
# 907 - Working with Your Company's Shareholders

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# Faculty Biographies

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Noel Elfant is vice president, general counsel, and secretary of Zebra Technologies Corporation in Vernon Hills, Illinois. He also is Zebra's chief compliance officer.

Previously, he served as associate general counsel and secretary of Philip Services Corporation, a company specializing in industrial engineering, environmental services, and scrap metals. Prior to that, Mr. Elfant served in the legal department of Fortune Brands, Inc., a diversified consumer products company, most recently as assistant general counsel. Mr. Elfant began his career in the real estate and corporate and securities departments of the Chicago-based national law firm of McDermott, Will & Emery.

Mr. Elfant earned his B.A. from the University of California, Los Angeles and his J.D. from Northwestern University School of Law.

**Mary Ann Hynes**
Vice President, General Counsel & Corporate Secretary
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**Bradley Rock**

Bradley Rock is a partner at DLA Piper US LLP in East Palo Alto, California. He concentrates in mergers and acquisitions; corporate securities, venture financings, and public offerings; public company securities law compliance; and software and hardware licensing and distribution. Recently he represented a publicly traded company in a complex cross border acquisition. He also represents publicly traded companies in acquisitions of domestic and foreign technology companies and publicly traded and private companies in connection with mergers and sale of assets. He has also advised software companies in negotiation of software development and licensing agreements. In addition, he provides counsel to semiconductor start-ups in the negotiation of strategic partnerships involving technology licensing, foundry commitment, and equity investment and recently counseled a public company in multimillion-dollar recapitalization and successful defense against hostile tender offer. He has also advised software companies in initial public offerings and represented hardware, software, and multimedia companies in venture capital financings.

**Robert Walner**

Robert Walner is executive vice president and general counsel of CompUSA in Highland Park, Illinois. He is an experienced general counsel and business executive with an extensive and recognized background in structuring, negotiating, and closing agreements for acquisitions, divestitures, strategic alliances, and financings. He has been a trusted advisor to top leadership, senior executives, boards of directors, and board committees of public companies. He has experience as a transaction attorney and a litigator as in-house counsel and in private practice. He has special expertise in corporate and securities law, corporate governance, Sarbanes-Oxley compliance, mergers and acquisitions, human resources and employment matters, real estate transactions, risk management, and litigation management.

He was previously chief legal and compliance officer for Inland Retail Real Estate Trust, Inc., Grubb & Ellis Company (where he was also executive vice president and chief administrative officer), and Balcor/American Express, Inc. He was previously a litigation attorney with the United States Securities and Exchange Commission.

Mr. Walner is the president and an advisory committee member of the Society of Corporate Secretaries and Governance Professionals (Chicago chapter). He is national chairman of the tax, regulatory and legislative committee of the Counselors of Real Estate. He is certified as a NYSE mediator and arbitrator and a NASD and AAA arbitrator. He is certified as a mediator for major civil cases for the Circuit Court of Cook County, Illinois. He is designated as a specialist in real estate investment (SRI); a specialist in real estate securities (SRS); and a counselor of real estate. He is a frequent speaker and author.

Mr. Walner has an M.B.A., with distinction, from the Kellogg School of Management at Northwestern University.

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR PART 240**

**[Release No. 34-56160; IC-27913; File No. S7-16-07]**

**RIN 3235-AJ92**

**Shareholder Proposals**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing amendments to the rules under the Securities Exchange Act of 1934 concerning shareholder proposals and electronic shareholder communications, as well as to the disclosure requirements of Schedule 14A and Schedule 13G. Proposed amendments to Exchange Act Rule 14a-8 would enable shareholders to include in company proxy materials their proposals for bylaw amendments regarding the procedures for nominating candidates to the board of directors. Schedule 14A and Schedule 13G would be amended to provide shareholders with additional information about the proponents of these proposals, as well as any shareholders that nominate a candidate under such an adopted procedure. Included in these nominating shareholder disclosures would be the disclosure requirements that currently apply to traditional proxy contests. Finally, the proposed amendments would revise the proxy rules to clarify that participation in an electronic shareholder forum that may constitute a solicitation would be generally exempt from the proxy rules. This release accompanies a second release, Shareholder Proposals Relating to the Election of Directors, in which we publish an interpretation and propose a rule change to affirm the staff of the Division of Corporation Finance's historical application of Rule 14a-8(i)(8).

**DATES:** Comments should be received by October 2, 2007.

**ADDRESSES:** Comments may be submitted by any of the following methods:

**Electronic Comments**:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-16-07 on the subject line; or
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

**Paper Comments:**

- Send paper comments in triplicate to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-16-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you

wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Lillian Brown, Steven Hearne, or Tamara Brightwell, at (202) 551-3700, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3010.

**SUPPLEMENTARY INFORMATION:** We are proposing amendments to Rule 14a-2,[1] Rule 14a-6,[2] Rule 14a-8,[3] Schedule 14A,[4] and Schedule 13G[5] under the Securities Exchange Act of 1934,[6] and proposing new Rule 14a-17 and Rule 14a-18 under the Exchange Act.

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[1] 17 CFR 240.a-2.

[2] 17 CFR 240.14a-6.

[3] 17 CFR 240.14a-8.

[4] 17 CFR 240.14a-101.

[5] 17 CFR 240.13d-102.

[6] 15 U.S.C. 78a et seq.





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## I. Overview

### A. Federal Regulation of the Proxy Process

Regulation of the proxy process is a core function of the Commission and is one of the original responsibilities that Congress assigned to the agency in 1934. Section 14(a) of the Exchange Act[7] stemmed from a Congressional belief that "fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange."[8] The Congressional committees recommending passage of Section 14(a) proposed that "the solicitation and issuance of proxies be left to regulation by the Commission."[9] Congress intended that Section 14(a) give the Commission the "power to control the conditions under which proxies may be solicited"[10] and that this power be exercised "as necessary or appropriate in the public interest or for the protection of investors."[11] Because the Commission's authority under Section 14(a) encompasses both disclosure and proxy mechanics,[12] the proxy rules have long governed not only the

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7 15 U.S.C. 78n(a).

8 Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970), quoting H. R. Rep. No. 1383, 73d Cong., 2d Sess., at 13 (1934). See also J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

9 S. Rep. No. 792, 73d Cong., 2d Sess., at 12 (1934).

10 H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 14 (1934). The same report demonstrated a congressional intent to prevent frustration of the "free exercise of the voting rights of stockholders." Id.

11 15 U.S.C. 78n(a).

