy materials at home that would otherwise be printed by issuers.

The paper-related savings to issuers and other soliciting persons discussed under the benefits section above are adjusted for the cost of printing and sending Notices. If Notices are sent by mail, then the mailing costs may vary widely among parties. Postage rates likely would vary from \$0.14 to \$0.39 per Notice mailed, depending on numerous factors. In our estimates of the paper-related benefits above, we assume that each Notice costs a total of \$0.42 to print and mail. Based on data from ADP and SIA, we estimate that issuers and other soliciting persons process a total of 229,116,797 accounts per

year.<sup>172</sup> The alternative model also requires minimal added disclosures in the form of a Notice to shareholders, informing them that the proxy materials are available at a specified Internet Web site. For purposes of the PRA, we have presented the extremely conservative estimate that the preparation and filing costs of the amendments, assuming that all issuers and other soliciting persons elect to follow the procedures, will be approximately \$2,020,475.<sup>173</sup> Under the alternate scenario presented above, these costs could range between \$202,048 if 10% of issuers adopt the model and \$1,010,238 if 50% of issuers adopt. The amendments also require issuers and intermediaries to maintain records of shareholders who have requested paper and e-mail copies for future proxy solicitations. We estimate that this cost to issuers and intermediaries will be approximately \$9,977,500 if all issuers adopt the notice and access model,<sup>174</sup> \$997,500 if 10% of issuers adopt the model, and \$4,988,750 if 50% of issuers adopt the model.

Issuers who adopt the notice and access model and their intermediaries will incur additional processing costs. The 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

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<sup>172</sup> See [www.ics.adp.com/release11/public\\_site/about/stats.html](http://www.ics.adp.com/release11/public_site/about/stats.html) stating that ADP handled 179,833,774 in fiscal year 2005 and letter from SIA stating that beneficial accounts represent 78.49% of total accounts.

<sup>173</sup> For PRA purposes, 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. We expect that costs for posting the materials on a Web site will be minimal and are included in this calculation.

<sup>174</sup> For PRA purposes, we estimate that issuers and intermediaries would spend a total of 79,820 hours of issuer and intermediary personnel time maintaining these records. We estimate the average hourly cost of issuer and intermediary personnel time to be \$125, resulting in a total cost of \$9,977,500 for issuer and intermediary personnel time.

required to prepare its own Notice to beneficial owners, along with instructions on when and how to request paper copies and the website where the beneficial owner can access his or her request for voting instructions. Since issuers reimburse intermediaries for their reasonable expenses of forwarding proxy materials and intermediaries and their agents already have systems to prepare and deliver requests for voting instructions, we do not expect the intermediaries' role in sending their Notices to beneficial owners to significantly affect the costs associated with the rule.

Under the notice and access model, a beneficial owner must request a copy of proxy materials from its intermediary rather than from the issuer. The costs 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 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. In addition, the final rules permit a beneficial owner to specify its preference on an account-wide basis, which should reduce the cost of processing requests for copies. These costs are ultimately paid by the issuer and therefore would be included in an issuer's assessment of whether to adopt the alternative model.

Shareholders obtaining proxy materials online would incur any necessary costs associated with gaining access to the Internet. In addition, some shareholders may choose to print out the posted materials, which will entail paper and printing costs. We estimate that approximately 10% of all shareholders will print out the posted materials at

home at an estimated cost of \$7.05 per proxy package. Based on these assumptions, the amendments are estimated to produce annual home printing costs ranging from \$16 million (if issuers who are responsible for 10% of all current proxy mailings choose to rely on the notice and access model) to \$80 million (if issuers who are responsible for 50% of all current proxy mailings choose to rely on the notice and access model).<sup>175</sup> Investors have the option to incur no additional cost by either accessing the proxy materials online or requesting paper copies of the materials from the issuer.

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

Section 23(a)(2) of the Exchange Act<sup>176</sup> 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. Section 3(f) of the Exchange Act<sup>177</sup> and Section 2(c) of the Investment Company Act of 1940<sup>178</sup> 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 have also discussed other impacts of

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<sup>175</sup> This range of potential home printing costs depends on data provided by Lexecon and ADP. See letter from ADP. The Lexecon data was included in the ADP comment letter. To calculate home printing cost, we assume that 50% of annual report pages are printed in color and 100% of proxy statement pages are printed in black and white. The estimated percentage of shareholders printing at home is derived from Forrester survey data furnished by ADP and adjusted for the reported likelihood that an investor will take extra steps to get proxy materials. Total number of shareholders estimated as above based on data provided by ADP and SIA. See letters from ADP and SIA.

