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American Business Conference A Coalition of Growth Companies

February 16, 2006

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Ms. Nancy M. Morris
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: File No. S7-10-05 Internet Availability of Proxy Materials

Dear Ms. Morris:

The American Business Conference (ABC) is a coalition of CEOs of midsize growth companies founded in 1981 by Arthur Levitt, Jr. ABC's current chairman is Alfred West, CEO of SEI Investments, Oaks, Pennsylvania.

We are writing to comment on the Commission's proposed rule regarding Internet availability of proxy materials.

General Comments

The proposed rule has as a central goal the *lowering* of the cost of proxy solicitations through the use of electronic technology. As a practical matter, it would have the greatest effect upon the cost of supplying proxy materials to individual stockholders with brokerage accounts.

We think reducing the cost of the street side proxy process is a worthy goal. It should please shareholders as well since, as the Commission notes in its release, they ultimately must bear the regulatory costs imposed upon the companies they own.

It implies no criticism of the Commission's initiative to note that the current street side proxy regime is already remarkable for achieving savings from the process, in part by encouraging electronic dissemination of proxy materials. We note in this regard a June 24, 2004 letter to the Commission from Mr. Donald D. Kittell of the Securities Industry Association. Mr. Kittell states that, in connection to street side efficiencies, "[i]ssuers have achieved savings of an

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estimated $350 million per year as a result of technological innovations that have reduced mailings through 'householding' accounts, the elimination of duplicate materials and electronic vs. paper communications." [1]

Past experience suggests that, left untouched, the current proxy process will continue to deliver ever-greater savings to issuers and their shareholders. Thus the right question to ask about the Commission's proposed rule is whether it would accelerate the savings and efficiencies that seem already to be built into the system.

We do not think the release fully answers this question. We want, in the rest of this letter, to comment on aspects of the proposal that seem to us inadequate or incomplete, particularly as they pertain to small and midsize business. We hope that our comments prove to be constructive, for it is crucial to us that any changes in the proxy system constitute a genuine improvement. Our criteria include: lower costs, easier implementation, greater shareholder satisfaction, and maintenance of the timeliness and accuracy of the street side shareholder vote.

The last two items are especially crucial. Any change in the proxy process that inadvertently frustrates shareholders or raises questions about the accuracy of shareholder votes will reflect poorly on issuers. ABC's aim is therefore to work with the Commission to craft a rule that enhances rather than detracts from the reputation of our member companies as they discharge their responsibilities to their owners.

Specific Comments on Proposed Rule

1. *Questions about technological infrastructure and capabilities of shareholders and issuers*

The success of the proposed rule depends upon the ability of issuers to furnish proxy materials to shareholders via the Internet and the ability – and willingness – of shareholders to accept and make use of proxy materials delivered to them in that way.

In regard to the latter, if shareholders either choose the notice and access model, or, by their indifference passively acquiesce to it, savings should result.

[1] Letter of Donald D. Kittell to Jonathan G. Katz, Secretary, United States Securities and Exchange Commission, Re File No. 4-493, June 24, 2004. Mr. Kittell is Executive Vice President, Securities Industry Association.

On the other hand, if large numbers of shareholders demand proxy materials in paper form, issuers will not realize savings. They may in fact end up paying more for the proxy process since they will have lost the advantages of predictability and scale in regard to printing and postage that are available in the current proxy process.

In effect, the Commission is making a bet. It is wagering that the combination of those shareholders possessing access to and facility with online delivery along with the "implied consent" cohort of shareholders who don't care about how they receive proxy materials will significantly exceed the number of shareholders who prefer their proxy communications on paper.

The Commission may well be right, but the case has not been made. ABC is hopeful that shareholder groups, technology experts, and intermediaries will provide objective, conclusive data on the issue of likely shareholder acceptance of the notice and access model and that the final result of this rulemaking will reflect the best available knowledge of shareholder preferences. The success of this rulemaking turns on this crucial matter.

In terms of the capacity of issuers to adopt the notice and access model, ABC believes that the Commission's proposal is clearly within the general capabilities of current technology. However, the degree to which the notice and access option can be certified as available over an appropriate period is an open question. Implicit in the proposal is the assumption that shareholder access is operational within certain standards. The release does not delineate those standards. For example, if Internet access under the proposal is to be the functional equivalent of either mail delivery or the current electronic access provided on an elective basis, how will an issuer assure itself that it has met the SEC's standard?

We would ask the Commission to address whether there should be some type of certification or testing requirement for notice and access proxy solicitation in order to assure all issuers that a breakdown in the proxy process for a single company's annual meeting will not undermine shareholder confidence in the overall proxy process. We note that the origin of the Sarbanes-Oxley Act can be found in the scandals surrounding Enron and WorldCom. We suggest that the Commission make sure in this rulemaking that the failure of a few does not have a vast and adverse impact on the many.

2. *Should the proposed model be based on shareholder consent?*

The Release contemplates that Internet access will be the default standard for the delivery of proxy materials to shareholders under the notice and access model. Shareholders of issuers who adopted notice and access would therefore be obliged to request paper delivery if that were their preference.