12 See Business Roundtable v. SEC, 905 F.2d 406, 411 (D.C. Cir. 1990) ("We do not mean to be taken as saying that disclosure is necessarily the sole subject of §14"); Roosevelt v. E.I. du Pont de Nemours & Co., 958 F.2d 416, 421-22 (D.C. Cir. 1992) (Congress "did not narrowly train section 14(a) on the interest of stockholders in receiving information necessary to the intelligent exercise of their" state law rights); SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947) (upholding the Commission's authority to promulgate Exchange Act Rule 14a-8), cert. denied, 332 U.S. 847 (1948). See also John C. Coffee Jr., Federalism and the SEC's Proxy Proposals, New York Law Journal 5 (March 18, 2004) (Section 14(a) "does not focus exclusively on disclosure; rather, it contemplates SEC rules regulating procedure in order to grant shareholders a

information required to be disclosed to ensure that shareholders receive full disclosure of all information that is material to the exercise of their voting rights under state law and the corporation's charter, but also the procedure for soliciting proxies.[13]

In assigning this responsibility to the Commission, Congress demonstrated its "intent to bolster the intelligent exercise of shareholder rights granted by state corporate law."[14] To identify the rights that the proxy process should protect, the Commission has taken as its touchstone the rights of security holders guaranteed to them under state corporate law. As Chairman Ganson Purcell explained to a committee of the House of Representatives in 1943:

> The rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on.[15]

Thus, the federal proxy authority is not intended to supplant state law, but rather to reinforce state law rights with a sturdy federal disclosure and proxy solicitation regime.

'fair' right of corporate suffrage"); Louis Loss & Joel Seligman, Securities Regulation 1936-37 (3d ed. 1990) (The Commission's "power under §14(a) is not necessarily limited to ensuring full disclosure. The statutory language is considerably more general than it is under the specific disclosure philosophy of the Securities Act of 1933").

13 E.g., Exchange Act Rule 14a-4 (17 CFR 240.14a-4), Exchange Act Rule 14a-7 (17 CFR 240.14a-7) and Exchange Act Rule 14a-8 (17 CFR 240.14a-8). Each specifies procedural requirements that companies must observe in soliciting proxies. Exchange Act Rule 14a-4(b)(2) requires that the form of proxy furnish the security holder with the means to withhold approval for the election of a director. Exchange Act Rule 14a-7 provides a procedure under which a security holder may be able to obtain a list of security holders. Exchange Act Rule 14a-8 provides a procedure under which a qualifying security holder can obligate the company to include certain types of proposals, along with statements in support of those proposals, in the company's proxy statement.

14 Roosevelt, 958 F.2d at 421.

15 Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong., 1st Sess., at 172 (1943) (testimony of SEC Chairman Ganson Purcell).



To that end, the Commission has sought to use its authority in a manner that does not conflict with the primary role of the states in establishing corporate governance rights. For example, Rule 14a-8, the shareholder proposal rule, explicitly provides that a shareholder proposal is not required to be included in a company's proxy materials if it "is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization."[16]

One of the key rights that shareholders have under state law is the right to appear in person at an annual or special meeting and, subject to compliance with applicable state law requirements and the requirements contained in the company's charter and bylaws, such as an advance notice bylaw, present their own proposals for a vote by shareholders at that meeting.[17] These proposals can relate to a wide variety of matters, including the nomination of the shareholders' own candidates for the election of directors.[18] Most shareholders, however, vote through the grant of a proxy before the meeting instead of attending the meeting to vote in person. Therefore, an important function of the proxy rules is to provide a mechanism for shareholders to present their proposals to other shareholders, and to permit shareholders to instruct their proxy how to vote on these proposals. Our regulations have been designed to facilitate the corporate proxy process so that it functions, as nearly as possible, as a replacement for an actual, in-person

16 17 CFR 240.14a-8(i)(1).

17 For example, Section 211(b) of the Delaware General Corporation Law permits any "proper business," in addition to the election of directors, to be conducted at an annual meeting of shareholders. In order to provide for an orderly period of solicitation before a meeting, many corporations have included provisions in their charter or bylaws to require advance notice of any shareholder resolutions, including nominations for director, to be presented at a meeting. See R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations & Business Organizations § 7.9 (4th ed. 2006).

18 Id.

gathering of security holders, thus enabling security holders "to control the corporation as effectively as they might have by attending a shareholder meeting."[19]

The Commission's proxy rules provide a means for shareholders to propose matters to other shareholders for a vote at an annual or special meeting. For example, under Rule 14a-8 a company must include in its proxy materials some proposals that shareholders could present at the annual or special meeting under state law. Other proposals can be included in proxy materials prepared by the shareholders themselves. In this regard, the proxy rules permit any shareholder to solicit votes for the election of a nominee to the board through a proxy solicitation by that shareholder. The proxy rules do not, however, require a company to include a shareholder's nominee for director in its proxy materials. Conversely, the proxy rules require the company to include in its proxy materials non-binding resolutions of eligible shareholders on subjects unrelated to the company's ordinary business unless the proposals fall within one of the substantive bases for exclusion in Rule 14a-8. The proposed amendments to the proxy rules discussed below address these matters.

**B. The Shareholder Proposal Process**

Rule 14a-8 creates a procedure under which shareholders, subject to certain requirements, may present in the company's proxy materials a broad range of binding and non-binding proposals, including non-binding proposals regarding matters that traditionally are within the province of the board and management. The rule permits a

[19] Business Roundtable, 905 F.2d at 410.



shareholder owning a relatively small amount of the company's shares[20] to submit his or her proposal to the company, and the rule requires the company to include the proposal alongside management's proposals in the company's proxy materials. For example, a proposal concerning a matter that under state law would not be a proper subject for shareholder action alone if it were cast as a binding proposal, may nonetheless be included in the company's proxy materials under Rule 14a-8 if it is cast as a recommendation or request that the board take specified action.[21] In all cases, the proposal may be excluded by the company if it fails to satisfy the rule's procedural requirements or falls within one of the rule's thirteen substantive categories of proposals that may be excluded.

Because the proxy process is meant to serve, as nearly as possible, as a replacement for an actual, in-person meeting of shareholders, it should facilitate proposals concerning only those subjects that could properly be brought before a meeting under the corporation's charter or bylaws and under state law. Most state corporation codes specify certain items of business that are required to be presented to the shareholders for a vote, such as the election of directors, and others that may or may not be brought to a vote, either in the discretion of the chair or as specified by the corporation's charter or bylaws.

[20] Exchange Act Rule 14a-8(b)(1) (17 CFR 240.14a-8(b)(1)) provides that a holder of at least $2,000 in market value, or 1% of the company's securities entitled to be voted, may submit a shareholder proposal subject to other procedural requirements and substantive bases for exclusion under the rule.

