SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS

February 10, 2006

Securities and Exchange Commission
100 F St., N.E.
Washington, D.C. 20549
Attention: Jonathan G. Katz, Secretary

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

Ladies and Gentlemen:

The Society of Corporate Secretaries & Governance Professionals (the "Society") appreciates the opportunity to respond to the request for comments made by the Securities and Exchange Commission (the "Commission") in its December 8, 2005 release entitled "Internet Availability of Proxy Materials" (the "Proposing Release"). The Society, founded in 1946 as the American Society of Corporate Secretaries, has over 3,800 members representing approximately 2,600 companies. Its members are responsible for public disclosure under the securities laws and matters affecting corporate governance, including the proxy process and annual shareholders' meeting of companies subject to the proxy rules under the Securities Exchange Act of 1934.

The Society agrees with and supports the Commission's Proposing Release and its underlying rationale. Our members are involved personally with the preparation of issuers' proxy materials on a regular basis, and through this involvement we know the costs and burdens associated with the existing regime requiring the distribution of paper proxy materials by issuers and intermediaries. The Society applauds the Commission for the initiatives presented in the Proposing Release and offers the comments in this letter in response to the Commission's request for comments on the proposed regulation. For ease of reference, except as otherwise noted, we use the definitions set forth in the Proposing Release.

Introduction

The Proposing Release offers new rules that would provide issuers with a less expensive alternative to printing and mailing proxy materials and annual reports in connection with shareholder meetings, the so-called "notice and access" model. The Society recognizes and thanks the Commission for its development of this innovative and cost-effective approach to proxy distribution. We also urge the Commission to take this

opportunity to expand its current review and rulemaking to address the existing distribution system for shareholder meeting materials in its entirety.

1. Notice of Internet Availability of Proxy Materials

The Proposing Release proposes amendments ("Proposed Rules") to various rules and forms under the Securities and Exchange Act of 1934 that would permit an issuer to post its proxy materials on its website and provide shareholders with a notice informing them that the materials are available and explaining how to access those materials.

The Proposed Rules should be revised to require that the Notice be sent to shareholders at least 45 days before the meeting to permit sufficient time for a Notice sent by bulk rate mail to reach shareholders and still permit shareholders to request, receive and review paper copies before the meeting date or vote deadline.

The Society supports the Commission's goal of continuing to provide shareholders the option of receiving a paper copy, if they so elect. The Proposed Rules would require that the Notice of Internet Availability of Proxy Materials be sent to shareholders at least 30 days in advance of a meeting date. Issuers with large numbers of shareholders frequently use bulk rate mail as the most cost-efficient method of delivering proxy materials in the U.S. Bulk mail can take as long as four weeks to be delivered. Under the Proposed Rules, some shareholders could receive the Notice of Internet Availability of Proxy Materials without sufficient time to request, receive and review a paper copy of those materials.

The Society believes that it is appropriate to permit issuers to household the Notice of Internet Availability of Proxy Materials without re-soliciting consent from shareholders that have already consented to householding.

It would be inappropriate to require re-soliciting consent from shareholders that have already consented to householding. Imposing an additional consent requirement subjects issuers to additional and unnecessary costs to obtain a consent that has already been obtained from their shareholders.

The Society believes that it is unnecessary to require that issuers provide shareholders with a postage-paid, pre-addressed reply card to request a copy of the materials. Issuers should only be required to provide a toll-free number for U.S. and Canadian callers.

The Proposed Rules suggest that issuers list a toll-free telephone number and an email address on the Notice of Internet Availability of Proxy Materials where shareholders can request a paper copy of the proxy materials. Shareholders without computer access would have the ability to request the copies by telephone or email. The addition of a postage-paid reply card would add unnecessary additional costs on issuers. In addition, the phone number should be required to be toll-free only for callers in the United States and Canada. To require the number to be toll-free for other international callers is logistically difficult and cost-prohibitive. Issuers will not take advantage of the

"notice-and-access" model if it cannot be done at a cost that is significantly competitive to the current model.

The Notice of Internet Availability of Proxy Materials should be permitted to include a request for the shareholder's affirmative consent to future electronic delivery of the Notice.