Experience under the current street side proxy system lends a superficial credence to the argument for making the notice and access model the default standard. As we noted earlier in this letter, under the current system issuers have seen significant cost savings because of a migration from paper to electronic delivery. According to Automatic Data Processing, Inc. (ADP), the intermediary that handles the bulk of street side proxy processing, over 10 million investors are now enrolled in e-delivery.[2] This is an impressive number and would seem to indicate a trend.

We would point out, however, that there was nothing inevitable or irreversible about that trend. Much of the gain in electronic delivery that has been accomplished thus far is directly attributable to the proxy fee structure put into place by the New York Stock Exchange (NYSE). The NYSE fee structure provides financial incentives to ADP and to broker-dealers to eliminate paper deliveries.

At the same time, we note that, according to ADP, over 2.4 million investors who initially opted for e-delivery subsequently dropped out of the program. Overall, ADP reports that today approximately 70 million investors have chosen not to accept e-delivery, despite repeated notification of that option.[3]

From an issuer perspective, we think that it is important that the Commission explore in depth why 70 million investors currently choose not to accept electronic delivery and, just as important, why 2.4 million investors who initially opted for electronic delivery subsequently dropped it. Obviously, if these matters are not better understood and addressed, it is hard to see how Internet access will be broadly accepted, even if made the default standard. Under those circumstances, issuers will run the risk that any increased savings in the proxy process will be significantly outweighed by a decline in shareholder participation and a loss of shareholder goodwill.

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[2] Letter of Richard Daly to Christopher Cox, Chairman, United States Securities and Exchange Commission, November 22, 2005. Mr. Daly is Group Co-President, Broker Services Group, Automatic Data Processing, Inc.

[3] *Ibid.*

3. Should the Commission permit Notice to include a request for shareholders to affirmatively consent to future electronic delivery of the Notice?

The notice and access proposal would require that shareholders desiring paper delivery of proxy materials reaffirm their preference on a continuing basis -- that is to say, for every meeting for every year for every stock they own. ABC believes this is an unnecessarily burdensome requirement, all but certain to frustrate and confuse shareholders in a way that would undermine investor confidence in the notice and access model.

We believe it is possible and more prudent to allow shareholders to indicate a one-time preference for paper materials which issuers and broker intermediaries would honor until the shareholder affirmatively indicated a preference for electronic delivery. This would obviously be convenient for shareholders. It would also provide issuers with a more reliable and consistent sense of the amount of printed materials that would have to be prepared each year, thereby contributing to more economical paper, printing, and mailing costs.

4. Is it appropriate to impose a separate obligation on the issuer to provide a copy of proxy materials to requesting shareholders?

As is obvious in our earlier comments, ABC cannot imagine a notice and access model that does not require issuers to provide a copy of proxy materials to requesting shareholders. Issuers, particularly small and mid-cap issuers, have a strong incentive to promote the proxy participation of retail shareholders, including providing them with a paper alternative to the notice and access model if they so choose.

The issue is cost. Print-on-demand and delivery-on-demand fulfillment would inevitably be more expensive on a per-shareholder basis than the current "paper-default" model that exploits scale economies for ink, paper, printing, and bulk mailing. The release at least implicitly recognizes this issue, asking as it does whether stockholders who opt out of electronic delivery should be charged a fee for paper delivery.

ABC does not support charging shareholders a fee for paper delivery of proxy materials. It smacks of a poll tax and would inevitably meet shareholder resistance. Instead, we believe it is the responsibility of the Commission to design a rule, in collaboration with the groups now responsible for the proxy process, that strikes just the right balance between shareholder preference and issuer cost in order to accomplish the Commission's goal of reducing the overall cost of the annual proxy process. That means that the savings that would result from electronic delivery must exceed the increased cost resulting from a higher per-shareholder cost of delivering printed materials.

5. *Should there be increased or more prominent disclosure regarding how the broker vote operates? Would the proposed model increase issuers' dependency on discretionary voting?*

For small and midsize companies, the fate of the broker discretionary vote may be the most important question raised by the notice and access model.

Created under NYSE Rule 452, the broker vote allows brokers to cast the proxies of customers who have chosen not to respond to the request for proxy instructions. Broker discretionary voting of so-called "uninstructed" proxies occurs only in regard to matters of routine business relating to an annual shareholder meeting: the election of an auditor, the election of the board of directors, and, most fundamentally, the establishment of a quorum to allow an annual meeting to go forward in the first place. When brokers choose to cast uninstructed proxies, they typically follow the recommendations of company management.

Small and midcap companies rely on the broker discretionary vote to hold their annual meetings in a cost-effective way. Statistics from the 2004 proxy season help to illustrate this point. During the 2004 proxy season, there were 967 meetings of companies with less than 1000 shareholders.[4] On average, without the broker vote these companies would have had an average quorum vote of 38.8 percent. With the broker vote included, that average rises to 60.1 percent. During this same period, there were 936 meetings of companies with 1000 – 5,000 shareholders. Without the broker vote, the average quorum vote would have been 57.1. Instead, with the broker vote, the average was 89.5 percent.