<sup>176</sup> 15 U.S.C. 78w(a)(2).

<sup>177</sup> 15 U.S.C. 78c(f).

the amendments in our Cost-Benefit, Paperwork Reduction Act and Final Regulatory Flexibility Act Analyses.

The amendments to the proxy rules are intended to improve efficiency by providing an alternative for issuers and other soliciting persons that could reduce the cost of soliciting proxies and sending information statements regarding shareholder meetings. Currently, many issuers must devote a significant amount of time and resources to proxy mailings. Similarly, undertaking a proxy contest is often a very costly endeavor. We expect that the amendments will reduce the time and resources related to such distributions. These costs include reimbursing intermediaries for their part in the process.

As noted elsewhere in this release, commenters expressed concern that the amendments might reduce shareholder participation in the proxy voting process, making issuers more dependent on broker discretionary voting. Such a result would affect the efficiency of the current proxy voting process. We have made revisions to the amendments to minimize such effect, by making it easier for shareholders to continue to receive paper copies of the proxy materials. Similarly, there was concern that the amendments would increase the risk of shareholders conducting frivolous proxy contests. We have also revised the final rules to minimize this possibility, by eliminating the proposed conditional solicitation.<sup>179</sup>

Some commenters were concerned that the added procedures would complicate the proxy distribution process, reducing the efficiency of the process. The final rules are voluntary. No issuer or other soliciting person is required to rely on the notice and access model. Those that choose to rely on the model presumably have determined that the

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<sup>178</sup> 15 U.S.C. 80a-2(c).

additional procedures that they must follow would reduce their cost of soliciting proxies, thereby increasing the efficiency of the process.

We considered the effects that the amendments would have on capital formation. The final rules do not directly affect the ability of issuers to raise capital. However, they are intended to reduce the cost of soliciting proxies. In addition, they facilitate proxy disclosure via the Internet, which may improve the manner in which investors receive those disclosures, thereby improving shareholder relations.

We considered the possible effects of the amendments on competition. As noted elsewhere in this release, companies in, and related to, the financial printing industry were concerned about the negative effects that the rules may have on that industry. Conversely, these rules may create alternative industries that promote more user-friendly, computer-based systems for interaction with shareholders, thus creating new jobs and industries in this field.

### **VIII. Final Regulatory Flexibility Analysis**

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to amendments to the proxy rules under the Exchange Act that will provide an alternative model for issuers and other persons soliciting proxies to satisfy certain of their obligations under the Commission's proxy rules. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act in conjunction with the proposing release. The proposing release included, and solicited comment on, the IRFA.

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<sup>179</sup> See Section III.C.1 of Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597].

### **A. Need for the Amendments**

On December 8, 2005, we proposed amendments to the rules regarding provision of proxy materials to shareholders.<sup>180</sup> We are adopting those amendments, substantially as proposed, but with a few modifications in response to public comment. Specifically, the amendments create an alternative notice and access model by which issuers and other soliciting persons can electronically furnish their proxy materials to shareholders. The amendments are intended to put into place processes that will 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 amendments may be able to significantly lower the costs of their proxy solicitations that ultimately are borne by shareholders. The fact that the amendments also apply to a soliciting person other than the issuer might help to reduce the costs of engaging in a proxy contest.

The amendments also have the potential to improve the ability of shareholders to participate meaningfully in the proxy process by reducing the cost of undertaking a proxy contest and may increase management's accountability and responsiveness to shareholders due to heightened concern about the possibility of a proxy contest. This, in turn, may enhance the value of shareholders' investments.

### **B. Significant Issues Raised by Public Comment**

In the proposing release, we requested comment on any aspect of the Initial Regulatory Flexibility Act Analysis, including the number of small entities that would be affected by the proposals, and both the qualitative and quantitative nature of the impact.

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<sup>180</sup> Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597].