[21] State corporation statutes generally provide that the business of the corporation shall be managed by, or under the direction of, the board of directors.

With respect to the chair's discretion, in general state law provides that the order of business at a meeting of shareholders and the rules for the conduct of the meeting are determined by the chair, who is usually appointed as provided in the bylaws, or in the absence of such provision, by the board of directors.[22] In order to reinforce the state law rights and responsibilities of shareholders, therefore, the proxy rules should be neutral with respect to the manner in which meetings of shareholders are conducted, and should not interfere with the chair's ability to conduct the meeting in accordance with the requirements of state law and the corporation's governing documents.

With respect to subjects and procedures for shareholder votes that are specified by the corporation's governing documents, most state corporation laws provide that a corporation's charter or bylaws can specify the types of binding or non-binding proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting. Rule 14a-8(i)(1) supports these determinations by providing that a proposal that is violative of the corporation's governing documents may be excluded from the corporation's proxy materials.

Rule 14a-8 specifies that companies must notify the Commission when they intend to exclude a shareholder's proposal from their proxy materials. This notice goes to the staff of the Division of Corporation Finance. In the notice, the company provides the staff with a discussion of the basis or bases upon which the company intends to exclude the proposal and requests that the staff not recommend enforcement action if the

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[22] See, e.g., Section 7.08, Model Business Corporation Act. The Comment to this Section states that it is expected that the chair will not misuse the power to determine the order of business and to establish rules for the conduct of the meeting so as to unfairly foreclose the right of shareholders – subject to state law and the corporation's charter and bylaws – to raise items which are properly a subject for shareholder discussion or action at some point in the meeting prior to adjournment.



company excludes the proposal. A shareholder proponent may respond to the company's notice, but is not required to do so. Generally, the staff responds to each notice with a "no-action" letter to the company, a copy of which is provided to the shareholder, in which the staff either concurs or declines to concur with the company's view that there is a basis for excluding the proposal.[23]

Each proxy season, the Division of Corporation Finance responds to hundreds of these no-action requests.[24] Although the Commission itself is not directly involved in responding to no-action requests, where a matter involves "substantial importance and where the issues are novel or highly complex," the Division may present an issue to the Commission for review – either at the Division's own instance or at the request of the company or the shareholder proponent.[25] Rule 14a-8 thus places the Commission's staff at the center of frequent disputes over whether a proposal must be included in the company's proxy materials.

**C. Commission Review of the Proxy Process**

In meeting the Commission's statutory obligation under Section 14(a) of the Exchange Act, this agency has monitored the development of the proxy process closely since 1934. Over the decades, we have made numerous improvements and refinements

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[23] The staff's response is an informal expression of its views, and does not necessarily reflect the view of the Commission. Either the shareholder proponent or the company may obtain a decision on the excludability of a challenged proposal from a federal court.

[24] During the 2006-2007 proxy season, the Division of Corporation Finance responded to approximately 360 Exchange Act Rule 14a-8 no-action requests. To respond to these requests, each proxy season the Division assembles a task force of attorneys who work full-time on the project from approximately January through April of each year.

[25] 17 CFR 202.1(d).

to the proxy rules based upon practical experience and the needs of investors.[26] This ongoing evaluation of the proxy process leads us to consider changes whenever it appears that the process can be improved to better promote the interests of investors, the efficient functioning of the capital markets, and the health of capital formation.

In 2003, the Commission directed the Division of Corporation Finance to review the proxy rules regarding procedures for the election of corporate directors and provide the Commission with recommendations regarding possible changes to the proxy rules. Following the Division's review of the proxy rules, the Commission proposed a comprehensive new set of rules, based on the Division's recommendations, which would have governed shareholder director nominations that are not control-related.[27] In connection with the rulemaking concerning shareholder director nominations, the Commission held a roundtable regarding the topic of shareholder director nominations generally, and more specifically, the shareholder director nominations release.[28] The Commission also proposed and adopted a new set of disclosure standards concerning director nominations and communications between shareholders and companies.[29]

More recently, the Commission held three roundtables in May 2007. This series of roundtables began with a re-examination of the fundamental principles of federalism

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[26] As long ago as 1940, observers noted that "[t]he history of [C]ommission regulation pursuant to authority granted in Section 14 of the Securities Exchange Act has been one of careful expansion based upon experience and demonstrated needs." Sheldon E. Bernstein & Henry G. Fischer, The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy, 7 U. Chi. L. Rev. 226, 228 (1940).

[27] Exchange Act Release 34-48626 (Oct. 14, 2003).

[28] Security Holder Director Nominations Roundtable (March 10, 2004).

[29] Exchange Act Release 34-48825 (Nov. 24, 2003).





that provide the context for our role under Section 14(a) of the Exchange Act. Specifically, the roundtables focused on the relationship between the federal proxy rules and state corporation law,[30] proxy voting mechanics,[31] and the evolution of both binding and non-binding shareholder proposals within the framework of the federal proxy rules.[32]

Roundtable participants argued that, in contrast to the current operation of the federal proxy rules, the federal role should be to facilitate shareholders' exercise of their fundamental state law and company ownership rights to elect the board of directors.[33] Some participants also observed that recent technological developments may provide promising possibilities for additional, complementary means for shareholders to interact and communicate with the management and the board of directors of the company that could be more effective and more efficient.[34] Participants generally agreed that enhanced

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[30] Roundtable on the Federal Proxy Rules and State Corporation Law (May 7, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are available on-line at http://www.sec.gov/spotlight/proxyprocess.htm.

[31] Roundtable on Proxy Voting Mechanics (May 24, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are available on-line at http://www.sec.gov/spotlight/proxyprocess.htm.

[32] Roundtable on Proposals of Shareholders (May 25, 2007). Materials related to the roundtable, including an archived broadcast and a transcript of the roundtable, are available on-line at http://www.sec.gov/spotlight/proxyprocess.htm.

[33] See, e.g., R. Franklin Balotti, Director, Richards, Layton & Finger, P.A, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 14-17; Leo E. Strine, Jr., Vice Chancellor, Court of Chancery of the State of Delaware, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 18-23; Stanley Keller, Edwards Angell Palmer & Dodge LLP, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 142-143.

[34] See, e.g., Stanley Keller, Edwards Angell Palmer & Dodge LLP, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 152-154.

disclosure should accompany any changes the Commission might propose so that shareholders can make fully informed voting decisions.[35]

In light of these issues and developments, the Commission is proposing that the current proxy rules and related disclosure requirements be revised and updated to more effectively serve the essential purpose of facilitating the exercise of shareholders' rights under state law.