Under the Proposed Rules, issuers would only be permitted to send the Notice of Internet Availability of Proxy Materials electronically to shareholders who have already elected electronic delivery of their proxy materials. Issuers would be required to send this Notice in paper form to shareholders who have not so elected. Using the Notice to offer an opportunity to shareholders, who do not want to receive any paper (including the notice) from issuers, to elect to receive the Notice electronically in the future would further the goals of the proposed rules and help to reduce further costs for issuers.

2. Mechanics of the Proposed "Notice and Access" Model

i. Proxy Card

The Proposed Rules should be revised specifically to permit issuers: (1) to decide the means by which a proxy card shall be furnished and whether or not it should be accompanied by the proxy statement or the Notice of Internet Availability of Proxy Materials when furnished to shareholders; and (2) to include bar codes or other identification conducive to the automated processing of votes on their proxy cards.

The Society supports the Commission's proposal to allow the proxy card to be furnished either together with or separate from either the Notice of Internet Availability of Proxy Materials or the proxy statement. Issuers use a variety of methods to tabulate shareholder votes, and the flexibility afforded by the Commission's proposal will allow many issuers to continue to use whatever methods they have decided are most appropriate for them. As an example, some issuers include bar codes or other individual identifying information on their proxy cards, necessitating that a unique proxy card be sent to each registered holder. However, for both smaller issuers and other issuers with abnormally large numbers of record shareholders, providing such identifying information within the Internet delivery system may prove extremely burdensome. Those issuers should be permitted to continue their current practice and be allowed to mail paper proxy cards together with or separate from either their proxy statements or their Notices of Internet Availability of Proxy Materials. Conversely, those issuers that do not require uniquely identified proxy cards would very likely find that their proxy cards can be delivered to shareholders more efficiently via the Internet.

Therefore, in order to avoid any confusion over the matter, we suggest that the final rule be revised to specifically include a provision stating that issuers may employ both methods or a combination of the two. Currently, proposed rule 14a-3(g)(3) states: "Whether or not combined with the state law meeting notice, the Notice of Internet Availability of Proxy Materials must be sent separately from other types of shareholder communications and may not accompany any materials other than the proxy card and

return envelope." We suggest that proposed rule 14a-3(g)(3) be revised to include two additional sentences, as follows:

> "Registrants may decide the means by which a proxy card should be furnished and whether or not it should be accompanied by either the proxy statement or, in the alternative, the Notice of Internet Availability of Proxy Materials. In addition, registrants may include on their proxy card bar codes or other identification conducive to the processing of votes."

In the alternative, these sentences could be added to existing rule 14a-4.

The Society takes no position on whether a shareholder would be more or less likely to access and review the proxy statement and annual report before voting if those documents were posted electronically on the Internet.

The Society does not know whether the method of delivering the proxy card would make a shareholder more or less likely to access and review the proxy statement and annual report before voting. This seems to us to be a matter of conjecture. While we encourage informed voting, we recognize that voting, whether civic or corporate, is an individual choice that can be exercised for whatever reason the voter chooses. However, we place a high value on informed voting, and we feel the best way to encourage informed voting is to allow a variety of methods for shareholders to receive and review the proxy statement and annual report. While not every shareholder makes regular use of the Internet, the Proposed Rules would enable those who do to have more immediate access to information relevant to exercising their shareholder franchise. As the Proposing Release notes, this will encourage more shareholders to use the Internet as a reliable and cost-efficient method of shareholder communication.

The Society does not believe that the Proposed Rules would increase issuers' dependency on discretionary broker voting and does not believe that required disclosures relating to discretionary broker voting should be changed.

The Society does not believe that the Commission's proposed model of "notice and access" would significantly change the impact of discretionary voting on public company issuers. The impact of discretionary voting has increased over twenty or more years for a number of reasons, most notably the tremendous increase in market volume and the shortening of the settlement period from five to three days, which motivated many shareholders to leave their holdings in street name. These factors will continue to affect public company issuers regardless of whether or not issuers' proxy materials are made available on the Internet. Broker discretionary voting is a critical issue for public companies, with ramifications far beyond the delivery requirements of proxy statements and proxy cards. As stated elsewhere in this letter, we encourage the Commission to undertake a comprehensive review of the existing distribution system of shareholder meeting materials as a whole.

The Society recommends that the Commission not impose additional requirements and costs on issuers to address problems arising from the intermediary community.