We did not receive comment on the number of small entities that would be affected by the proposals. Also, no commenters noted any difference in the potential effect of the amendments on small entities as opposed to other entities.

One commenter remarked that smaller companies depend more heavily on broker discretionary voting than larger companies in order to meet state law quorum requirements.<sup>181</sup> Although the new rules do not affect the NYSE’s broker discretionary voting rule, that commenter noted that if the final rules reduce shareholder voting, such smaller companies would become even more dependent on broker discretionary voting. As noted elsewhere in this release, we have made revisions to the amendments to minimize such effect, by making it easier for shareholders to continue to receive paper copies of the proxy materials.

### **C. Small Entities Subject to the Amendments**

Exchange Act Rule 0-10(a)<sup>182</sup> 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.<sup>183</sup> Approximately 157 registered investment companies meet this

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<sup>181</sup> See letter from ABC.

<sup>182</sup> 17 CFR 240.0-10(a).

<sup>183</sup> See Rule 0-10 under the Investment Company Act of 1940 [17 CFR 270.0-10].

definition. Moreover, approximately 53 business development companies may be considered small entities.

Paragraph (c)(1) of Rule 0-10 under the Exchange Act<sup>184</sup> states that the term “small business” or “small organization,” when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to §240.17a-5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2005, the Commission estimates that there were approximately 910 broker-dealers that qualified as small entities as defined above.<sup>185</sup> Small Business Administration regulations define “small entities” to include banks and savings associations with total assets of \$165 million or less.<sup>186</sup> The Commission estimates that the rules will apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of \$165 million or less.

No issuer is required to follow the notice and access model. However, we expect that many issuers will choose to follow the alternative model because of the substantial cost savings that they may realize. These issuers likely will include many small entities. Broker-dealer and bank intermediaries are required to comply with the notice and access model if an issuer or other soliciting person requests such intermediaries to follow the alternative model.

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<sup>184</sup> 17 CFR 240.0-10(c)(1).

<sup>185</sup> These numbers are based on a review by the Commission’s Office of Economic Analysis of 2005 Financial and Operational Combined Uniform Single (FOCUS) Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent in their FOCUS Report filings.

#### **D. Reporting, Recordkeeping and Other Compliance Requirements**

If an issuer chooses to follow the model, it will be required to prepare, file, and furnish a Notice to shareholders. Similarly, upon request from an issuer or other soliciting person, a broker-dealer or bank intermediary will be required to prepare and furnish its own Notice to beneficial owners. These Notices must include factual information that is readily available to the issuer and intermediary. An issuer relying on the notice and access model also will be required to provide copies of the proxy materials to requesting shareholders and to maintain a Web site on which to post the proxy materials. Intermediaries will be required to forward copies of the proxy materials to requesting beneficial owners and to maintain a Web site on which to post its request for voting instructions. Those Web sites must be maintained in a manner to ensure that the anonymity of persons accessing the Web sites is preserved. Finally, issuers and intermediaries must maintain records regarding which shareholders have indicated a preference to receive paper or e-mail copies of the proxy materials in the future.

#### **E. Agency Action to Minimize Effect on Small Entities**

Compliance with the alternative notice and access model is voluntary for issuers. An issuer that is a small entity, like other types of entities subject to the proxy rules, need not elect to follow the alternative model. This flexibility to comply with traditional methods of distributing proxy materials to shareholders or to comply with the notice and access model will allow a small entity to choose the compliance means that will be most cost effective for its particular situation. It is likely that only the issuers that believe they

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<sup>186</sup> 13 CFR 121.201.

will realize cost savings or other benefits as a result of following the notice and access model will choose to do so.

Broker-dealer and bank intermediaries that are small entities must comply with the requirements of the voluntary model upon request from an issuer or other soliciting person. However, an intermediary is not required to forward proxy materials to beneficial owners unless the issuer or other soliciting person provides assurance of reimbursement of the intermediary's reasonable expenses incurred in connection with forwarding those materials. Therefore, any costs imposed on intermediaries by the rules will be borne by the issuer or other soliciting person, and ultimately shareholders. Exempting broker-dealers and banks that are small entities would lead to inconsistent means by which beneficial owners receive their proxy materials, which we believe would not be appropriate.