## II. Proposed Amendments to the Proxy Rules and Related Disclosure Requirements

We are proposing changes to Rule 14a-8 that would facilitate shareholders' exercise of their state law rights to propose bylaw amendments concerning shareholder nominations of directors. Additionally, we are proposing amendments to the proxy rules to make clear that director nominations made pursuant to any such bylaw provisions would be subject to the disclosure requirements currently applicable to proxy contests. These proposed amendments are intended to align the Commission's shareholder proposal rule more closely with the underlying state law rights of shareholders.

As discussed above, in addition to governing the procedure for soliciting proxies, a primary purpose of the federal proxy rules is to provide shareholders with full disclosure of all information for the exercise of their voting rights under state law and the corporation's charter. The amendments we propose today are designed to provide shareholders with additional disclosure to allow for better-informed voting decisions.

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[35] See, e.g., Roberta Romano, Yale Law School, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 26-27; Stephen P. Lamb, Vice Chancellor, Court of Chancery of the State of Delaware, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 123-125.



This additional disclosure is of great importance to informed voting decisions both when shareholders are presented with proposed bylaw amendments and when shareholders are presented with nominees for director submitted under the company's bylaws. As such, we are proposing amendments to Schedule 13G and Schedule 14A that would enhance the disclosure of information about the proponents of bylaw amendments concerning the nomination of directors, about any shareholders that submit director nominees under any adopted bylaw, and about any director nominee that is submitted by a shareholder under such a bylaw.

### A. Proposed Amendments Concerning Bylaw Proposals for Shareholder Nominations of Directors

#### 1. Background Regarding the Election Exclusion in Rule 14a-8(i)(8)

Rule 14a-8(i)(8) sets forth one of several substantive bases upon which a company may exclude a shareholder proposal from its proxy materials. Specifically, it provides that a company need not include a proposal that "relates to an election for membership on the company's board of directors or analogous governing body." The purpose of this provision is to prevent the circumvention of other proxy rules that are carefully crafted to ensure that investors receive adequate disclosure and an opportunity to make informed voting decisions in election contests. Last year, the U.S. Court of Appeals for the Second Circuit, in American Federation of State, County and Municipal Employees, Employees Pension Plan v. American International Group, Inc.,[36] held that AIG could not rely on Rule 14a-8(i)(8) to exclude a shareholder bylaw proposal under which the company would be required, under specified circumstances, to include

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[36] 462 F.3d 121 (2d Cir. 2006) (AFSCME).

shareholder nominees for director in the company's proxy materials at subsequent meetings.

The effect of the AFSCME decision was to permit both the bylaw proposal and, had the bylaw been adopted, subsequent election contests conducted under it, to be included in the company's proxy materials, but without compliance with the disclosure requirements of Rule 14a-12 solicitations. Because of the importance that we attach to the provision of meaningful disclosure to investors in election contests, we are revisiting the provisions of Rule 14a-8 in light of the AFSCME decision with a proposal that is designed to ensure that this objective is consistently achieved.

Since the AFSCME case was decided last year, the Commission has undertaken a thorough review of the proxy process. That review, including three recent roundtables on the topic, has led us to conclude that the federal proxy rules can be better aligned with shareholders' fundamental state law rights to nominate and elect directors. At the same time, the vindication of these state law rights must be accomplished in a way that accommodates the abiding federal interest in the full and fair disclosure to shareholders of information that is material to a contested election. This is the policy interest, grounded firmly in Section 14 of the Securities Exchange Act of 1934, that underlies the election exclusion of Rule 14a-8(i)(8).

To achieve the mutually reinforcing objectives of vindicating shareholders' state law rights to nominate directors, on the one hand, and ensuring full disclosure in election contests, on the other hand, we are proposing revisions to Rule 14a-8(i)(8) that would permit a shareholder who makes full disclosure in connection with a bylaw proposal for director nomination procedures, including a proposal such as that in the AFSCME case,



to have that proposal included in the company's proxy materials.[37] The basis for the disclosure that we are proposing is the familiar Schedule 13G regime, under which certain passive investors that beneficially own more than 5% of a company's securities, report their ownership of a company's securities. We believe that using this well-understood system of disclosure should reduce compliance costs for companies and shareholders. In addition, because shareholders eligible to file under Schedule 13G must not have acquired or held their securities for the purpose of or with the effect of changing or influencing the control of the company, the opportunity to use Rule 14a-8 to inappropriately circumvent the disclosure and procedural regulations that are intended to apply in contested elections should be minimized.

Under the proposed amendments, if the proponents of a bylaw to establish a procedure for shareholder nominations of directors do not meet both the threshold for required filing on Schedule 13G, and the eligibility requirements to file on Schedule 13G, the proposal could then be excluded from the company's proxy materials under Rule 14a-8(i)(8). In this way, shareholders will be guaranteed the disclosure necessary to evaluate such proposals.

In light of the need for full disclosure where the possibility of control over a company is present, we believe that our decision to link the ability to include a bylaw proposal for director nominations in a company's proxy materials to the 5% threshold set by Section 13(d) of the Exchange Act addresses the basic policy concerns previously articulated by both Congress and the Commission. Moreover, because the proposed expansion of shareholders' ability to submit proposals under Rule 14a-8 would be limited

[37] See proposed revision to Exchange Act Rule 14a-8(i)(8).

to specific situations in which shareholders would be assured of appropriate disclosure and procedural protections, if the proposal did not meet the eligibility requirements of the amended rule, the Commission's staff would continue to interpret the rule to permit companies to exclude the proposal.

We believe that the amendments we are proposing today, including the amendments to the language of the election exclusion, will provide clarity and certainty in this area. We also believe they will facilitate shareholders' exercise of their state law rights to propose amendments to company bylaws concerning director nominations.

**2. Proposed Amendment to Rule 14a-8(i)(8) Concerning Bylaw Amendments on Procedures for Shareholder Nominations of Directors**

We are proposing an amendment to Rule 14a-8(i)(8)[38] that would enable shareholders to have their proposals for bylaw amendments regarding the procedures for nominating directors included in the company's proxy materials. Such a bylaw proposal would be required to be included in the company's proxy materials if:

- The shareholder (or group of shareholders) that submits the proposal is eligible to file a Schedule 13G and files a Schedule 13G that includes specified public disclosures regarding its background and its interactions with the company;[39]
- The proposal is submitted by a shareholder (or group of shareholders) that has continuously beneficially owned more than 5% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the shareholder submits the proposal;[40] and
- The proposal otherwise satisfies the requirements of Rule 14a-8.[41]

As amended, Rule 14a-8 would allow proponents of bylaw proposals to offer shareholder nomination procedures as they see fit. The only substantive limitations on such procedures would be those imposed by state law or the company's charter and bylaws. For example, the procedure could specify a minimum level of share ownership for those making director nominations that would be included in the company's proxy materials; it could specify the number of director slots subject to the procedure; or it could prescribe a method for the allocation of any costs – so long as both the form and substance of any such requirements were consistent with applicable state law and the company's charter and existing bylaw provisions. Likewise, the voting threshold required in order to adopt the bylaw would be determined by the thresholds set forth by state law or in the company's charter and bylaws with respect to the adoption of bylaws or bylaw amendments.[42]

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38 See proposed revision to paragraph (i)(8) of Exchange Act Rule 14a-8.