Without the broker discretionary vote, many smaller companies would not reach quorum or would reach quorum uncomfortably close to the date of the annual meeting. Either way, such companies would have to spend money on proxy solicitations, an additional cost that would not change the outcome of routine meetings and proposals. Indeed, some large companies with large retail shareholding would find themselves in the same predicament.

[4] The 2004 "proxy season" was from February 15 to May 1.

A fuller understanding on the part of shareholders of the function of the broker discretionary vote could conceivably influence their decision whether or not to return their voting instruction forms. That possibility, together with the overall importance of the broker discretionary vote and our long standing, across-the-board commitment to full, plain English disclosure, leads ABC to support a more prominent, understandable explanation of the operation of the broker discretionary vote in the proposed notice.

The larger question is whether the notice and access model would increase issuers' dependency on discretionary voting. We think it may because we think fewer shareholders are likely to respond to requests for proxy instructions if additional steps are required to obtain or review a proxy card or proxy materials.[5] To the extent that fewer shareholders vote, the broker discretionary vote will become significant for companies beyond the thousands of smaller firms that already depend upon it to reach a timely quorum.

We view such a possibility with concern. The broker discretionary vote is already a controversial matter. Shareholder activists see it as a way for management to "stuff the corporate ballot box," especially in regard to board membership. If the broker discretionary vote becomes a more visible factor in larger numbers of high-profile corporate elections, that argument will be amplified, perhaps to the point that the New York Stock Exchange will eliminate the rule. Even before the notice and access model had been announced, the NYSE had established a proxy review committee with the stated purpose of reviewing and modifying NYSE Rule 452 as it pertains to broker discretionary voting.

If the notice and access proposal indirectly leads to the elimination of the broker discretionary vote, the result will be highly unfavorable to smaller businesses. No amount of savings likely to be realized through notice and access will outweigh the thousands of dollars they will have to spend each year on proxy solicitors and the additional postage and printing that solicitations entail.

As we have noted in comment letters and other communications to the Commission and to the NYSE, the broker vote can and should be reformed in a way that preserves its efficiencies while meeting the objections of shareholder

[5] On the probability of Internet access will discourage investor participation, see letter of Dominic Jones to Jonathan G. Katz, Secretary, Secretary, U.S. Securities and Exchange Commission, January 31, 2006. Mr. Jones is President of *IR Web Report*, a firm with independent expertise in online disclosure and communication practices of large-cap companies.

activists. We believe there is merit in the concept of an "echo" or "mirror" vote, which would allow uninstructed shares of street name holders to be cast, on a broker by broker basis, in proportion to instructed shares. In other words, if those clients of XYZ Securities Firm who choose to return their proxies vote 80/20 in favor of a particular director, the uninstructed shares would be voted in the same proportion. This approach has the benefit of being operationally practical. It would also be reasonably faithful to the likely sentiments of brokers' clients who do not return their instructions. Such a system would provide fairer treatment for all shareholders while retaining the broker discretionary vote, thereby avoiding expensive and wasteful proxy solicitations.

ABC of course understands that this rulemaking is not about the broker discretionary vote. We understand, too, that the broker discretionary vote is the creation of the NYSE and not the Commission.

That said, we would urge that the Commission, in any final rulemaking in regard to the notice and access proposal, to take cognizance of the importance of the broker discretionary vote as part of the Commission's overall desire to lower the costs of the proxy process. In that context, we would ask the Commission to suggest that market regulators focus their attention on the intelligent reform of the broker discretionary vote rather than its elimination.[6]

Absent the Commission's willingness to do these things, ABC, and, we suspect, others concerned about the welfare of smaller and midsize public companies, will not be able to support the notice and access proposal.

Conclusion

ABC believes the current street side proxy process works well. It has resulted in steadily lowering costs for issuers while delivering timely and accurate vote tallies. It is admittedly complex, but its complexity is a natural result of the complexity of corporate finance and the need to balance the often-conflicting imperatives of big issuers, small issuers, institutional shareholders, individual shareholders, the brokerage community, shareholder activists and other key constituent groups.

[6] The recent decision by Charles Schwab & Company to terminate its NYSE membership illustrates the need for a reformed broker discretionary vote to apply to brokers that are registered only with the NASD.

To say this is not to make an argument for the *status quo*. As we have demonstrated in this letter, however, any effort to improve upon the current street side proxy process, particularly for the purpose of reducing costs, will inevitably oblige the Commission to confront a large array of very difficult issues: from such evergreen matters as the fate of the broker discretionary vote, to newer topics, such as the degree to which the rise of the Internet and the personal computer have changed consumer expectation and preferences, particularly in regard to the delivery of information.

These are difficult and important matters, and ABC stands ready to help the Commission in any way we can.

Sincerely,

John Endean

John Endean
President

cc: Honorable Christopher Cox, Chairman, U.S. Securities and Exchange Commission
Honorable Paul S. Atkins, Commissioner
Honorable Roel C. Campos, Commissioner
Honorable Cynthia A. Glassman, Commissioner
Honorable Annette L. Nazareth, Commissioner
Martin P. Dunn, Deputy Director, Division of Corporation Finance