We considered alternatives, such as permitting an intermediary to merely forward an issuer's Notice rather than preparing its own Notice and permitting beneficial owners to request copies directly from the issuer. However, we believe that those alternatives create a high likelihood of confusion with respect to whether a beneficial owner would be entitled to execute a proxy card rather than provide voting instructions to his or her intermediary. To prevent such confusion, we have decided that such alternatives would not be appropriate.

## **IX. Statutory Basis and Text of Amendments**

We are adopting the amendments 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.

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

1. The general authority citation for Part 240 is revised to read 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, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

2. Amend §240.14a-2 by:

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

b. Revising the term “annual report” to read “annual report to security holders” in paragraph (b)(13).

The revisions 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 §240.14a-16, 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, as described in §240.14a-16, 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 registrant 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 registrant 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 or proxy statement, as applicable;

(D) With respect to delivery of the proxy statement or Notice of Internet Availability of Proxy Materials, 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 or proxy statement, as applicable. A security holder's affirmative written consent will be considered valid only 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 required by paragraph (e)(1)(ii)(B)(2) of this section; 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, proxy statement or Notice of Internet Availability of Proxy Materials to a security holder if:

(i) An annual report to security holders and a proxy statement, or a Notice of Internet of Availability of Proxy Materials, 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, a proxy statement or a Notice of Internet Availability of Proxy Materials under this section is reinstated.

\* \* \* \* \*

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 paragraphs (a)(2)(i) and (a)(2)(ii);
  - b. Adding paragraph (a)(2)(iii); and
  - c. In the “Notes to §240.14a-7”, revising the numerical designation “1.” to read “Note 1 to §240.14a-8”, revising the numerical designation “2.” to read “Note 2 to §240.14a-7” and adding “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 described in §240.14a-16), furnished by the security holder to the record holders, including banks, brokers, and similar entities, designated by the security holder. 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. The security holder may designate only record holders and/or beneficial owners who have not requested paper and/or e-mail copies of the proxy statement. 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 statement or Notice of Internet Availability of Proxy Materials furnished by the security holder shall be sent to that address, provided that if multiple copies of the Notice of Internet Availability of Proxy Materials are furnished by the security holder for that address, the registrant shall deliver those copies in a single envelope to that address. 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); and

(D) If the registrant has relied on §240.14a-16, the names of security holders who have requested paper copies of the proxy materials for all meetings and the names of security holders who, as of the date that the registrant receives the request, have requested paper copies of the proxy materials only for the meeting to which the solicitation relates.

(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.

\* \* \* \* \*

Notes to §240.14a-7.

\* \* \* \* \*

Note 3 to §240.14a-7. If the registrant is sending the requesting security holder's materials under §240.14a-7 and receives a request from the security holder to furnish the materials in the form and manner described in §240.14a-16, the registrant must accommodate that request.

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 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.

9. Add §240.14a-16 to read as follows:

**§240.14a-16 Internet availability of proxy materials.**

(a)(1) A registrant may furnish a proxy statement pursuant to §240.14a-3(a), or an annual report to security holders pursuant to §240.14a-3(b), to a security holder by sending the security holder a Notice of Internet Availability of Proxy Materials, as described in this section, 40 calendar days or more prior to the security holder meeting date, or if no meeting is to be held, 40 calendar 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 section.

(2) If the registrant chooses to provide the proxy statement or annual report to security holders to beneficial owners pursuant to this section, it must provide the record holder or respondent bank with all information listed in paragraph (d) of this section in sufficient time for the record holder or respondent bank to prepare, print and send a Notice of Internet Availability of Proxy Materials to beneficial owners at least 40 calendar days before the meeting date.

(b)(1) All 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 on or before the time that the notice is sent to the security holder and such materials must remain available on that Web site through the conclusion of the meeting of security holders.

(2) All 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.

(3) The Web site address relied upon for compliance under this section may not be the address of the Commission's electronic filing system.

(4) The registrant must provide security holders with a means to execute a proxy as of the time the Notice of Internet Availability of Proxy Materials is first sent to security holders.

(c) The materials must be presented on the Web site in a format, or formats, convenient for both reading online and printing on paper.