39 The eligibility to file a Schedule 13G generally is available only for persons who have acquired and continue to hold the securities beneficially owned without "a purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect." See Rule 13d-1(e). Although proposing a bylaw amendment pursuant to proposed Rule 14a-8(i)(8) would not on its own eliminate the ability to file a Schedule 13G, a determination of whether a proposing shareholder is eligible to file a Schedule 13G will continue to be based on the specific facts and circumstances accompanying the activities of the proposing shareholder. See Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854].

40 The one-year holding requirement would apply individually to each member of a group that is aggregating its security holdings to make a proposal.

41 To require a company to include the proposal in its proxy materials, the proposal would have to satisfy the procedural requirements of Exchange Act Rule 14a-8 and not fall within one of the other substantive bases for exclusion included in Exchange Act Rule 14a-8.

42 In the event the charter or bylaws are silent as to the voting threshold required, a company and its shareholders should look to the governing state corporation law. The staff of the Commission would not become involved in determining what this threshold is or whether it had been achieved. Interpretation and enforcement of any bylaw provision setting forth a procedure for shareholder director nominees to be included in the company's proxy materials would be the province of the appropriate state court since it would be a question of state law, not federal law. The staff of the Commission would not become involved in determining the correct interpretation or application of

The disclosure requirements and anti-fraud provisions of the federal proxy rules would, of course, apply to any solicitation of proxies conducted pursuant to a bylaw provision proposed and approved by shareholders. A shareholder proposal to establish bylaw procedures for shareholder nominations of directors would also be subject to any substantive bases for exclusion currently provided for in Rule 14a-8 that do not relate to an election for membership on the company's board of directors.

Shareholder proposals to amend the company's bylaws to establish a procedure for shareholder nominations of directors by proponents that do not meet the eligibility requirements of the proposed amendment to Rule 14a-8(i)(8) – including the requirements that the shareholder proponents have been more than 5% owners for at least one year and have filed a Schedule 13G – would be subject to exclusion.

We believe that the amendments we are proposing today will not only provide consistency and certainty in this area of Rule 14a-8, but also will provide shareholders the ability to have a greater voice in their company's corporate governance, consistent with their rights under state law.

**Request for Comment**

- As proposed, a bylaw proposal may be submitted by a shareholder (or group of shareholders) that is eligible to and has filed a Schedule 13G that includes specified public disclosures regarding its background and its interactions with the company, that has continuously held more than 5% of the company's securities for at least one year, and that otherwise satisfies the procedural requirements of Rule 14a-8 (e.g., holding the securities through the date of the annual meeting). Are these disclosure-related requirements for who may submit a proposal, including eligibility to file on Schedule 13G, appropriate? If not, what eligibility requirements and what disclosure regime would be appropriate?
  - For example, should the 5% ownership threshold be higher or lower, such as 1%, 3%, or 10%? Is the 5% level a significant barrier to shareholders making such proposals? Does the impediment imposed by this threshold depend on the size of the company? Should the ownership percentage depend on the size of the company? For example, should it be 1% for large accelerated filers, 3% for accelerated filers and 5% for all others? Should an ownership threshold be applicable at all?
  - If the eligibility requirement should be different from 5%, should we nonetheless require the filing of a Schedule 13G or otherwise require disclosure equivalent to a Schedule 13G?
  - The proposed one-year holding requirement is consistent with the existing holding period in Rule 14a-8(b)(1) to submit a shareholder proposal. Is it appropriate to limit use of the proposed rules to shareholder proponents that have held their securities for any length of time? If so, is the one-year period that we have proposed appropriate, or should the holding period be longer (e.g., two years or three years) or shorter than proposed (e.g., six months)? Why? With regard to the one-year holding requirement, is it appropriate to require that each member of a group of shareholders individually satisfy this holding requirement?

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an adopted bylaw provision. In addition, the staff of the Commission would not become involved in determining whether a bylaw provision was properly adopted.

- Shareholders of some companies, e.g., open-end management investment companies, are not eligible to file Schedule 13G because the securities of those companies are not defined as "equity securities" for purposes of Rule 13d-1, which governs the filing of Schedule 13G by beneficial owners of equity securities. Should we permit security holders of such companies to file a Schedule 13G for the purpose of relying upon proposed Rule 14a-8(i)(8) if the holder otherwise would be eligible to file a Schedule 13G but for the exclusion of the company's securities from the definition of "eligible security?" If we were to do this, what, if any, amendments would be required to Schedule 13G? Should we instead use an eligibility requirement, other than eligibility to file Schedule 13G, in Rule 14a-8(i)(8) for shareholders of companies whose securities are not "equity securities?"

- If a shareholder acquires shares with the intent to propose a bylaw amendment, could that be deemed to constitute an intent to influence control of the company and thus potentially bar them from filing on 13G? If so, should the Commission provide an exemption that would enable such a shareholder to file on Schedule 13G?
- Proposals to establish a procedure for shareholder nominees would be subject to the existing limit under Rule 14a-8 of 500 words in total for the proposal and supporting statement. Is this existing word limit sufficient for such a proposal? If not, what increased word limit would be appropriate?
- In seeking to form a group of shareholders to satisfy the 5% threshold, shareholders may seek to communicate with one another, thereby triggering application of the



proxy rules. In order not to impose an undue burden on such shareholders, should such communications be exempt from the proxy rules? If so, what should the parameters of any such exemption be?

- Is there any tension between the requirement in Schedule 13G that the securities not be acquired or held for the purpose of changing or influencing control of the company and the desire of the holder of such shares to propose a bylaw amendment seeking to establish procedures for including shareholder-nominated candidates to the board? Does the answer to this question depend on the number of candidates sought to be included in the proposal? If there is tension, should we establish a safe harbor of some kind?

