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Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Attn: Nancy Morris, Secretary

Re: Internet Availability for Proxy Materials
Release Nos. **34-52926; IC-27182 (File No. S7-10-05)**

Dear Ladies and Gentleman:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law (the "Committee") in response to the request of the Securities and Exchange Commission (the "Commission") for public comment on Release No. 34-52926, dated December 15, 2005 (the "Release"). The Release sets forth proposals (the "Proposals") under Securities Exchange Act of 1934, as amended (the "Exchange Act") that would provide an alternative method for issuers and other persons to furnish proxy materials to shareholders by posting them on the Internet.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee. This letter also does not represent the views of any other ABA Section.

OVERVIEW

Overall, the Committee supports the Commission's efforts to update the regulatory framework to take advantage of communications technology. The Committee applauds the Commission for pursuing the use of technology to reduce the time and expense involved in delivering proxy materials to shareholders. We support the proposed "notice and access" model as a framework for adapting the proxy material distribution rules to the increasing use of the Internet as a means of business communication. In this regard, we view the proposed model as consistent with the Commission's recent reforms of the prospectus delivery requirements under the Securities Act of 1933.

We believe that the use of the internet has become sufficiently widespread that the proposed "notice and access" model presents an attractive alternative for some issuers in communicating with their shareholders. We also believe, however, that many shareholders would prefer to continue receiving their proxy materials in written form as it will be easier for these investors to read the materials in print and the printing of the materials will be somewhat of a burden and expense to shareholders. It is important that the Proposals continue to provide this flexibility and not require one form over the other.

The proposed "notice and access" model should also be available to mutual funds, closed-end funds and other investment companies. Investment companies and their shareholders would also benefit from the cost savings and time savings associated with Internet delivery of information.

The Proposals unfortunately build on an already complex system of distributing proxy materials to beneficial owners through intermediaries. In this regard, the Proposals may lead to confusion among shareholders and the complexities of the system may slow the process such that shareholders may not receive their copies of proxy materials in a timely manner.

We have concerns about extending the "notice and access" model to third party solicitors. We believe that if the Commission decides to allow third parties to use the "notice and access" model, it should put certain safeguards in place, such as a minimum level of beneficial ownership in the issuer's voting securities by the third party or requiring third parties, just as the issuers are required under the Proposals, to provide copies of their proxy materials in paper form to requesting shareholders.

We agree with the Commission that the "notice and access" model should not be made available with regard to proxy materials related to business combination transactions.

COMMENTS ON THE PROPOSALS

We are of the view that the availability of the "notice and access" model should not be determined by the relative level of sophistication or other characteristics of issuers or shareholders but rather should be available for all issuers and shareholders generally. We believe that issuers and shareholders would benefit in different respects and to different degrees under the proposed model, depending on their own communication preferences as well as the impact of Internet-based communications on the particular combination of expense, timeline

considerations and commitment of human resources that they face in their own proxy distribution process. For this reason, we would encourage the Commission as a general matter to allow for a high level of flexibility in implementation of the Proposals.

Notice of Internet Availability of Proxy Materials

We support the proposed content and structure of the Notice of Internet Availability of Proxy Materials. However, we recommend that the Commission permit the Notice to include a request for the shareholder's affirmative consent to future electronic delivery of the Notice. We believe that this may further the goals of the Proposals. Further, we believe the Commission should consider permitting the Notice to include a request for consent to future electronic delivery of proxy materials generally. This would allow issuers to avoid having to do a separate mailing to obtain the necessary affirmative consents.

Mechanics of the Proposed "Notice and Access" Model

Proxy Card

We support the Commission's proposal to provide flexibility with respect to the timing and means of delivering proxy cards. We are not of the view that an investor's decision whether to read proxy materials will be affected by whether or not the proxy card is received together with the Notice of Internet Availability of Proxy Materials or the proxy statement.

The proposed model could have the effect of confusing street name holders and increasing issuers' dependency on discretionary broker voting. If investors who hold their shares in "street name" gain access to proxy information directly through the issuer's website and not through a communication with their intermediary broker-dealer, greater uncertainty as to the proper way for the investor to cast votes may result. Absent a proxy from the record holder to the beneficial owner granting the beneficial owner the right to vote the shares, a management proxy card filled out by the beneficial owner would not be a valid proxy and could not be counted. And if the beneficial owner does not return voting instructions to the intermediary (thinking that he/she has already voted), the intermediary will use its discretionary voting power to vote the beneficial owner's shares. We believe that more prominent disclosure in the Notice of Internet Availability of Proxy Materials would help inform investors of the potential effect of discretionary broker voting.