Although some of our member companies are brokers or otherwise involved in the system of intermediaries, as an institution serving issuers, we do not have any particular insight into the questions regarding proxy cards raised in the Proposing Release concerning intermediaries. We do believe that the financial and operational burdens of these concerns rightfully belong on the intermediary community and therefore advise against adding requirements on issuers as a solution to problems that may be raised by the intermediary community. In that vein, we believe that it would be unrealistic and unhelpful to implement a system encouraging brokers or other record holders to establish their own Internet Web sites to post requests for voting instructions or to grant a proxy back to the beneficiary.

The Proposed Rules should not be revised to include any regulation of issuer practices for preventing persons other than holders of record from being able to print or download proxy cards from issuers' Web sites.

We are sensitive to the voting security issues alluded to by the Commission when requesting comments on requiring systems to block downloading of proxy cards. However, we feel that it would be best if the Commission avoided any specific rules in this area, allowing issuers and others the flexibility to address these issues within the confines of available technology and each issuers' IT systems.

ii. Internet Web Site Posting of Proxy Materials

The Proposed Rules should not be revised to require that issuers' proxy materials be made electronically available only on the EDGAR Web site.

The Society does not support making EDGAR the sole Web site for the electronic availability of issuers' proxy materials. As we understand the current EDGAR system, it is not designed for the type of interactivity contemplated by the Proposing Release. Particularly in these early years of Internet availability of proxy materials, we believe that issuers and shareholders alike are best served by allowing a variety of systems to be used for the electronic posting of proxy materials. This will encourage both competition and innovation in the use and development of applications for making proxy materials available online. Issuers currently use their own websites and the websites of transfer agents and others for the posting of proxy-related materials. Our experience is that these arrangements have generally been quite successful and quite useable by investors.

Similarly, we believe that the Proposed Rules should not be revised to require issuers to post their proxy materials in any particular electronic format, such as PDF or HTML. The issuer and shareholder communities have not had enough experience with any single electronic format to lead us to believe that one format is preferable to another. Therefore, regulation in this area would be premature and would likely over time become obsolete as newer technological solutions are developed and made available.

The Proposed Rules should specify that issuers post all of their proxy materials for a specific meeting on a single Internet Web site so that those materials would be readily accessible in one place.

The Society agrees with the concept that all soliciting materials from the issuer for a specific meeting be available through a single site. We think a similar requirement should be imposed upon any other person soliciting proxies and that any person making such a solicitation be required to inform the issuer of the Web site address used by it for posting soliciting materials.

The Proposed Rules should not impose additional requirements on issuers regarding the Internet Web site posting of information, including additional requirements regarding pre-registration by shareholders.

The Society believes that issues such as pre-registration of shareholders and use of third party Web sites are best left to implementation by issuers on a case-by-case basis. We expect that some issuers, particularly smaller companies and new registrants, will need to rely on third parties to implement the system. We would encourage the Commission to leave flexibility for them to do so. Similarly, pre-registration may or may not be feasible depending upon the particular IT system employed. Since securities laws clearly establish liability standards for proxy material that negate any disclaimer or other attempt to limit liability, we see no need to further address these issues at this time.

The Proposed Rules should not require that annual reports to security holders be filed or furnished on EDGAR.

Since more and more companies are using the Form 10-K as their annual report, often with a fairly brief wrap-around, we do not believe there is much value to requiring the EDGAR filing of the annual report. Indeed, we foresee that an Internet-based system will encourage more issuers to use the Form 10-K as the annual report and will also lead to fewer issuers seeing the need or desire to have a separate document.

iii. Period of Reliance on the Proposed Model

In subsequent proxy seasons, the issuer should not be bound by prior elections to receive paper copies. However, the Proposed Rules should be revised to allow shareholders to make a revocable election not to receive paper copies at any future meeting.

We believe that shareholders who desire paper copies of proxy materials should be required to notify the issuer of that desire every year. Although it would be possible for issuers to retain a master database with respect to elections made by registered holders, it would not be possible for issuers to do so for street name holders whose identities are not disclosed to the issuer under the current rules applicable to non-objecting beneficial owners and objecting beneficial owners ("NOBO/OBO rules"). As issuers do not know the identity of the OBOs, they cannot keep track of OBOs' elections. It would also be impracticable to send a special mailing to holders who have acquired shares since the last annual meeting record date (and thus have not previously made an election). Furthermore, shareholders may forget or not understand that they have not made an election to receive paper copies and be needlessly frustrated if they do not have an annual opportunity to make the election. They may also want to change their

election as they become more computer-literate, furthering the goal expressed in the Proposing Release of promoting the use of the Internet. Since the issuer will be required to mail a notice each year, the notice should provide all holders with the opportunity to renew or change their decision with respect to the receipt of paper copies.