### 3. Proposed Disclosure Requirements Related to Shareholder Proponents and Nominating Shareholders

#### a. Overview of Requirements Applicable to Shareholder Proponents

Under the revisions to Rule 14a-8 that we are proposing today, a company would be required to include in its proxy materials bylaw proposals to establish procedures governing shareholder nominations for director so long as the bylaw is consistent with state law and the company's charter and bylaws. To trigger that requirement, an essential element is that the shareholder (or group of shareholders) proposing the bylaw provide disclosure about its own background, intentions, and course of dealings with the company to enable other shareholders to vote intelligently on the proposal. This disclosure requirement is being implemented through proposed amendments to existing Schedule 13G and a new reporting requirement under proposed Item 24 of Regulation 14A.

The already significant role that full disclosure plays in our proxy rules is

rendered still more important when individual shareholders or groups of shareholders, who do not owe a fiduciary duty to the company or to other shareholders, use company assets and resources to propose changes in the company's governing documents. Our proposed amendments would require that certain information concerning proposals that could cause a fundamental change in the relationship between the company and its shareholders be placed before all shareholders entitled to vote. This information, in this context, includes background information on the shareholder proponent that other shareholders ordinarily would find to be important and relevant to a decision when asked to consider a proposed bylaw amendment setting forth procedures for director nominations. In addition, we believe that the use of such a proposal, or the possibility of such a proposal, to influence the company's management or board of directors to take or not to take other related or unrelated actions should be rendered transparent. It would be useful to the company's shareholders to know of any course of dealing between the shareholder proponent and the company when they are deciding how they will vote on the proposal. The additional Schedule 13G and Regulation 14A disclosure requirements that we are proposing address these concerns.

Therefore, we propose to require disclosure on Schedule 13G of significant background information regarding the shareholder proponent, as well as an extensive description of the course of dealing between the shareholder proponent and the company. In addition, we propose to require the company to disclose similar information with regard to the nature and extent of its relationships with the shareholder proponent. We believe that this additional disclosure will provide transparency to shareholders voting on such bylaw amendments.





Specifically, we are proposing that any shareholder (or group of shareholders) that forms any plans or proposals regarding an amendment to the company's bylaws[43] concerning shareholder director nominations, file or amend Schedule 13G to include the following information that would be required by new Item 8A, Item 8B, and Item 8C:

- the shareholder proponent's relationships with the company; and
- additional relevant background information on the shareholder proponent.

The shareholder proponent also would be required to amend its Schedule 13G to update this information as necessary.

To permit reliance on the existing disclosure scheme set forth in Regulation 13D, the proposed amendments to Rule 14a-8 will require shareholder bylaw proposals to be included in a company's proxy materials only if the shareholder proponent is subject to Regulation 13D and eligible to file on Schedule 13G.[44] Regulation 13D, which requires the disclosure of specified information in filings with the Commission on Schedule 13D, applies to persons that directly or indirectly beneficially own more than 5% of a class of voting equity securities registered pursuant to Section 12 of the Exchange Act.[45] Schedule 13G requires less disclosure than Schedule 13D and is available for use by

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[43] In this regard, the formation of any plans or proposals regarding an amendment to the company's bylaws would include the submission of a proposal to amend the company's bylaws, and discussions in which the shareholder indicated to management an intent to submit such a proposal or indicated an intent to refrain from submitting such a proposal conditioned on the taking or not taking of an action by the company. See proposed Note to Item 8A of Schedule 13G. In the proposed disclosure requirements, and in the following discussion of those proposed requirements, the term "shareholder proponent" refers to a person that has formed any plans or proposals regarding an amendment to the company's bylaws for a shareholder director nomination procedure; any affiliate, executive officer or agent acting on behalf of that person with respect to the plans or proposals; and anyone acting in concert with, or who has agreed to act in concert with, that person with respect to the plans or proposals. See proposed Item 8A(a) of Schedule 13G.

[44] See proposed revisions to paragraph (i)(8) of Rule 14a-8.

[45] See 17 CFR 240.13d-1.

persons who beneficially own more than 5% of a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act and who meet the criteria for one of three types of Schedule 13G filers.[46] Generally, persons, including groups and others who file on Schedule 13G must certify that the securities have not been acquired with the purpose nor with the effect of changing or influencing control of the company.[47]

The proposed amendments to Rule 14a-8 and Schedule 13G, which would enable a shareholder that had provided specified disclosures to propose a bylaw amendment, would apply to a shareholder (or group of shareholders) that:

- has continuously held more than 5% of the company's shares entitled to be voted on the proposal for at least one year as of the date of submitting the proposal;
- was eligible to file a report of beneficial ownership on Schedule 13G; and
- has filed a report of beneficial ownership on Schedule 13G, or an amendment thereto, that includes information about the shareholder or group's background and relationships with the company.

The requirement that a shareholder or group of shareholders hold more than 5% of the company's shares entitled to be voted on the proposal corresponds with the filing requirement on Schedule 13G for beneficial owners of more than 5% of a company's

[46] Regulation 13D permits filing on Schedule 13G for a specified list of qualified institutional investors who have acquired the securities in the ordinary course of their business and not with the purpose nor the effect of changing or influencing control of the company. See Exchange Act Rule 13d-1(b) (17 CFR 240.13d-1(b)). In addition, persons who are beneficial owners of more than 5% of a class of equity securities may file Schedule 13G, if they have not acquired the securities with the purpose nor with the effect of changing or influencing control of the company, and if they are not directly or indirectly the beneficial owner of 20% or more of the class of securities. See Exchange Act Rule 13d-1(c) (17 CFR 240.13d-1(c)). Finally, certain persons may file a Schedule 13G, in lieu of Schedule 13D, if they qualify under Exchange Act Section 13(d)(6) or Rule 13d-1(d) (17 CFR 240.13d-1(d)).

[47] Reports of beneficial ownership filed on Schedule 13G pursuant to Rule 13d-1(d) are not required to make this certification.



shares, and facilitates the provision of the additional disclosures concerning the shareholder proponent that the amendments to Rule 14a-8 would require. The proposed requirement that the shares be continuously held for at least one year as of the date of submitting the proposal has the additional benefit of ensuring that proposals are made by shareholders with a significant long-term stake in the company, and it is consistent with the current requirement in Rule 14a-8 that has worked well historically. The proposed requirement that the shareholder (or group of shareholders) be eligible to report on Schedule 13G would not only ensure that they are subject to the disclosure requirements of the Williams Act, but also that their shares were not acquired and are not held with the purpose or effect of changing or influencing control of the company.