The "notice and access" model would be most efficient and effective if it enables issuers to continue to produce proxy cards and use the tabulation systems that best serve their individual needs. Issuers who currently use bar codes or other methods of identifying proxy cards should be able to adapt their process to proxy cards made available through Internet access. Likewise, we do not believe that requirements should be placed on issuers who choose not to include such information on their proxy cards to do so.

Internet Web Site Posting of Proxy Materials

We support the Commission's view that the HTML and ASCII formats available on EDGAR are not sufficient for effective Internet delivery of proxy materials. Important information contained in charts, tables and graphics may be omitted from EDGAR filings. Although we are of the view that the "notice and access" model is best served by formats that present documents in a form substantially equivalent to a printed version, we would not suggest that specific formats be required. We believe that efficient and effective formats for Internet posting of financial documents, charts and graphs will continue to be developed, and that allowing for flexibility in the use of formats will foster innovation in this area.

We do not believe it is necessary to require EDGAR filing or furnishing of annual reports to security holders in order to advance the objectives of the "notice and access" model. The delivery of proxy materials through the Internet should create a parallel means of providing information as an alternative to print but should not necessarily lead to additional filing requirements. Similarly, we are not of the view that requiring additional means of disseminating additional soliciting materials is necessary.

Period of Reliance on the Proposed Model

We anticipate that, during the initial few years of the "notice and access" model, investors and issuers may change their communication preferences as they adapt to the new communications model. For this reason, we would not suggest at this time that they be bound by their initial decision with respect to paper delivery versus Internet delivery. We do believe, however, that many investors may wish to have their decision be effective for future periods unless they inform the issuer that they would like to change their election. The final rules should permit such an election.

Role of Intermediaries

As the Commission aptly observed in the Proposing Release, "[t]he 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." Accordingly, while we strongly support the Commission's goal of enhancing the efficiency of this process by creating a "notice and access" alternative to physical delivery of proxy materials by issuers and third parties conducting a regulated solicitation, we have some concerns about building a new model on the foundation of the present street-name system without first undertaking a fundamental re-examination of the continuing viability of the applicable rules – Rules 14a-13, 14b-1 and 14b-2. These rules effectively enfranchise beneficial owners of equity securities who otherwise generally would not be eligible to vote under most states' laws, by providing a regulatory framework for record holder transmission of soliciting materials to, and obtaining voting instructions from, those who choose to hold securities in "street name" through broker-dealers, banks and other institutional custodians. As a result, we respectfully submit that the Commission may wish to consider a comprehensive re-examination of the current efficacy of a communications mechanism developed almost 30 years ago before proceeding with adoption of the proposed "notice and access" model for street-name holdings.

We recognize that the Commission has made substantial efforts over the years to assure that the proxy regulatory system keeps pace with technological developments, particularly with respect to beneficial owners. Notable examples include the Commission's publication of interpretive releases in 1995,¹ 1996,² and 2000³, and the agency's oversight of the New York Stock Exchange's pilot program relating to electronic communications between member broker-dealer firms and their "street-name" customers. At least with respect to institutional customers of broker-dealers, banks and other institutions that outsource their responsibilities under Rules 14b-1 and 14b-2, there is considerable evidence that the present system works fairly well in effecting both timely delivery of soliciting materials and timely implementation of voting instructions by intermediaries acting as agents for institutional custodians. At the same time, we have some concerns that the proposed model may lead to confusion – and possibly, therefore, to lower levels of instructed voting – on the part of individual beneficial owners who may not be as comfortable as their institutional counterparts with receiving and transmitting communications via electronic media.

Notwithstanding these somewhat cautionary observations, the Committee endorses the policy goals of the Commission's proposed amendments relating to the intermediary's role in a "notice and access" model, and offers the following responses to the Commission's specific requests for comment.

Should the proposed alternative model be limited to the furnishing of proxy materials by issuers to their record holders?