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

(1) 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 security holders] [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] to facilitate timely delivery.”;**

(2) 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;

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

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

(5) A toll-free telephone number, an e-mail address, and an Internet Web site where the security holder can request a copy of the proxy statement, annual report to

security holders, and form of proxy, relating to all of the registrant's future security holder meetings and for the particular meeting to which the proxy materials being furnished relate;

(6) Any control/identification numbers that the security holder needs to access his or her form of proxy;

(7) Instructions on how to access the form of proxy, provided that such instructions do not enable a security holder to execute a proxy without having access to the proxy statement and, if required by §240.14a-3(b), the annual report to security holders; and

(8) Information on how to obtain directions to be able to attend the meeting and vote in person.

(e)(1) 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 security holder meeting required under state law, unless state law prohibits such incorporation or combination.

(2) The Notice of Internet Availability of Proxy Materials may contain only the information required by paragraph (d) of this section and any additional information required to be included in a notice of security holders meeting under state law; provided that:

(i) The registrant must revise the information on the Notice of Internet Availability of Proxy Materials, including any title to the document, to reflect the fact that:

(A) The registrant is conducting a consent solicitation rather than a proxy solicitation; or

(B) The registrant is not soliciting proxy or consent authority, but is furnishing an information statement pursuant to §240.14c-2; and

(ii) The registrant may include a statement on the Notice to educate security holders that no personal information other than the identification or control number is necessary to execute a proxy.

(f)(1) Except as provided in paragraph (h) of this section, the Notice of Internet Availability of Proxy Materials must be sent separately from other types of security holder communications and may not accompany any other document or materials, including the form of proxy.

(2) Notwithstanding paragraph (f)(1) of this section, the registrant may accompany the Notice of Internet Availability of Proxy Materials with:

(i) A pre-addressed, postage-paid reply card for requesting a copy of the proxy materials; and

(ii) A copy of any notice of security holder meeting required under state law if that notice is not combined with the Notice of Internet Availability of Proxy Materials.

(g) Plain English.

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

(2) 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:

- (i) Short sentences;
- (ii) Definite, concrete, everyday words;
- (iii) Active voice;
- (iv) Tabular presentation or bullet lists for complex material, whenever possible;
- (v) No legal jargon or highly technical business terms; and
- (vi) No multiple negatives.

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

(h) The registrant may, at its discretion, choose to furnish some proxy materials pursuant to §240.14a-3(a)(1) and other proxy materials pursuant to this section, provided that the registrant may not send a form of proxy to security holders until 10 calendar days or more after the date it sent the Notice of Internet Availability of Proxy Materials to security holders, unless the form of proxy is accompanied or has been preceded by a copy of the proxy statement and any annual report to security holders that is required by §240.14a-3(b) through the same delivery medium. If the registrant sends a form of proxy after the expiration of such 10-day period and the form of proxy is not accompanied or preceded by a copy, via the same medium, of the proxy statement and any annual report to security holders that is required by §240.14a-3(b), then the registrant

shall accompany the form of proxy with a Notice of Internet Availability of Proxy Materials.

(i) The registrant must file a form of the Notice of Internet Availability of Proxy Materials with the Commission pursuant to §240.14a-6(b) no later than the date that the registrant first sends the notice to security holders.

(j) Obligation to provide copies.

(1) The registrant must send, at no cost to the record holder or respondent bank and by U.S. first class mail or other reasonably prompt means, a paper copy of the proxy statement, information statement, annual report to security holders, and form of proxy (to the extent each of those documents is applicable) to any record holder or respondent bank requesting such a copy within three business days after receiving a request for a paper copy.

(2) The registrant must send, at no cost to the record holder or respondent bank and via e-mail, an electronic copy of the proxy statement, information statement, annual report to security holders, and form of proxy (to the extent each of those documents is applicable) to any record holder or respondent bank requesting such a copy within three business days after receiving a request for an electronic copy via e-mail.

(3) The registrant is required to provide copies of the proxy materials pursuant to paragraphs (j)(1) and (j)(2) for one year after the conclusion of the meeting or corporate action to which the proxy materials relate.

(4) The registrant must maintain records of security holder requests to receive materials in paper or via e-mail for future solicitations and must continue to provide

copies of the materials to a security holder who has made such a request until the security holder revokes such request.