In general, the Society supports the concept that each meeting be treated as a discrete event with the issuer and each shareholder free to change their elections for subsequent meetings. However, we suggest that the Commission allow, but not require, a shareholder to make a revocable election that would apply to future meetings just as the householder rules currently provide. Fortunately, shareholder meetings are not adjourned frequently. In those infrequent events, requiring an additional Notice of Internet Availability of Proxy Materials appears to us to be an additional burden that would benefit few shareholders. We feel that in most cases state law notice requirements can be satisfied within the Notice of Internet Availability of Proxy Materials. However, we do not see any benefit to specifically linking the two concepts under the "notice and access" model.

3. Requests for Copies of Proxy Materials

The Proposed Rules should be revised to provide that the Notice of Internet Availability of Proxy Materials state a date, no less than 15 days before the meeting date, by which a shareholder must request a paper copy of an issuer's proxy materials.

The Society believes that the regulations regarding paper delivery of proxy materials should respect the importance to the corporate voting process of the fully informed shareholder. Therefore, the Proposed Rules should specify a minimum period of time within which a shareholder may request a paper copy of an issuer's proxy materials. It is more important that shareholders desiring paper copies of an issuer's proxy materials receive them well before the meeting than it is to give shareholders a greater amount of time to decide whether or not to request a paper copy. The Society believes that 15 days before the meeting date is sufficient time because most issuers will have mailed proxy materials 30 days or more before the meeting. Thus, keying the time period for requests off of the date of the meeting does not create significant risk that shareholder will have little time within which to decide whether to request a paper copy.

Additionally, shareholders that desire a paper copy are very likely to request one from the issuer closer in time to the date the notice is received. If a shareholder does not have access to the Internet or personally prefers not to read the issuer's proxy materials on line, that shareholder will not need long to decide whether to request a paper copy. This will be especially true if the notice is drafted according to the Proposed Rule in an easy-to-read, plain English fashion and provides simple instructions for requesting a paper copy of the issuer's proxy materials.

On balance, we believe that minimum should be no more than 15 days prior to the meeting date. In particular, we believe 15 days to be preferable to a shorter (e.g., ten-day) period because the two-day delivery rules for intermediaries can cause hidden and

unpredictable delay and because, even if the shareholder is receiving paper proxy materials directly from the issuer, anything less than 15 days provides insufficient time for a shareholder to receive and then review the proxy materials.

The Proposed Rules should be revised to include a specific provision stating that issuers are not required to respond to a request for a paper copy of its proxy materials if that request is received after the annual meeting date.

The Society believes that Proposed Rule 14a-3(g)(7) should be revised by adding the following provision:

> "(iii) If the registrant receives a request from a shareholder for a paper copy or an electronic copy of the registrant's proxy materials after the date of the meeting to which the proxy materials relate, the registrant is not required to respond to such request."

Including an express provision to this effect is consistent with the mirror requirement, contained in Proposed Rule 14a-3(g)(7), that proxy materials posted on the Internet "remain available on that Web site *until the time of the meeting of security holders . . . .*" (emphasis added). Further, we believe that the shareholders have adequate access through other means to issuers' proxy materials after the occurrence of the meetings to which they relate and that regulations making proxy materials accessible on the Internet should not further burden issuers with additional requirements relating to paper delivery. Under the current regime, shareholders may obtain copies of documents directly from the SEC and, where shareholders hold their shares in street name, from their brokers, banks or other intermediaries. In addition, it is currently the regular choice of many issuers to regularly make available printed copies of materials to shareholders upon requests submitted either to those issuers' investor relations groups or their corporate secretary's offices. Further regulation along these lines would be viewed as a significant and hidden cost to issuers, especially new and smaller issuers for whom costs associated with federal securities regulation have significantly ballooned in recent years. The Proposed Rule should not be revised to impose additional delivery requirements on issuers above and beyond the practices already followed by issuers.

Requiring issuers to respond to shareholders requests for copies of proxy materials within less than five business days is too difficult and expensive, particularly in light of the uncertainty over the number of people who will request paper copies from year to year.