This may be the most effective way to test issuer and third-party solicitors' interest in using the model with the least risk of disenfranchisement, given the ability of the issuer to solicit proxies directly from record holders empowered to vote without the need to go through intermediaries. Should the weight of public commentary persuade the Commission that substantial segments of the street-name shareholder population might be unable to exercise those voting rights conferred by the Commission's own rules in the event an issuer (or other soliciting person) relied on the proposed alternative model, we suggest that the Commission allow those issuers who wish to experiment with the model to use the opportunity it provides to achieve the cost savings predicted in the Proposing Release with respect to their record holders without the need to rely on intermediaries whose costs are beyond such issuers' control. After a few proxy seasons' experience with the model, the Commission would be in a position to tackle the more complicated area of street-name proxy delivery and voting.

Is it appropriate to allow the issuer to compel the intermediary to undertake the obligations that would be required under the proposed model?

We believe it is appropriate for an issuer opting to use the "notice and access" alternative to compel intermediaries to undertake the obligations attendant to implementation of this

¹ Release No. 33-7233 (Oct. 6, 1995) (the "1995 Interpretative Release").

² Release No. 33-7288 (May 9, 1996) (the "1997 Interpretative Release").

³ Release No. 33-7856 (Apr. 28, 2000) (the "2000 Interpretative Release").

alternative communications mechanism, as contemplated by the proxy rules. Rules 14b-1 and 14b-2 already require broker-dealer and bank intermediaries to deliver issuer proxy materials (which the Commission has defined in the Proposing Release to include, among other documents, the issuer's annual report to shareholders and information statements), so long as the issuer reimburses them for "reasonable expenses" thus incurred. For the vast majority of street-name holdings, such expenses translate into fees charged by agents of the intermediaries in accordance with rates established by the New York Stock Exchange under the oversight of the Commission. (Even though the NYSE's rate schedules technically apply only to member broker-dealer firms, we are aware that many banks and other institutional intermediaries, and their agents, currently charge public companies the NYSE's rates in seeking reimbursement of the costs of proxy delivery, as well as the costs of implementing beneficial owners' voting instructions). As discussed further below, we see no reason why any new or additional costs that might be incurred by intermediaries as a result of an issuer's decision to use the notice and access alternative could not be evaluated for reasonableness by the NYSE and reflected in proposed proxy fee schedules that are subject to Commission scrutiny as well as the public notice and comment process.

Of course, the Commission may wish to reconsider whether the NYSE should continue to determine proxy delivery (and voting) fees charged by regulated broker-dealers (and thus, as a practical matter, by the many other non-member intermediaries that apparently follow the NYSE-prescribed rate schedules) once the exchange becomes a for-profit entity. We express no view on this matter now, pending the Commission's consideration of the broader questions raised by this and other market structure developments.

Are there practical problems with an issuer's reliance on the proposed "notice and access" model in connection with the furnishing of proxy materials and requests for voting instructions to beneficial owners?

In our view, practical problems and substantive liability questions both would arise if the proposed model were overlaid in its current form upon the complex street-name communications system that has evolved over the years under the umbrella of the Commission's proxy rules and NYSE requirements. First, there is the risk of confusion and, at worst, disenfranchisement of the very beneficial holders who are empowered to vote solely by the Commission's proxy rules, if intermediaries and their largely unregulated agents are permitted to create and transmit their own substantive communications on matters presented to a shareholder vote. For this reason, we oppose permitting intermediaries and/or their agents to replace the issuer's (or other party conducting a regulated solicitation) Notice of Internet Availability of Proxy Soliciting Materials with their own Notices, or to supplement the issuer's (or other soliciting party's) Notice with anything beyond the simple directions to customers on how to relay voting instructions to the intermediary's agent that currently appear on the voting instruction requests used by ADP on behalf of its broker-dealer, bank and other institutional clients. We understand that this particular communication generally tracks the form of proxy governed by Rule 14a-4 and can be viewed as falling within the ambit of the broker-dealers' Rule 14a-2(a)(1) exemption (or, in the case of banks and other fiduciaries, the Rule 14a-1(l)(2)(iv)(B) exemption). However, the proposed Notice clearly would not be covered by the foregoing exemptive provisions simply because it is prepared by an intermediary (or its agent) and, indeed, is treated as "additional