(k) Security holder information.

(1) A registrant or its agent shall maintain the Internet Web site on which it posts its proxy materials in a manner that does not infringe on the anonymity of a person accessing such Web site.

(2) The registrant and its agents shall not use any e-mail address obtained from a security holder solely for the purpose of requesting a copy of proxy materials pursuant to paragraph (j) for any purpose other than to send a copy of those materials to that security holder. The registrant shall not disclose such information to any person other than an employee or agent to the extent necessary to send a copy of the proxy materials pursuant to paragraph (j).

(l) A person other than the registrant may solicit proxies pursuant to the conditions imposed on registrants by this section, provided that:

(1) A soliciting person other than the registrant is required to provide copies of its proxy materials only to security holders to whom it has sent a Notice of Internet Availability of Proxy Materials; and

(2) A soliciting person other than the registrant must send its Notice of Internet Availability of Proxy Materials by the later of:

(i) 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or

- (ii) 10 calendar days after the date that the registrant first send its proxy statement or Notice of Internet Availability of Proxy Materials to security holders.
- (3) Content of the soliciting person's Notice of Internet Availability of Proxy Materials.
- (i) If, at the time a soliciting person other than the registrant sends its Notice of Internet Availability of Proxy Materials, the soliciting person is not aware of all matters on the registrant's agenda for the meeting of security holders, the soliciting person's Notice on Internet Availability of Proxy Materials must provide a clear and impartial identification of each separate matter on the agenda to the extent known by the soliciting person at that time. The soliciting person's notice also must include a clear statement indicating that there may be additional agenda items of which the soliciting person is not aware and that the security holder cannot direct a vote for those items on the soliciting person's proxy card provided at that time.
- (ii) If a soliciting person other than the registrant sends a form of proxy not containing all matters intended to be acted upon, the Notice of Internet Availability of Proxy Materials must clearly state whether execution of the form of proxy will invalidate a security holder's prior vote on matters not presented on the form of proxy.
- (m) This section shall not apply to a proxy solicitation in connection with a business combination transaction, as defined in §230.165 of this chapter.
- (n) This section provides a non-exclusive alternative by which an issuer or other person may furnish a proxy statement pursuant to §240.14a-3(a) or an annual report to security holders pursuant to §240.14a-3(b) to a security holder. This section does not affect the availability of any other means by which an issuer or other person may furnish

a proxy statement pursuant to §240.14a-3(a), or an annual report to security holders pursuant to §240.14a-3(b), to a security holder.

10. 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; and

c. Revising Item 23.

The revision reads as follows.

**§240.14a-101 Schedule 14A. Information required in proxy statement.**

\* \* \* \* \*

Item 23. Delivery of documents to security holders sharing an address. If one annual report to security holders, proxy statement, or Notice of Internet Availability of Proxy Materials is being delivered to two or more security holders who share an address in accordance with §240.14a-3(e)(1), furnish the following information:

(a) State that only one annual report to security holders, proxy statement, or Notice of Internet Availability of Proxy Materials, as applicable, is being delivered to multiple security holders sharing an address unless the registrant has received contrary instructions from one or more of the security holders;

(b) Undertake 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 documents was delivered and provide instructions as to how a

security holder can notify the registrant that the security holder wishes to receive a separate copy of an annual report to security holders, proxy statement, or Notice of Internet Availability of Proxy Materials, as applicable;

(c) Provide the phone number and mailing address to which a security holder can direct a notification to 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, as applicable, in the future; and

(d) Provide instructions how security holders sharing an address can request delivery of a single copy of annual reports to security holders, proxy statements, or Notices of Internet Availability of Proxy Materials if they are receiving multiple copies of annual reports to security holders, proxy statements, or Notices of Internet Availability of Proxy Materials.

11. Amend §240.14b-1 by:

a. Revising paragraphs (b)(2) including 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 paragraphs (d) and (e).

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.**

(b) \* \* \*

(2) The broker or dealer shall, upon receipt of the proxy, other proxy soliciting material, information statement, and/or annual report 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 report to security holders.