**b. Proposed New Item 8B of Schedule 13G**

A shareholder proponent may have a variety of relationships with the company. Because these relationships will often be relevant to an informed decision by other shareholders as to whether to vote in favor of a proposed bylaw amendment, disclosure of information concerning the proposal should include information about such relationships. Accordingly, we are proposing to add a new Item 8B to Schedule 13G concerning the nature and extent of relationships between the shareholder proponent and the company.[48] As proposed, new Item 8B disclosure would include:

- any direct or indirect interest of the shareholder proponent in any contract with the company or any affiliate of the company (including any employment

[48] In proposed Item 8A of Schedule 13G we define a shareholder proponent to include a person or group that has formed any plans or proposals with regard to the amendment, any affiliate, executive officer, or agent of such shareholder proponent, or anyone acting in concert with, or who has agreed to act in concert with such shareholder proponent with respect to the proposed bylaw amendment.

agreement, collective bargaining agreement, or consulting agreement);

- any pending or threatened litigation in which the shareholder proponent is a party or a material participant, involving the company, any of its officers or directors, or any affiliate of the company; and
- any other material relationship between the shareholder proponent and the company or any affiliate of the company not otherwise disclosed.[49]

Additionally, Item 8B would require a shareholder proponent to describe the following items that occurred during the 12 months prior to the formation of any plans or proposals, or during the pendency of any proposal or nomination:

- any material transaction of the shareholder proponent with the company or any affiliate of the company; and
- any discussion regarding the proposal between the shareholder proponent and a proxy advisory firm.

As proposed, new Item 8B also would require disclosure of any holdings of more than 5% of the securities of any competitor of the company, including the number and percentage of securities owned, as of the date the shareholder proponent first formed a plan or proposal regarding an amendment to the company bylaws in accordance with Rule 14a-8(i)(8).[50] The shareholder proponent also would be required to disclose any material relationship with any competitor other than as a security holder, as of the date the shareholder proponent first formed a plan or proposal regarding an amendment to the

[49] A material relationship between the proponent and the company or an affiliate of the company may include, but is not limited to, a current or prior employment relationship, including consulting arrangements.

[50] For this purpose, a "competitor" of the company is proposed to include any enterprise with the same Standard Industrial Classification code.



company bylaws in accordance with Rule 14a-8(i)(8).

Finally, new Item 8B would require disclosure regarding any meetings or contacts, including direct or indirect communication by the shareholder proponent, with the management or directors of the company that occurred during the 12-month period prior to the formation of any plans or proposals, or during the pendency of any proposal. The proposed disclosure would provide:

- a description, in reasonable detail, of the content of such direct or indirect communication;
- a description of the action or actions sought to be taken or not taken;
- the date of the communication;
- the person or persons to whom the communication was made;
- whether that communication included any reference to the possibility of such a proposal; and
- any response by the company or its representatives to that communication prior to the date of filing the required disclosure.

To the extent that the shareholder proponent and management or the directors of the company have an ongoing dialogue, the shareholder proponent may describe the frequency of the meetings and the subjects covered at the meetings rather than providing the information separately for each meeting. However, if an event or discussion occurred at a specific meeting that is material to the shareholder proponent's decision to submit a proposal, that meeting would be required to be discussed in detail separately.

**c. Proposed New Item 8C of Schedule 13G**

When a shareholder (or group of shareholders) proposes a bylaw amendment

regarding the procedures for nominating directors, background information regarding the proposing shareholder often will be relevant to an informed voting decision by the other shareholders. Accordingly, we are proposing to add a new Item 8C to Schedule 13G concerning the following information about the shareholder proponent:

- If the shareholder proponent is not a natural person:
  - The identity of the natural person or persons associated with the entity responsible for the formation of any plans or proposals;
  - The manner in which such person or persons were selected, including a discussion of whether or not the equity holders or other beneficiaries of the shareholder proponent entity played any role in the selection of such person or persons, and whether they played any role in connection with the formation of any plans or proposals;
  - Any fiduciary duty to the equity holders or other beneficiaries of the entity that the person or persons associated with the entity responsible for the formation of any plans or proposals have in forming such plans or proposals;
  - The qualifications and background of such person or persons relevant to the plans or proposals; and
  - Any interests or relationships of such person or persons, and of that entity, that are not shared generally by the other shareholders of the company and that could have influenced the decision by such person or persons and the entity to submit a proposal.
- If the shareholder proponent is a natural person:
  - The qualifications and background of such person or persons relevant to the





plans or proposals; and
  - Any interests or relationships of such person or persons that are not shared generally by the other shareholders of the company and that could have influenced the decision by such person or persons to submit a proposal.

With regard to these disclosures, examples of any interests or relationships of the shareholder proponent not shared by other shareholders of the company may include, but are not limited to, contractual arrangements, current or previous employment with the company, employment agreements, consulting agreements, and supplier or customer relationships.

**d. Proposed New Item 24 to Schedule 14A**

Because a shareholder proponent's relationships with the company often will be relevant to an informed voting decision by other shareholders, background information regarding these relationships should be disclosed not only by the shareholder proponent, but also the company. Accordingly, we are proposing to add a new Item 24 to Schedule 14A to require the disclosure by the company of the nature and extent of the relationship between the shareholder proponent, any affiliate, executive officer or agent of the shareholder proponent, or anyone acting in concert with, or who has agreed to act in concert with, the shareholder proponent with respect to the proposed bylaw amendment submitted in accordance with Rule 14a-8(i)(8), on the one hand, and the company, on the other. Item 24 disclosures would include:

- any direct or indirect interest of the shareholder proponent in any contract with the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);

- any pending or threatened litigation in which the shareholder proponent is a party or a material participant, involving the company, any of its officers or directors, or any affiliate of the company; and
- any other material relationship between the shareholder proponent and the company or any affiliate of the company not otherwise disclosed.

Additionally, Item 24 of Schedule 14A would require disclosure of the following with respect to the 12 months prior to the shareholder proponent forming any plans or proposals, or during the pendency of any proposal, regarding an amendment to the company bylaws in accordance with Rule 14a-8(i)(8):

- any material transaction of the shareholder proponent with the company or any affiliate of the company; and
- any meetings or contacts between the shareholder proponent and management or directors of the company.[51]

As with the shareholder proponent requirement, to the extent that the shareholder proponent and management or directors of the company have an ongoing dialogue, the company would be required to merely describe the frequency of and the subjects covered at the meetings, except where an event or discussion occurred that is material to the shareholder proponent's decision to submit a proposal.

For purposes of meeting these proposed disclosure requirements, the company

[51] As with the corresponding disclosure requirement for shareholder proponents, the proposed disclosures would include: a description, in reasonable detail, of the content of such direct or indirect communication; a description of the action or actions sought to be taken or not taken; the date of the communication; the person or persons to whom the communication was made; whether that communication included any reference to the possibility of such a proposal; and any response by the company or its representatives to that communication prior to the date of filing the required disclosure. See proposed Item 24(d)(2) of Schedule 14A.



would be entitled to rely on the Schedule 13G disclosures of the shareholder proponent concerning the date on which the shareholder proponent formed any plans or proposals regarding an amendment to the company bylaws in accordance with Rule 14a-8(i)(8).