soliciting material” when generated by the issuer or other soliciting person using the notice and access model to satisfy proxy delivery obligations. Accordingly, if the Commission were to permit intermediaries and their agents to substitute their own form of Notice for that of the issuer (or other person soliciting proxies), or to supplement the issuer’s Notice (or that used by any other person soliciting proxies) with anything beyond an otherwise exempt ministerial communication relating to transmission of voting instructions (or a particular intermediary’s execution of a proxy on behalf of a beneficial owner to “pass through” state-law voting rights to that beneficial owner), these communications likewise should be filed with the SEC as “soliciting material” and otherwise subject to SEC scrutiny. It would be appropriate, however, for an intermediary (or its agent) to continue to forward to beneficial owners, along with the proxy materials themselves, the simple instructions on how to direct the voting of street-name securities in current use.

There is a risk that street-name holders might transmit voting instructions to their broker-dealer or bank custodians without reading the proxy statement if these instructions are solicited in conjunction with the Notice while the proxy statement is merely made available on an Internet web site. Still, the Commission could direct intermediaries (and their agents) to include a legend or other statement in the request for voting instructions urging their customers to read the proxy statement before deciding how to direct the vote. In response to the Commission’s specific question, we do not think that holders would benefit if the rules were to require the intermediary (or, as is more likely, its agent) to establish its own website to post its request for voting instructions – holders would be less likely to direct a vote unless that request were affirmatively “pushed” to them along with the Notice. As noted, we do not believe that the intermediary should be permitted to create its own Notice and direct beneficial owners to its own web site to obtain the proxy materials, much less the intermediary’s voting instructions request.

We have additional substantive concerns about the Commission’s current proposal to allow intermediaries to post, on their own (or an agent’s) website, the proxy statements and other soliciting materials filed by the issuer (or other person conducting a regulated solicitation). Absent some form of relief to protect intermediaries against the potential liability consequences of posting a third party’s soliciting materials, there would be little incentive for such intermediaries (or their agents) to incur the costs of providing this service on behalf of those issuers opting for the notice and access alternative. There would also be a practical question of whether and to what extent issuers should subsidize the costs of intermediary web sites used by multiple issuers. In this regard, experience with the NYSE’s pilot fee program demonstrates that it is difficult to disaggregate and allocate to individual issuers the initial capital outlays and maintenance costs necessary to establish and administer a communications network such as ADP’s that serves numerous issuers and intermediaries.

Nor would an issuer (or other soliciting party) necessarily be comfortable relying on a third party with whom it does not have a contractual or other relationship (like that which exists between intermediaries and their agents) to assure the integrity of that issuer’s (or other soliciting person’s) proxy materials once outside the issuer’s control. At a minimum, the Commission should consider providing specific regulatory guidelines that build on the 2000 Interpretive Release to clarify the various actors’ legal duties and liabilities under the notice and access model.

Moreover, we do not believe that it would be reasonable to expect intermediaries to undertake the monitoring and “updating” duties for the numerous issuers of voting securities held in street-name accounts. While we assume that the intermediaries (or their agents) could use hyperlinks (running to an issuer’s website) embedded in that intermediary’s (or agent’s) e-mail communications with a customer to satisfy its own delivery obligation under Rule 14b-1 (broker-dealers) or 14b-2 (banks and other institutional fiduciaries) – assuming the requisite consent had been obtained from the customer -- it would be helpful if the Commission were to reaffirm or otherwise articulate its current views on the liability implications for the parties on each end of the hyperlink in this context.

Should intermediaries or their agents be allowed to use the “notice and access” model regardless of whether the issuer chooses to furnish documents to its record shareholders in reliance upon the proposed model? If so, should the issuer have to supply copies of the proxy materials to intermediaries for forwarding to beneficial owners who request them?

We believe that only parties conducting a regulated proxy solicitation (including a solicitation of action via consent) – most notably the issuer – should make the judgment whether to use the notice and access alternative. Only those parties bearing both the duties and the liability exposure under the proxy rules have the requisite incentives to comply with those rules and thereby act to promote informed proxy voting.

Should intermediaries be able to use the e-mail addresses that they have obtained from their customers for electronic delivery of the Notice of Internet Availability of Proxy materials even if their customers have not specifically consented to the electronic delivery of proxy materials?