The Society believes that issuers should be permitted at least five business days to respond to a shareholder's request to receive a paper copy of the proxy materials. If the two-business-day delivery rule were adopted, issuers would be overwhelmed with compliance costs, and there is a substantial risk that those costs would result in issuers simply abandoning use of this model. From the perspective of the issuers, this model will provide value if it enhances the voting process and does so in a cost-effective manner. The model runs the risk of becoming more expensive than the current system if provisions such as this two-day proposal are adopted. The number of voters requesting

paper documents is a significant unknown factor in this new model and creates the potential for significant uncontrollable expense.

We feel that this model is not likely to be used if it results in more expense to issuers rather than less. This is particularly true in light of recent trends among public companies that have reduced the size of their administrative infrastructure under relentless pressures to reduce costs. Many companies have reduced or eliminated the shareholder records function and outsourced most, if not all, of that function to third parties. A two-day delivery requirement would force public companies, during the days leading up to their annual meetings (a period of time already notoriously busy), to ensure that at least one person was available to take telephone requests for paper copies from shareholders, prepare packages for mailing, ensure that the requesting party is on the shareholder rolls and adequately address in a timely fashion any inconsistencies, problems or concerns that might arise in the request. These costs could be especially high for issuers with significantly high numbers of retail shareholders that may use the Internet less frequently than institutional investors who are regular users of electronic technologies. Even more troubling is that a two-day delivery requirement would be adopted without the benefit of any experience among issuers of the number of paper copies that would be requested of them from year to year.

The Proposed Rule that issuers use First Class mail to provide requested paper copies of its proxy materials is appropriate. The Proposed Rules should not be revised to require that the issuer provide requested paper copies by more expedited means, such as overnight or two-day delivery.

The Society believes that the First Class mail requirement, contained in proposed rule 14a-3(g)(7), is an adequate and appropriate delivery requirement. First Class mail would provide for receipt of the paper copies within an adequate time period before the meeting, on average within three days of mailing within the United States. We believe that First Class mail is preferable to other means because it is less expensive to the issuer than overnight or two-day delivery, consistent with the emphasis in the Proposing Release on the cost savings to issuers of Internet availability of proxy materials. Such cost savings would risk being significantly undercut by hidden, unknown costs of overnight or two-day delivery. In addition, issuers are accustomed to mailing proxy statements through the use of First Class mail. Moreover, for issuers with shareholders that do not reside in the United States, international mailing, via overnight or two-day delivery, would be cost-prohibitive.

4. Role of Intermediaries

As noted above, the Society and its members are very supportive of the ”notice-and-access” model, but the discussion of the role of the intermediary highlights the point that the existing distribution system for proxy/annual meeting material to beneficial owners is very complex and long overdue for a holistic fresh look. We urge the Commission to take this opportunity to expand this current review and rule making project to address the system in its entirety. The Society is part of a coalition, with the Business Roundtable, National Investor Relations Institute, Securities Transfer

Association and National Association of Corporate Directors, which has supported the need to address this topic from a very broad, system-wide point of view. The coalition has urged the Commission to take action on the Business Roundtable petition filed with the SEC in April 2004.

Our concern in this regard with respect to the "notice-and-access" model is that it will be a complex redesign effort that is built to accommodate the existing system, which will serve to perpetuate many of the systemic problems, costs and concerns raised by the Coalition and others. The architecture of a robust "notice-and-access" model might be very different if the related distribution system issues were considered and worked on simultaneously. We urge the Commission to take this opportunity to consider "the big picture" with regard to these matters.

Having made that broad statement of interest, we comment with regard to selected questions in the Proposing Release as follows:

The "notice-and-access" model should not be limited to record holders, but should apply to beneficial holders as well.

The Society believes that the "notice-and-access" model should apply to beneficial owners as well as record holders. We expect that there will be many practical issues of dealing with record and beneficial owners, as noted in the Proposing Release. However, for many, if not most, companies the beneficial owners constitute the largest percentage of recipients of proxy material. A model that does not include beneficial owners will not effectively begin to address the voting, cost and efficiency issues that caused the Commission to propose the model in the first place. We note that these issues of record versus beneficial ownership, such as the possibility of stockholder confusion and added issuer expense, are the result of the current distribution system. Issuers operate within a mandated system that actively frustrates their ability to know who their owners are. Furthermore, if you do not know your owners, you cannot effectively and efficiently contact your owners. NOBO/OBO and other obsolescent rules and concepts will serve to frustrate and make more difficult and expensive the design of the "notice-and-access" model.

