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Business Law Section
Committee on Securities Regulation

February 17, 2006

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

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

Attention: Nancy M. Morris, Secretary

Re: File No. S7-10-05
Internet Availability of Proxy Materials
Release Nos. 34-52926 and IC-27182

Ladies and Gentlemen:

The Committee on Securities Regulation (the "Committee") of the Business Law Section of the New York State Bar Association appreciates the invitation in Release No. 34-52926 (the "Release") to provide its views on proposed amendments to the proxy rules under the Securities Exchange Act that would provide an alternative method for issuers and other persons to furnish proxy materials to shareholders over the internet, referred to as the "notice and access" model.

The Committee is composed of members of the New York Bar, a principal part of whose practice is in securities regulation. The Committee includes lawyers in private practice and in corporation law departments. A draft of this letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, are those of the Committee and do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

A. Summary of Comments

The Committee supports the Commission's objectives to update its regulatory framework to take advantage of communications technology and to reduce printing and mailing costs associated

with furnishing proxy materials to shareholders. The Release proposes, as an alternative to mailing proxy materials including annual reports to shareholders, a model permitting proxy materials to be furnished by posting them on an internet web site upon providing shareholders with notice of their availability and the ability to obtain paper copy upon request (hereafter "Notice and Access Model").

We believe that the extent to which the Notice and Access Model will result in cost savings for issuers and other parties, convenience for shareholders and improved efficiency of the proxy distribution system may vary from issuer to issuer, and in all cases may not be apparent or predictable with reasonable assurance prior to the completion of each issuer's distribution using the Notice and Access Model. These cost savings will depend on an unpredictable mix of the opt-out rate of shareholders, variations in printing, and processing and mailing costs for paper deliveries upon request, compared to present costs of making paper deliveries for all but those who have expressly elected to receive electronic delivery. As noted in the Release, issuers may be required to prepare a sufficient supply of paper copies of all proxy materials to satisfy all shareholder requests which may result in excessive paper copies being prepared.

Consequently, we believe that many issuers may be reluctant to implement the Notice and Access Model, as presently proposed or, alternatively, may feel compelled to implement the Notice and Access Model without any reasonable assurance of cost savings and, perhaps, even when the total cost might be greater than existing practices.

We propose the following changes in the Notice and Access Model that we believe will reduce the potential costs of using the Notice and Access Model for issuers and improve the ability of issuers to plan for and forecast costs of proxy distributions using the Notice and Access Model.

1. Allow standard rate mailing of requested proxy materials, instead of first class mail as required by the proposal, in order to retain the economies of existing distribution systems.
2. Increase the time period for issuers to fulfill requests for copies from the two business days in the proposal. We would rely on issuers and their information processors to provide information on what would be a reasonable time period.
3. Establish a date prior to the meeting date time that would be a deadline by which shareholders requesting paper or email delivery must make their request. This is necessary for issuers to plan, and to eliminate possible questions about whether a beneficial owner will direct the voting of such owner's shares, disrupting the 10-day discretionary broker vote.
4. Permit, as presently proposed, the proxy card to be sent by issuers with the Notice of Internet Availability of Proxy Materials. In addition, any non-issuer party intending to make an electronic solicitation should be required to send a copy of a Notice of Internet Availability of Proxy Material to all shareholders in order that all shareholders will be informed about the existence and subject matter of such solicitations.
5. Apply the modifications discussed above in items 1 through 4, customized as appropriate, to processes and rules for banks, brokers and other intermediaries (and their agents) to communicate with beneficial owners for whom they hold securities in street name.

6. Permit the Notice and Access Model to be available for issuers in connection with business combination transactions.

7. Consider establishing a task force or committee of representatives of issuers, banks, brokers and other intermediaries, and ADP and other processors to work out cost effective and efficient procedures to implement the Notice and Access Model, resolve implementation problems and provide information on the numerous questions posed by the staff of the Commission in the Release.

B. Specific Comments and Discussion

1. Permit Use of Standard Rate Mailing of Materials Requested by Shareholders.

Over the years, issuers have identified many processes to provide shareholders with proxy statements, annual reports and other proxy materials in timely, economic ways which comply with state corporation laws and the proxy rules. An industry of information processing agents has developed to assist them. As noted in the Release, a significant benefit sought by proposing the Notice and Access Model is “potential cost reductions in printing and mailing.” The requirement of proposed Rule 14a-3(g)(7) for requested paper proxy materials to be provided by U.S. First Class Mail or “other reasonably prompt means” could dramatically increase the distribution costs. Particularly during the initial implementation period when requests for paper copies may be highest, issuers may not be able qualify for special bulk rates for distribution of materials nor predict the cost of the solicitation process.