No, at least without addressing on a more comprehensive basis the relative merits of an affirmative vs. implied consent model for electronic delivery. Because the Notice would be “additional soliciting material” subject to mandatory delivery obligations of the issuer (under Rule 14a-13 in the street-name context) and intermediary broker-dealers, banks and their agents (under Rules 14b-1 and 14b-2), we do not see a basis for deviating from the current affirmative consent model reflected in the SEC’s 1995, 1996 and 2000 Interpretive Releases. However, if the SEC decides to revisit the electronic delivery framework established in these three releases to grapple with shareholder consent issues, for either or both record holders and street-name holders, we urge you to consider the applicability of the Electronic Signatures in Global and National Commerce Act of 2000.

Is the proposed requirement that the issuer or soliciting party deliver a sufficient number of copies of its Notice of Internet Availability of Proxy Materials to intermediaries at least five business days prior to the proposed deadline for furnishing the proposed Notice of Internet Availability of Proxy Materials appropriate? Would this proposed requirement present special difficulties for a soliciting person other than the issuer, given the differences in the timing requirements for delivery of the Notice if the soliciting person is reacting to the issuer’s solicitation?

This provision appears reasonable with respect to issuers engaged in an uncontested annual meeting solicitation, but may not be in other situations. On the second question posed, it is not clear to us from the Proposing Release that a soliciting person other than the issuer is even required to send a Notice to street-name holders through intermediaries (or directly to record holders, for that matter) if that person plans to conduct a targeted solicitation and contact shareholders directly to seek their votes. Nothing in the existing proxy rules requires a soliciting person other than the issuer to communicate with beneficial owners through their intermediaries. Rather, it is the practical reality that beneficial owners have no voting power under applicable state laws without the cooperation of their institutional custodians, who do have such power, that often prompts dissidents circulating their own proxy cards to solicit the street-name vote pursuant to the shareholder communications mechanism that has developed under Rules 14a-13 (which applies only to issuers), 14b-1 and 14b-2 -- notwithstanding the absence of any rules that provide for non-issuer soliciting parties' use of this mechanism.

In any case, even if the soliciting person (other than the issuer) did choose to solicit some segment of an issuer's street-name ownership under the existing shareholder communications system, it does not appear that a Notice would be necessary. The Proposing Release contemplates that non-issuer solicitors may use a Rule 14a-12-exempt communication to direct the targeted beneficial owners to a publicly accessible web site on which his/her/its proxy materials are posted.

Of course, beneficial holders would not have the legal right to download and execute forms of proxy -- only their record-holder custodians would have that right once DTC executes an omnibus proxy in favor of depositary participants. For this reason, permitting a non-issuer solicitor to seek proxy votes (including via consent) from beneficial as well as record holders via a Rule 14a-12 exempt communication without substantial clarifying disclosure -- explaining that only record holders can vote and that beneficial holders would have to obtain a proxy from their custodians or rely on the current street-name communications system to instruct such custodians on how to vote -- could lead to shareholder confusion and concomitant disinclination to vote through their intermediaries. The Commission could require non-issuer solicitors to provide this information -- whether in a 14a-6(b) Notice or a 14a-12 communication filed with the SEC -- that specifically identifies the targeted stockholder group and explains the mechanics of voting.

Alternatively, the Commission may wish to mandate that any non-issuer soliciting person who opts to rely on the notice and access model must use the existing street-name communications system to solicit votes from beneficial owners. (In this regard, we are not sure how practical it would be for such soliciting persons to direct the issuer under Rule 14a-7 to "deliver" the Notice and/or other proxy materials through the chain of intermediaries to selected street-name holders pursuant to the proposed notice and access model -- particularly if a large segment of the issuer's beneficial owners are OBOs). The Commission could well determine that non-issuer solicitors who wish to solicit some or all of the issuer's street-name holders must use (or ask the issuer to use on its behalf) the existing shareholder communications system, to assure investor protection -- particularly given the risk of disenfranchisement due to investor confusion. In other words, the Commission could condition both issuers' and non-issuer solicitors' ability to rely on the "notice and access" model on their use of the current, intermediated system. To formalize the obligations of a non-issuer solicitor in this area, however, we believe the Commission would

have to engage in further rulemaking that would set forth (in the relevant regulatory text) the respective duties of the non-issuer soliciting person (or the issuer if that person invokes Rule 14a-7 to ask the issuer to handle proxy delivery), on the one hand, and the broker-dealer and bank intermediaries, on the other.