Note to Paragraph (b)(2): At the request of a registrant, or on its own initiative so long as the registrant does not object, a broker or dealer may, but is not required to, deliver one annual report to security holders, proxy statement, information statement, or Notice of Internet Availability of Proxy Materials to more than one beneficial owner sharing an address if the requirements set forth in §240.14a-3(e)(1) (with respect to annual reports to security holders, proxy statements, and Notices of Internet Availability of Proxy Materials) and §240.14c-3(c) (with respect to annual reports to security holders, information statements, and Notices of Internet Availability of Proxy Materials) applicable to registrants, with the exception of §240.14a-3(e)(1)(i)(E), are satisfied instead by the broker or dealer.

(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) Compliance with §240.14a-16. If a registrant or other soliciting person informs the broker or dealer that it intends to rely on §240.14a-16 to furnish proxy materials to beneficial owners and provides all of the relevant information listed in §240.14a-16(d) to the broker or dealer, the broker or dealer shall:

(1) Prepare and send a Notice of Internet Availability of Proxy Materials containing the information required in paragraph (e) of this section to beneficial owners no later than:

(i) With respect to a registrant, 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; and

(ii) With respect to a soliciting person other than the registrant, the later of:

(A) 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or

(B) 10 calendar days after the date that the registrant first sends its proxy statement or Notice of Internet Availability of Proxy Materials to security holders.

(2) Establish a Web site at which beneficial owners are able to access the broker or dealer's request for voting instructions and, at the broker or dealer's option, establish a Web site at which beneficial owners are able to access the proxy statement and other soliciting materials, provided that such Web sites are maintained in a manner consistent with paragraphs (b), (c), and (k) of §240.14a-16;

(3) Upon receipt of a request from the registrant or other soliciting person, send to security holders specified by the registrant or other soliciting person a copy of the

request for voting instructions accompanied by a copy of the intermediary's Notice of Internet Availability of Proxy Materials 10 calendar days or more after the broker or dealer sends its Notice of Internet Availability of Proxy Materials pursuant to paragraph (d)(1); and

(4) Upon receipt of a request for a copy of the materials from a beneficial owner:

(i) Request a copy of the soliciting materials from the registrant or other soliciting person, in the form requested by the beneficial owner, within three business days after receiving the beneficial owner's request;

(ii) Forward a copy of the soliciting materials to the beneficial owner, in the form requested by the beneficial owner, within three business days after receiving the materials from the registrant or other soliciting person; and

(iii) Maintain records of security holder requests to receive a paper or e-mail copy of the proxy materials in connection with future proxy solicitations and provide copies of the proxy materials to a security holder who has made such a request for all securities held in the account of that security holder until the security holder revokes such request.

(e) Content of Notice of Internet Availability of Proxy Materials. The broker or dealer's Notice of Internet Availability of Proxy Materials shall:

(1) Include all information, as it relates to beneficial owners, required in a registrant's Notice of Internet Availability of Proxy Materials under §240.14a-16(d), provided that the broker or dealer shall provide its own, or its agent's, toll-free telephone

number, an e-mail address, and an Internet Web site to service requests for copies from beneficial owners;

(2) Include a brief description, if applicable, of the rules that permit the broker or dealer to vote the securities if the beneficial owner does not return his or her voting instructions; and

(3) Otherwise be prepared and sent in a manner consistent with paragraphs (e), (f), and (g) of §240.14a-16.

12. Amend §240.14b-2 by:

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

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

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 paragraphs (d) and (e).

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.**

\* \* \* \* \*

(b) \* \* \*

(3) Upon receipt of the proxy, other proxy soliciting material, information statement, and/or annual report 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:

\* \* \* \* \*

Note to Paragraph (b)(3): At the request of a registrant, or on its own initiative so long as the registrant does not object, a bank may, but is not required to, deliver one annual report to security holders, proxy statement, information statement, or Notice of Internet Availability of Proxy Materials to more than one beneficial owner sharing an address if the requirements set forth in §240.14a-3(e)(1) (with respect to annual reports to security holders, proxy statements, and Notices of Internet Availability of Proxy Materials) and §240.14c-3(c) (with respect to annual reports to security holders, information statements, and Notices of Internet Availability of Proxy Materials) applicable to registrants, with the exception of §240.14a-3(e)(1)(i)(E), are satisfied instead by the bank.