The issuer should be able to compel the intermediary to work under the new model.

Under the current distribution system, the intermediary serves a vital and irreplaceable role and ought not to be allowed to stay out of the "notice-and-access" model if any success for the model is to be anticipated. Therefore, we believe that there should be no question as to whether the intermediary must continue to play the same central role as it currently does and be required by the issuer to work under the new model. The architecture of the current distribution system mandates this conclusion as a practical matter. However, if the Commission is suggesting that we reconsider the status of the intermediary as a necessary party to the "notice-and-access" model, it seems clear that the Commission must reconsider the current distribution system as a whole.

Intermediaries should be able to use the email addresses they now have for implementing the model without specific consent.

The Society supports and encourages the Commission's idea that electronic delivery and voting should be expanded and maintained going forward through as many means as practicable. As in the "notice-and-access" model, electronic delivery and voting should be seen as a default and an opt-out arrangement. The intermediary should be encouraged to increase its efforts with regard to paper-mailing "suppression" by utilizing the electronic delivery lists from brokers and combining them with the lists of additional persons who have utilized electronic voting after having received the intermediary's voting instruction form ("ad hoc electronic votes"). Both groups of investors should be seen as having accepted electronic delivery and voting as the norm and dealt with accordingly. It is possible that the Commission, following the receipt of comments on the "notice-and-access" model, might decide to revise the rule proposal or set up a pilot program or test. We strongly encourage the inclusion of ad hoc electronic voters in any such pilot program or test.

The Proposed Rules should provide that the issuer may forward to intermediaries requests that the issuer receives directly from beneficial owners.

The rules should allow for the issuer to forward such requests to the intermediary for fulfillment. At present, there are no processes in place to deal with the anticipated confusion of record and beneficial owners with regard to their proper contacts when seeking paper delivery, or when seeking to vote on-line. These will be some of the major challenges in executing the "notice-and-access" model, and the rules should allow for issuers to establish paper delivery arrangements in accord with their own choosing.

With respect to the identification of beneficial owners, the Proposed Rules should at least provide that the burden of protection against identification should fall as much on the beneficial owners and their brokers/banks as on issuers.

The Society believes that all of the problems surrounding the "identification" of beneficial owners arise from the current distribution system and its continued use of NOBO/OBO restrictions and other mechanisms intended to prevent issuers from knowing the names and addresses of their owners. These mechanisms disrupt the distribution system. They add on costs, they prevent effective and efficient communication and they cause new initiatives such as the "notice-and-access" model to be designed in inefficient and expensive ways that perpetuate burdens on issuers and stockholders. If these mechanisms are to be maintained with the advent of the "notice-and-access" model, then the Proposed Rules should be revised to at least provide that the burden of protection against identification should fall as much on the beneficial owners and their brokers/banks as on issuers. Participants and their service providers must be held to some level of responsibility and common sense, lest the "notice-and-access" model be ground to a halt in a web of impractical and gilt-edged "privacy" controls. The model should be the same as the rule for unlisted numbers in the phone book – the customer desiring the unlisted number pays the phone company a fee for remaining anonymous.

There is a concern that beneficial owners may try to vote on the issuer's proxy card instead of the intermediary's voting instruction form. However, when attempting to vote electronically, they will not have the required PIN and other information needed to access the proxy. The issuer's electronic proxy voting site could have a prominent notice alerting beneficial owners how to proceed if they mistakenly try to vote on the issuer screen and should direct them to the appropriate intermediary Web site(s). Some burden must rest with the beneficial owner who chooses a custodial arrangement to understand and use the process correctly.

New fees should be established that intermediaries may charge as reasonable services to an issuer. However, the Commission should set these rules rather than relying on the NYSE rate-making authority.

It has long been established that issuers should reimburse intermediaries for their costs in forwarding proxy materials. In the case of the "notice-and-access" model, out-of-pocket costs and fees to the intermediary will be items of major importance. Issuers will not take advantage of the "notice-and-access" model if it cannot be done at a cost that is significantly competitive to the current model. We recommend that the Commission take this opportunity to move from the NYSE to the Commission the rate-making authority that has controlled distribution fees to date. The allocation of this authority to the NYSE is obsolete in the modern era and is a major impediment to the modernization of the distribution system.