The Commission should adopt the basic principle that all participants in the street-name voting process – whether they be issuers, other soliciting persons, or intermediaries – must take proper measures within the parameters of their respective duties under the Commission’s proxy rules to ensure that beneficial owners are unable to download and print paper copies of a web-based proxy card, execute the paper versions and return them for tabulation without having first obtained a legal proxy from their record holder custodians. Rather than prescribe a certain methodology, we recommend that the Commission take a “principles-based” approach and allow those with legal responsibilities under the proxy rules to develop technological safeguards against abuses of the proxy process.

The Commission has asked whether a non-issuer soliciting person should be able to use Rule 14a-7 to compel an issuer to transmit communications under the “notice and access” model. With respect to street-name holders, this would not be appropriate if the costs to the issuer of such transmission by intermediaries were to exceed the costs of paper delivery or permissible electronic delivery (with consent), and the issuer itself had not elected to incur those costs by itself invoking the notice and access model. However, it is likely that in most cases the notice and access model would result in lower costs to the issuer.

Finally, as discussed above, the proposal would allow soliciting persons other than the issuer to use a Rule 14a-12 communication rather than a Rule 14a-6(b) Notice to refer shareholders to their posted proxy materials. Because oral as well as written communications are covered by Rule 14a-12, we suggest that the Commission clarify whether it intends to allow such soliciting persons to direct shareholders by telephone or other oral means to its web-based proxy materials. We believe that non-issuer soliciting persons should be required to file a written communication under Rule 14a-12 where this avenue is used in lieu of a Rule 14a-6(b) Notice.

Is it appropriate to require the issuer to send copies of the proxy materials to beneficial owners who request copies directly from the issuer? Should the intermediary be required to estimate the number of copies that it is likely to need to satisfy requests from its beneficial owner customers? If so, would the intermediary have a reasonable basis to make such an estimate? Would the flow of copies from issuer to intermediary to beneficial owner be overly time-consuming? Should proxy intermediaries be allotted less time to forward e-mail copies of the proxy materials?

It is unclear why the Commission would consider requiring this form of direct communication between issuers and beneficial owners under the notice and access alternative, while not enabling such direct communication to occur under the existing shareholder communications system (unless, of course, the issuer is willing to incur duplicative delivery costs because of the need to deliver proxy materials in paper or e-format to beneficial owners via intermediaries). In any case, the predominance of OBOs in the street-name market suggests that issuers would be unable to achieve substantial cost efficiencies if required to send copies of proxy materials under the

proposed alternative. The SEC might wish to permit issuers this choice and revisit the issue after several proxy seasons to see whether the benefits outweigh the costs in terms of possible investor confusion and hassle if they ask the intermediary who the refers them to the issuer rather than just providing the materials.

The issuer might be able to trace the identity of anyone accessing the Web site on which the proxy materials are posted through the use of “cookies” or other technology? Should the rules require that the proxy materials to be accessed by beneficial owners be posted on a Web site that protects the confidentiality of an OBO’s identity? If so, should this Web site be separate from the issuer’s Web site? Are there other ways to protect the identities of OBOs without placing an excessive burden on issuers or intermediaries?

We respectfully submit that these comment requests raise “global” policy issues that go to the heart of the viability of the current street-name system established by statute and Commission rules, including but not limited to beneficial owners’ right to financial privacy, and whether individuals opting for OBO status should be required to bear the attendant costs. Unless the SEC is prepared to consider these issues more broadly beyond the comparatively narrow ambit of the proposed notice and access alternative – a matter on which we express no view -- we recommend that the Commission not permit any practices that would potentially compromise individual financial privacy rights. This militates in favor of either prohibiting cookies and similar tracing mechanisms, or requiring intermediaries to establish separate websites on which soliciting materials of issuers and other soliciting parties are posted.

Should issuers be permitted to request proof of a person’s status as a beneficial owner when they receive requests for copies of their proxy materials? Should we require issuers to provide copies to all persons requesting copies? Keeping in mind that only shareholders would receive the Notice, is there a possibility that the issuer would be unduly burdened by excessive requests for copies?

