

# JONES DAY

250 VESEY STREET • NEW YORK, NEW YORK 10281-1047  
TELEPHONE: +1.212.326.3939 • FACSIMILE: +1.212.755.7306

November 7, 2018

Via Electronic Delivery

U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
Attention: Mr. Brent Fields, Secretary

Re: Petition for Rulemaking Regarding Extension of Access Equals Delivery Reforms to Include Business Combinations

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Ladies and Gentlemen:

Introduction

Jones Day respectfully submits this petition to the Securities and Exchange Commission (the “Commission”) requesting that the Commission initiate a rule change to amend Rule 172(d)(3) [17 CFR 230.172] and Rule 173(f)(4) [17 CFR 230.173] under the Securities Act of 1933 (the “Securities Act”) in order for the Commission’s “access equals delivery” model to be extended to prospectuses required for business combination transactions (as defined in Rule 165(f)(1)). This rule change would permit a final prospectus to be deemed to precede or accompany a security for purposes of Section 5(b)(2) as long as the final prospectus meeting the requirements of Securities Act Section 10(a) is filed with the Commission as part of the registration statement within the required prospectus filing timeframe, and posted on the issuer’s public investor site.

On October 3, 2018, we requested that the Commission adopt a change to Rule 14a-16(m) under the Securities Exchange Act of 1934 proposing that the notice and access provisions become generally applicable to business combinations. Similarly, we hereby request an amendment to Securities Act Rules 172(d)(3) and 173(f)(4) for substantially the same reasons.

Background

In 2005, the Commission adopted an “access equals delivery” model regarding the delivery of final prospectuses, as set out in Securities Act Rules 172 and 173. These rules were intended “to facilitate effective access to information, while taking into

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account advancements in technology and the practicalities of the offering process".<sup>1</sup> Presuming that investors have access to the Internet to obtain filed prospectuses from the Commission's on-line EDGAR System, the "access equals delivery" model implemented a delivery regime which permits issuers to satisfy their prospectus delivery requirements as long as they file a final prospectus with the Commission, or make a good faith and reasonable effort to file such final prospectus, by the required prospectus filing date. Business combination transactions and exchange offers were, however, excluded from this regime on the basis that proxy rules and tender offer rules, in conjunction with state law, may impose informational and delivery requirements in these transactions such that the information in the final prospectus would need to be delivered regardless of the Securities Act's requirements.<sup>2</sup>

The world was very different in 2005 than it is today. As such, we respectfully urge the Commission to consider the extension of these rules to business combinations for the same reasons as the original adoption of access equals delivery provisions so that even more savings may be realized by extending the model to such larger documents. While we recognize that in certain circumstances state law may independently require that the information included in the prospectus be delivered, we nevertheless believe that the Securities Act requirements should not impose an independent delivery requirement that would apply even if, and when, such state laws evolve to permit modern electronic forms of delivery.

Unnecessary Burden and Expense of Compliance

Jones Day is a global law firm that specializes in, among other things, mergers and acquisitions, corporate and securities laws and corporate governance. In this capacity, we have worked on hundreds of business combination deals that have required the physical mailing of materials to stockholders. We therefore have first-hand experience about how costly and burdensome these business combination disclosures may be for issuers, and wish to stress the fact that such resources could instead be used for other activities that would benefit stockholders.

Since the Release in 2005, communications technology and Internet access have exploded. The great majority of investors today have instant, wireless access to the Internet. In fact, 89% of all households in the United States in 2016 had a computer

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<sup>1</sup> Extract from the SEC's File No. S7-38-04 "Securities Offering Reform," effective as of December 1, 2005.

<sup>2</sup> Id.

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or smartphone,<sup>3</sup> representing a tremendous increase since 2005 and having undoubtedly further risen since. Electronic applications even make the review of lengthy documents more comfortable and reader-friendly than paper documents.

Aligning with the Commission's objectives as recently reiterated by Chairman Clayton<sup>4</sup> to ensure that the Commission's requirements are achieving investor information and protection objectives "in an effective and efficient manner", the cost savings and environmental incentives are all the more relevant for business combination transactions due to the length of certain of their disclosure documents. Recently obtained printing quotes for a final prospectus to be mailed to an investor were estimated to be approximately \$3.00 per set and, with many companies being widely held and having up to a million beneficial owners, the out-of-pocket printing expense would be in the range of \$3.0 million dollars for a document that interested stockholders will have already viewed electronically (on Edgar or the issuer's website) and that a substantial portion of stockholders throw away without opening. In addition to the cost borne by stockholders for such mailing, we have been told by shareholder communications experts that the amount of paper used often represents in excess of one hundred acres of trees to produce the paper. The cost savings and environmental benefit of such a rule extension would be significant, without any detriment to investors.

Moreover, extending the "access equals delivery" model to business combination transactions would not preclude investors from later requesting delivery of a printed copy of the electronically available documents, therefore preserving the investor's options. Such extension would also not prevent deliveries of printed copies should they remain mandated pursuant to specific tender offer rules or state laws.

In sum, the Commission, which deserves credit for revisiting rules that become technologically outdated, should therefore reevaluate the merits of this distinction between registration statements for business combinations and other registration statements in light of these different items: cost savings, increased efficiency, faster access to information and positive environmental impact.

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<sup>3</sup> United States Census Bureau, Computer and Internet Use in the United States : 2016, issued August 2018 (<https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf>) : "Among all households in 2016, 89 percent had a computer, which includes smartphones, and 81 percent had a broadband Internet subscription."

<sup>4</sup> Open Meeting : Proposal to Modernize and Simplify Disclosure Requirements, SEC Chairman Jay Clayton, October 11, 2017.

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Specific Rule Change Requested

1. Please delete sub-section (3) of Securities Act Rule 172(d):

(3) A business combination transaction as defined in Rule 165(f)(1)  
(\$230.165(f)(1).

2. Please delete sub-section (4) of Securities Act Rule 173(f):

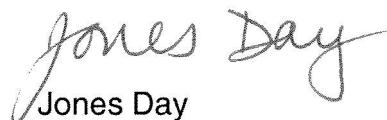
(3) A business combination transaction as defined in Rule 165(f)(1)  
(\$230.165(f)(1).

Conclusion

Antiquated rules that create unnecessary burden and expense for public companies and their stockholders should be updated to reflect changes in market practice and the availability of Internet access. We believe that revising the "access equals delivery" model to extend to business combination transactions is consistent with the current regulatory trend to reduce administrative burdens and eliminate unnecessary expense, and would acknowledge the wide availability of Internet access. Accordingly, we urge the Commission to undertake this reform promptly.

Please feel free to contact Randi L. Strudler (212) 326-3626 or Peter E. Devlin (212) 326-3978 to discuss this matter in more detail.

Respectfully submitted,

  
Jones Day

cc: Robert A. Profusek  
Global Chair of M&A at Jones Day