5. Soliciting Persons Other than Issuer

The Society agrees that the "notice and access" model as proposed by the Commission should not be limited solely to issuers and that there should be differences in how persons other than the issuer are treated to account for differences in the provision of information to shareholders. The Society, however, would like to offer the following points and clarifications that it believes should be addressed in the final release:

Proposed Rules 14a-7(a)(2)(i) and 14a-7(a)(2)(ii)(D) regarding affirmative consent to electronic delivery should not cover implied consents.

Issuers may use their electronic mail systems to deliver certain securities communications to employees (who have not affirmatively consented to electronic delivery) based on their implied consent to receive communications through the company's electronic systems. In its interpretive Release No. 33-7288 (May 9, 1996), the Commission provided an example that a company may complete electronic delivery to employees through its electronic mail system, in instances where: (a) employees use the company's electronic mail system in the course of performing their duties as employees and ordinarily are expected to log-on to electronic mail routinely, (b) those employees who do not log-on have alternative means of receiving electronic mail messages, (c) the electronic mail includes the actual document or announces the availability of the document and provides information on how to access the document

through the local area network, and (d) the electronic mail prominently states that a paper version of the document is available upon request.

The final rules should clarify that affirmative consent as used in the rules does not include implied consent, such as in the case where employees receive communications from the issuer as part of their duties as employees. Issuers should not be obligated to furnish employee email addresses to a soliciting third party (or forward communications to employees from a soliciting third party). While employees may be expected to check the employer's electronic system in the course of their employment, they do not expect to be solicited by third parties as part of their duties. There also can be no interpretation that employees – or employers – have consented to the use by others of employee email addresses. Moreover, many companies have a policy and have implemented procedures to block third parties from contacting their employees via the company's internet.

Proposed Rules 14a-7(a)(2)(i) and 14a-7(a)(2)(ii)(D) regarding affirmative consent to electronic delivery should be limited to the scope of the consent given.

Proposed Rules 14a-7(a)(2)(i) and 14a-7(a)(2)(ii)(D) provide that an issuer shall send proxy materials to security holders who have consented to electronic delivery, or furnish the soliciting third party with "information related to such consent that enables the requesting security holder to deliver the proxy materials electronically." A consent, however, is a contractual matter (between the security holder and the person obtaining the consent), and it cannot be applied in instances where so doing will violate the terms of the consent.

Security holders may consent to electronic delivery of shareholder communications through an intermediary or agent, such as Automatic Data Processing, Inc., or directly through an issuer. Consents given by the security holder may vary. To the extent that the security holder consents to *all* shareholder communications delivered by the issuer, agents and third parties, then this information (such as email addresses) should be provided. However, the proposed rules should not presume that consent has been given in all cases. The consent given by the security holder may be limited to varying degrees. For example, the consent may be limited to communications from the issuer only, or it may be limited to annual meeting materials only (and would not cover special meetings, whether called by the issuer or other persons).

Issuers (or agents or intermediaries) may have privacy policies that prohibit them from sharing email addresses with third parties without an express consent to do so. Sharing email addresses (without an express consent and in violation of a privacy policy), may constitute a deceptive practice in violation of federal law, e.g., Section 5 of the Federal Trade Commission Act, as well as related state laws. The final rules should recognize that email addresses should not be shared unless the scope of consent expressly permits doing so.

To eliminate confusion and conflicts regarding to what extent a person other than the issuer may deliver to persons who have consented to electronic delivery, we suggest the following language to the proposed rules:

> *Proposed Rule 14a-7(a)(2)(i):* "….Upon request by a soliciting security holder, the registrant must send the proxy materials furnished by the security holder electronically to all record holders designated by the security holder who have provided the registrant with an affirmative consent to electronic delivery of proxy materials via means permitted by such consent, <u>if the terms of the affirmative consent permit.</u>" [Underlined language added.]
>
> *Proposed Rule 14a-7(a)(2)(ii)(D):* "The names of security holders who have <u>affirmatively</u> consented to electronic delivery of proxy materials and the information related to such consent that enables the requesting security holder to deliver the proxy materials electronically, <u>if the terms of the affirmative consent permit.</u>" [Underlined language added.]