2. Increase Proposed Two-Business Day Time Period for Issuers to Send Requested Copies of Proxy Materials.

The proposed rules would require issuers to provide any shareholder making a request for paper copies of proxy materials to send those materials within two business days after receiving the request (proposed Rule 14a-3(g)(7)). Brokers and dealers would be required to request paper copies from the issuer within two business days after receiving a beneficial owner’s request and to send the paper copies within two business days after receiving the paper copies from the issuer (proposed Rule 14b-1(d)). The text of the Notice of Internet Availability of Proxy Materials must provide a toll-free number and an email address to which shareholders may direct their request for copies of the proxy materials. A two-business day turnaround time for issuers to send proxy materials would require issuers to have a full supply of all materials (proxy statements and cards, annual reports) for all shareholders since the issuer will not be able to predict the quantity of requests for written materials and two days is not sufficient time to reproduce paper copies, particularly if the issuer delivers a “glossy” annual report to its shareholders. This timetable may result in unnecessary cost and waste or deter issuers from adopting the Notice and Access Model. Issuers and their information processing agents are in the best position to advise what a more practical time period would be to permit shareholders to have the information in adequate time to act on it if they chose to and to accomplish the goal stated in the Release of decreasing proxy solicitation costs. In addition, as discussed below, the issuer’s obligation to deliver the proxy materials within two business days by First Class mail continues through the meeting date, although the shareholder would no longer be able to vote after receiving those materials.

3. There Should Be a Deadline For Shareholders to Request Paper or Email Copies of Proxy Materials.

Although the form of Notice of Internet Availability of Proxy Materials set forth in proposed Rule 14a-3(i) provides for a request by the issuer that shareholders should make their request for paper copies of proxy materials at least two weeks or more prior to the meeting date, the issuer is required to send copies of the proxy materials upon a shareholder's request whether made before or after the meeting date. Proposed Rule 14a-3(g)(i) requires that the proxy materials of an issuer using the Notice and Access Model remain posted on the issuer's internet site until the time of the shareholders' meeting. We recommend that the final rules include a date prior to the shareholders' meeting date by which the shareholder must request the proxy materials which is long enough before the meeting to allow the shareholder to take action at the meeting with respect to those materials. We believe that the final rules should coordinate with the rules of the New York Stock Exchange with respect to brokers and dealers voting shares which they hold of record on certain matters without having received the instruction of the beneficial owner. NYSE Rules 451 and 452 generally permit intermediaries to vote on uncontested matters so long as they have distributed the proxy materials to the beneficial owners at least 15 days in advance of the meeting and have not received instructions within 10 days prior to the meeting. We have informally noted that many clients rely on the "broker vote" for quorums at their shareholder meetings. If shareholders are allowed to request paper copies at any time up to the meeting date, the intermediaries may find it difficult to determine whether they have met the 15 day requirement with respect to various beneficial holders in order exercise the discretionary power to vote their shares. Terminating the issuer's obligation to quickly mail proxy materials a reasonable time prior to the meeting would not preclude a shareholder from requesting a copy from the issuer's investor relations staff. In addition, shareholders also have access to the materials indefinitely on the Commission's EDGAR website.

4. Issuers Should Be Permitted to Send the Proxy Card with the Notice of Internet Availability of Proxy Materials, as Proposed in the Release. In addition, any non-issuer party intending to make an electronic solicitation should be required to send a copy of a Notice of Internet Availability of Proxy Material to all shareholders in order that all shareholders will be informed about the existence and subject matter of such solicitations.

In order to encourage all shareholders to vote their shares at meetings of shareholders, we believe that the proposal to permit issuers to include the proxy card with the Notice of Internet Availability of Proxy Materials should be included in the final rules. The combination of the Notice of Internet Availability, with the state law notice of meeting which will likely be required to be included in many circumstances, and the proxy card will provide the shareholder with basic information to permit the shareholder to determine when and how to seek the balance of the proxy materials and exercise the shareholder's voting franchise. We note that soliciting persons other than the issuer may limit their solicitations to electronic medium only. In other words, such a person could issue a press release in accordance with Rule 14a-12 but only distribute its proxy materials, including the proxy card, on its web site. Accordingly, any non-issuer party intending to make an electronic solicitation should be required to send a copy of a Notice of Internet Availability of Proxy Material to all shareholders in order that all shareholders are informed about the existence and subject matter of such solicitations.

We hope the Commission and the Staff find these views and suggestions helpful. We would be happy to meet with the Staff to discuss these matters further.

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

A handwritten signature in cursive script that reads "Michael J. Holliday" followed by a circled number "8".

By: /s/ Michael J. Holliday
MICHAEL J. HOLLIDAY
CHAIR OF THE COMMITTEE

Drafting Committee:

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The Honorable Roel C. Campos, Commissioner
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The Honorable Annette L. Nazareth, Commissioner
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