For the reasons discussed above, we do not believe that issuers should be required to transmit paper copies of their proxy materials to street-name holders under the “notice and access” alternative. Instead, the intermediaries or their agents should bear this responsibility – just as they do under the existing proxy rules. If the Commission chooses to permit or require issuers to provide paper copies to all requestors – whom we assume would be NOBOs, as OBOs are now conditioned to look to their custodian or its agent, ADP -- we suggest that an issuer be able to ask for the same kind of proof of beneficial ownership now required under Rule 14a-8.

Is there a concern that beneficial owners may erroneously attempt to execute a proxy card if the issuer posts its proxy card on the same Internet Web site as the proxy statement? Should the rules separate the voting mechanisms for registered holders and beneficial owners to prevent confusion? Should we require intermediaries to establish their own Web sites to post proxy materials to help prevent any such confusion? Is it likely that intermediaries or third parties will develop Web sites to facilitate use of the “notice and access” model?

These questions illustrate the difficulties of trying to layer the “notice and access” model on the already complex beneficial owner delivery system. For the reasons discussed above, we urge the

Commission to take a principles-based approach here and direct all interested participants bearing obligations under the proxy rules to work out methods for preventing deliberate or mistaken beneficial owner execution of proxy cards without having obtained the requisite proxy from record-holder custodians. In other words, we urge the Commission to maintain the current separation of record holder and street-name voting mechanisms that have developed under the loose framework of the proxy rules and relevant SRO member-firm regulations.

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

It would be appropriate to permit intermediaries to charge the issuer for forwarding paper copies to requesting beneficial owners, assuming the fees are "reasonable" within the meaning of Rules 14a-13, 14b-1 and 14b-2. With respect to the reasonableness of any incentive fee for suppression of paper copies should a beneficial owner ask for one, the issue here is whether the intermediary or its agent ADP can persuade an individual to consent to electronic delivery. It is not clear how an individual who asks for paper specifically could be induced to consent to receive electronically formatted versions of the proxy materials under the notice and access alternative.

As to whether OBOs should bear the cost, we do not believe the Commission should grapple with the global issues of financial privacy thus raised unless it undertakes a broader review of the current shareholder communications rules.

Should the self-regulatory organizations establish new fees that an intermediary may charge as reasonable for services rendered to an issuer when the issuer relies on the proposed "notice and access" model, if adopted? If so, what type of fee schedule would be appropriate?

The question of the reasonableness of the new fees, if any, should be evaluated in a rulemaking context. If the Commission does not wish to assume this responsibility, the appropriate rate-making forum would be the SROs.

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

We recommend that the Commission amend Rules 14b-1 and 14b-2 to mandate intermediary delivery of proxy and other soliciting materials on behalf of non-issuer soliciting parties, conditional upon reimbursement of reasonable expenses by such parties. The SEC would have to adopt a new rule, or amend existing Rule 14a-13, which relates only to issuer obligations under the shareholder communications requirements, to impose such a reimbursement duty on

non-issuers. We believe such revisions would be appropriate even if the SEC does not proceed to adoption on the “notice and access” proposal.

Proposed “Notice and Access” Model for Furnishing of Internet Proxy Materials by Soliciting Persons Other than the Issuer

We have a number of reservations regarding the Commission’s proposal that the “notice and access” model for furnishing proxy materials be extended to parties other than the issuer. We believe that if the Commission decides to allow third parties to use the “notice and access” model, it should put certain safeguards in place, as discussed further below, such as a minimum level of beneficial ownership in the issuer’s voting securities by the third party or requiring third parties, just as the issuers are required under the Proposals, to provide copies of their proxy materials in paper form to requesting shareholders.

This “notice and access” model, if applied to non-issuers, would substantially increase the likelihood that third parties would launch opposing solicitations for the simple reason that the costs of such solicitations would now be minimal. While this may be a positive development for those promoting legitimate shareholder issues, it may increase the number of solicitations by those pursuing matters better addressed through the shareholder proposal process of Rule 14a-8. Under the proposed rules, a third party could wage a proxy contest by simply posting proxy materials on a website and directing shareholders to that site using communications permitted under Rule 14a-12. In some cases, a third party would not even be required to provide a notice to shareholders. Because this system is virtually cost-free, it is ripe for abuse. Indeed, the proposal has the potential to create disorderly, confusing and even frivolous proxy solicitations. It is possible, if not likely, that third parties could use the system to promote social and political goals unassociated with the business of the corporation or the creation of shareholder value. Furthermore, this system creates the opportunity for third parties to do an end-run around the shareholder proposal process set forth under Exchange Act Rule 14a-8 by sending to shareholders proposals that are not appropriate under basic corporate law principles and Rule 14a-8 and information that could be misleading. Exacerbating this possibility is that, unlike shareholder proposals, there is no beneficial ownership threshold required for third party proxy solicitations under the proposal.