The mechanics of proxy solicitation for persons other than the issuer should contain appropriate safeguards to ensure the integrity of the voting process

While soliciting persons other than the issuer may limit their solicitations to certain shareholders, there should be safeguards to protect the integrity of the voting and information process with respect to those shareholders. We therefore suggest the following regarding the mechanics of the voting process:

Paper ballots should entail an obligation to provide paper materials, if requested: A soliciting person other than the issuer that follows the "notice and access" model may wish to provide a paper ballot along with the notice sent to stockholders. If the soliciting person does so, however, there should not be an expectation that the solicitation "is conditioned on the security holder agreeing to access the soliciting materials via the specified web site." Security holders who receive a paper ballot that can be executed and mailed in have an expectation, especially to the extent that they do not have internet access, of the ability to order a paper copy of the soliciting materials to make an informed decision. It would be disingenuous to tell these security holders not to vote, when they already have a ballot in hand. Proposed Rules 14a-3(g)(8)(iii) and (iv) should be clarified to provide that the notice need not contain instructions regarding how to request paper copies of soliciting materials when both the form of proxy and the soliciting materials are posted electronically and are accessible at the same location.

Appropriate safeguards should be in place to ensure the integrity of the voting process: In instances where a soliciting person other than the issuer does not solicit security holders directly, but posts a form or proxy and soliciting materials on an internet site, there should be a process to ensure that (1) only shareholders of the issuer vote and (2) that the votes are tabulated accurately. We urge the Commission to adopt rules to promote accurate voting results in such situations.

The issuer should not be required to share information regarding number of persons requesting paper copies

The final rules should not contain an obligation of the issuer to share with a soliciting third party the number of persons requesting paper copies. Such information may not be easy to access (it may be in the control of an agent or intermediary), and it adds an undue burden to the process (the issuer would need to track information, or pay third parties to track information, that may not be helpful for the planning process). Such a burden may add little or no benefit: For example, it may be easier and more cost-effective for the soliciting party to set aside paper copies based on a percentage of the total shareholders.

6. Business Combination Transactions

The Proposing Release provides at Section III.D that issuers could not use the "notice and access" model for distributions of proxy materials in business combinations, citing three reasons: (1) these transactions are unusual; (2) they sometimes involve an offering with prospectus delivery requirements regulated under the Securities Act of 1933 (a "'33 Act Offering"); and (3) the proxy statements used in business combination transactions are typically long and complex. We ask the Commission to reconsider this position and allow issuers to use the "notice and access" model for distributions of proxy materials in business combinations.

As to the first point, for most issuers, business combination transactions are in fact infrequent. However, because the proxy statements delivered in connection with such transactions are often longer than the typical annual meeting proxy statement, the potential savings from electronic delivery – one of the principal objectives of the notice and access model – are that much greater.

On the second concern, we are surprised that the Proposing Release takes the view that a '33 Act Offering is a barrier, given the Commission's recent adoption of the "access equals delivery" model for many offerings under the new Rule 172. In any case, business combination transactions that do not involve '33 Act Offerings could be exempted from this restriction so that they could have the benefits of the "notice and access" model.

As to the third issue of length and complexity, the typical annual meeting proxy statement has become so long, due in part to the rising number of shareholder proposals and the increasing length and type of executive compensation disclosures, that shareholders who want to do a detailed review will probably elect to print out a copy, just as they would for a careful examination of a business combination proxy statement. Thus, any perceived burden of printing the proxy statement will not be materially greater in the case of business combination versus annual meeting proxy statements. Also, the Proposing Release allows the use of electronic proxy delivery in proxy contest situations where many of the same issues of length and complexity present in business combination

transactions also exist (e.g., shareholder approval of compensation plans or charter amendments).

If, however, the Commission determines to retain the restriction against electronic proxy delivery in business combination transactions, we would request that the Commission commit to revisit the question in one or two years after adoption to determine whether the concerns expressed in the Proposing Release continue to be serious issues or whether some or all business combinations, including tender offers and issuer self-tenders, might be allowed to use the notice and access model.

Moreover, if, as expected, the Commission goes forward with plans to implement XBRL data tagging, it will be a substantial drawback to those shareholders who wish to take advantage of XBRL to have received the proxy statement in paper rather than electronic form.

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We appreciate the opportunity to provide this letter to the Commission on the Proposing Release. Please feel free to contact Marie Oh Huber at marie_huber@agilent.com or Cary Klafter at cary.klafter@intel.com if you would like to discuss our comments further.

Respectfully submitted,

The Society of Corporate Secretaries and Governance Professionals

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