\* \* \* \* \*

(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) Compliance with §240.14a-16. If a registrant or other soliciting person informs the bank that it intends to rely on §240.14a-16 to furnish proxy materials to beneficial owners and provides all of the relevant information listed in §240.14a-16(d) to the bank, the bank shall:

(1) Prepare and send a Notice of Internet Availability of Proxy Materials containing the information required in paragraph (e) of this section to beneficial owners no later than:

(i) With respect to a registrant, 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; and

(ii) With respect to a soliciting person other than the registrant, the later of:

(A) 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or

(B) 10 calendar days after the date that the registrant first sends its proxy statement or Notice of Internet Availability of Proxy Materials to security holders.

(2) Establish a Web site at which beneficial owners are able to access the bank's request for voting instructions and, at the bank's option, establish a Web site at which beneficial owners are able to access the proxy statement and other soliciting materials, provided that such Web sites are maintained in a manner consistent with paragraphs (b), (c), and (k) of §240.14a-16;

(3) Upon receipt of a request from the registrant or other soliciting person, send to security holders specified by the registrant or other soliciting person a copy of the request for voting instructions accompanied by a copy of the intermediary's Notice of Internet Availability of Proxy Materials 10 days or more after the bank sends its Notice of Internet Availability of Proxy Materials pursuant to paragraph (d)(1); and

(4) Upon receipt of a request for a copy of the materials from a beneficial owner:

(i) Request a copy of the soliciting materials from the registrant or other soliciting person, in the form requested by the beneficial owner, within three business days after receiving the beneficial owner's request;

(ii) Forward a copy of the soliciting materials to the beneficial owner, in the form requested by the beneficial owner, within three business days after receiving the materials from the registrant or other soliciting person; and

(iii) Maintain records of security holder requests to receive a paper or e-mail copy of the proxy materials in connection with future proxy solicitations and provide copies of the proxy materials to a security holder who has made such a request for all securities held in the account of that security holder until the security holder revokes such request.

(e) Content of Notice of Internet Availability of Proxy Materials. The bank's Notice of Internet Availability of Proxy Materials shall:

(1) Include all information, as it relates to beneficial owners, required in a registrant's Notice of Internet Availability of Proxy Materials under §240.14a-16(d), provided that the bank shall provide its own, or its agent's, toll-free telephone number,

e-mail address, and Internet Web site to service requests for copies from beneficial owners; and

(2) Otherwise be prepared and sent in a manner consistent with paragraphs (e), (f), and (g) of §240.14a-16.

13. 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 to security holders or a proxy statement under §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-16; 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.

14. 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-16. 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.

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

16. 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.

\* \* \* \* \*

17. Amend §240.14c-101 by:

a. Revising the word “mailing” to read “sending” in Item 4, Instruction 1;

and

b. Revising Item 5.

The revision reads as follows.

**§240.14c-101 Schedule 14C. Information required in information statement.**

\* \* \* \* \*

Item 5. Delivery of documents to security holders sharing an address. If one annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials is being delivered to two or more security holders who share an address, furnish the following information in accordance with §240.14a-3(e)(1):

(a) State that only one annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials, as applicable, is being delivered to multiple security holders sharing an address unless the registrant has received contrary instructions from one or more of the security holders;

(b) Undertake to deliver promptly upon written or oral request a separate copy of the annual report to security holders, information 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 documents was delivered and provide instructions as to how a security holder can notify the registrant that the security holder wishes to receive a separate copy of an annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials, as applicable;

(c) Provide the phone number and mailing address to which a security holder can direct a notification to the registrant that the security holder wishes to receive a separate annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials, as applicable, in the future; and

(d) Provide instructions how security holders sharing an address can request delivery of a single copy of annual reports to security holders, information statements, or Notices of Internet Availability of Proxy Materials if they are receiving multiple copies of annual reports to security holders, information statements, or Notices of Internet Availability of Proxy Materials.

#### **PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934**

18. The general authority citation for Part 249 is revised to read 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.

\* \* \* \* \*

19. 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.

\* \* \* \* \*

20. 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.

\* \* \* \* \*

21. 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.

\* \* \* \* \*

22. 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**

23. 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.

\* \* \* \* \*

24. 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.

Nancy M. Morris  
Secretary

January 22, 2007