A collateral effect of extending the “notice and access” model to third parties is its potential to disturb discretionary voting authority. As previously mentioned, the proposed rules remove an important traditional barrier – i.e., cost – to launching a third-party proxy contest. Once a proxy contest is launched, the election would become “non-routine” under applicable SRO rules. As a result, brokers would be prevented from exercising discretionary authority to vote uninstructed shares, which could lead to an increase in the number of broker non-votes.

Finally, the proposal disfavors those shareholders who prefer or require paper copies of proxy materials. The proposed rules, like the current third party solicitation rules, do not require a third party to solicit all shareholders. Instead, the proposed rules allow a third party to limit its solicitation to only those persons willing to access proxy materials on the Internet. This is problematic. First, limiting a solicitation to only those persons capable of and willing to access proxy materials on the Internet disenfranchises those shareholders who require or prefer paper copies. Moreover, it is unlikely that a majority of shareholders will consent to only accessing

proxy materials online and therefore, third parties waging a bona fide proxy contest would almost certainly need to circulate paper proxy materials in order to secure a majority of the vote. Put differently, this proposed requirement would benefit primarily, if not exclusively, those shareholders who wish to stir up controversy and gain publicity from soliciting proxies over the Internet for the sole purpose of causing a disruption to the proxy solicitation process.

To address these concerns, if the Commission decides to move forward with its proposal to extend the “notice and access” model to non-issuer third parties, we recommend that certain safeguards be implemented to prevent abuse. We propose at least two such safeguards: (1) a minimum beneficial ownership threshold for third parties soliciting proxies; and (2) a requirement that third parties soliciting proxies furnish paper copies of all proxy materials upon shareholder request. We believe that these two requirements are necessary to ensure a fair and orderly proxy solicitation process, one that is limited to bona fide solicitations.

The notion of a minimum beneficial ownership threshold is not a novel idea. The Commission has embraced the minimum threshold requirement in Exchange Act Rule 14a-8 with regard to shareholder proposals. Similarly, the Commission incorporated ownership and other conditions in the shareholder access proposals a few years ago. We believe that in the case of third party proxy solicitations, the ownership threshold should be set higher than the lesser of 1% of the outstanding shares or \$2,000 in market value threshold under Rule 14a-8. Establishing a higher threshold, for example 5%, would prevent the proposed proxy rules from becoming a tool for skirting the shareholder proposal rules and would also prevent individuals without a significant stake in the outcome from launching a proxy contest to promote individual goals or stir up controversy.

Like the implementation of a minimum beneficial ownership threshold, we believe that requiring third parties to furnish paper copies of proxy materials upon request is consistent with current Commission policy. We agree with Chairman Cox that “not every investor will prefer Internet access” for purposes of obtaining proxy materials. The proposed rules reflect this reality by requiring issuers using the “notice and access” model to provide paper copies of their proxy materials upon shareholder request. We see little reason why this requirement should not be extended to third party solicitors employing the “notice and access” model. A failure to do so would create a substantial risk that shareholders who are either unable or unwilling to view proxy materials electronically will be less effective participants in the shareholder voting process.

Business Combination Transactions

We believe it is premature at this time to extend the “notice and access” model to proxy materials relating to business combination transactions. We agree with the Commission that business combination transactions are extraordinary events involving proxy statements of considerable length and complexity. Furthermore, as the Commission points out, business combinations frequently involve securities offerings that must be registered under the Securities Act and require the delivery of a prospectus in any event. For these reasons, it is our belief that proxy materials related to a proposed business combination, for all practical purposes, should continue to be delivered in paper format. We agree with the Commission that the “notice and access” model should not be extended to proxy materials relating to business combinations at

this time. However, we encourage the Commission to revisit this issue at a future date once the proposals have been implemented in the non-business combination context.

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The Committee appreciates the opportunity to comment on the Proposals and respectfully requests that the Commission consider our recommendations. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Respectfully Submitted,

/s/ Dixie L. Johnson

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