**Request for Comment**

- The proposed disclosure standards relate to the qualifications of the shareholder proponent, any relationships between the shareholder proponent and the company, and any efforts to influence the decisions of the company's management or board of directors. To assure that the quality of disclosure is sufficient to provide information that is useful to shareholders in making their voting decisions and to limit the potential for boilerplate disclosure, we have proposed that the disclosure standards require specific information concerning these qualifications, relationships, and efforts to influence the company's management or board of directors. Is the proposed level of required disclosure appropriate? Are any of the proposed disclosure requirements unnecessary to shareholders' ability to make an informed voting decision? If so, which specific requirements are not necessary? Should we require substantially similar disclosure from both the proponent and the company as proposed or should the company be allowed to avoid duplicating disclosure relating to the proponent where the company agrees with the disclosure provided? Is any additional disclosure appropriate?
- We solicit comments with respect to any other types of background information regarding a shareholder proponent that should be disclosed in Schedule 13G or Item 24 of Schedule 14A. What other types of information do shareholders need to have about the shareholder proponent, or the shareholder proponent's course of dealing

with the company, when voting on a proposal?

- Would the proposed Schedule 13G disclosure requirements for shareholder proponents be useful to other shareholders in forming their voting decisions? Are the requirements practical? Is any aspect of the proposed disclosure overly burdensome for shareholder proponents to comply with?
- As proposed, shareholder proponents would be required to disclose discussions with a proxy advisory firm prior to submitting a proposal. Is this disclosure requirement appropriate? Why or why not?
- We also propose that companies would be responsible for disclosure regarding their relationships and course of dealing with the shareholder proponent in Item 24 of Schedule 14A. Is this proposed additional disclosure useful? Would any aspect of this disclosure requirement be impractical or overly burdensome?
- As proposed, the disclosures concerning the shareholder proponent and company's relationship must be provided for the 12 months prior to forming any plans or proposals, or during the pendency of any proposals, with regard to an amendment to the company bylaws. Is this the appropriate timeframe? If not, should the timeframe be shorter (e.g., 6 or 9 months) or longer (e.g.,18 or 24 months)? Is any federal holding period requirement appropriate?
- Is the proposed reliance on the existing Schedule 13G framework appropriate? Should we require the type of disclosure found in Schedule 13G, but nevertheless permit a shareholder who holds less than 5% of a company's shares to file a Schedule 13G and to submit bylaw proposals of the type described herein? Is there another





disclosure provision in the federal securities laws with a lesser ownership requirement that would more appropriate upon which to rely?

- Is it appropriate to require any additional disclosure by shareholders and/or the company, beyond what is currently required, in connection with a proposed amendment to the company's bylaws in accordance with proposed Rule 14a-8(i)(8)? Rather, should we require disclosure only when a shareholder actually seeks to nominate a director using a nominating procedure established pursuant to a company's bylaws?

**e. Disclosure by Nominating Shareholders – Proposed New Rule 14a-17**

One of our primary concerns with using Rule 14a-8 to nominate or establish a procedure for shareholders to nominate a candidate for director is that doing so could result in shareholders being asked to vote on a director nominee without the disclosure that otherwise would be required under the federal proxy rules applicable to elections involving solicitations in opposition to the company's nominees. To address this concern, we are proposing a new Rule 14a-17 that would provide that the existing disclosure requirements for solicitations in opposition (either for a short slate or for a majority of board seats) would apply to nominating shareholders and their nominees under any shareholder nomination procedure.[52] These disclosure requirements are found in Item 4(b), Item 5(b), Item 7, and Item 22(b) of Schedule 14A, and provide basic information regarding the nominating shareholder (or shareholder group) and nominee or nominees, including biography and shareholdings, other interests of the individuals (or

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[52] See proposed Exchange Act Rule 14a-17(c).

group), methods and costs of the solicitation, and other information to enable voting shareholders to make an informed decision.

Because the shareholder nominee would be included in the company's proxy materials, the company would be required to include the disclosure in its proxy statement or, in the Internet version of its proxy statement, to link to a website address where those disclosures would appear. The nominating shareholder would be responsible for providing the information to the company.[53] Further, the nominating shareholder would be required to provide a statement that the shareholder nominee consented to being named in the proxy materials and to serve if elected.[54] Finally, a company would not be required to include a nominating shareholder's nominee in its proxy materials if the shareholder fails to provide the information required by proposed Rule 14a-17(b)-(c).[55]

**f. Liability for, and Incorporation by Reference of, Information Provided by the Nominating Shareholder**

It is our intent that a shareholder who nominates a director under a bylaw provision concerning the nomination of directors would be liable for any materially false or misleading statements in the disclosure provided to the company and included by the company in its proxy materials. The proposed rules contain express language, modeled on Exchange Act Rule 14a-8(l)(2),[56] providing that the company would not be responsible for that disclosure.[57] In addition, it is our intention that any information that is provided to the company for inclusion in its proxy materials by the nominating shareholder and included in the company's proxy statement would not be incorporated by reference into any filing under the Securities Act or the Exchange Act unless the company determines to incorporate that information by reference specifically into that filing.[58] However, to the extent the company does so incorporate that information by reference, we would consider the company's disclosure of that information as the company's own statement for purposes of the anti-fraud and civil liability provisions of the Securities Act or the Exchange Act, as applicable.

**g. Filing Requirements**

When, in accordance with a shareholder nomination bylaw procedure, a shareholder nominates a candidate for director, the company would be required to file its proxy statement in preliminary rather than definitive form, in the same manner as under the existing proxy rules applicable to proxy contests.[59] This is the same result that would be obtained in a traditional contested election in which the shareholder nominees appeared in a separate proxy statement.

It is possible that either the company or a nominating shareholder (or group of shareholders) may wish to solicit in favor of their nominee or nominees outside the company proxy materials. As in a traditional contested election, it is important that any

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53 Id.

54 See Exchange Act Rule 14a-4(d)(4) (17 CFR 240.14a-4(d)(4)). The rule provides that such consent is required in order for a person to be named in the proxy statement as a bona fide nominee.

55 See proposed Exchange Act Rule 14a-17(d).

56 17 CFR 240.14a-8(l)(2). Exchange Act Rule 14a-8(l)(2) applies with respect to proposals and supporting statements that are submitted by shareholders and then required to be repeated in the company's proxy materials by Exchange Act Rule 14a-8. In this regard, Exchange Act Rule 14a-8 states that "the company is not responsible for the contents of [the shareholder proponent's] proposal or supporting statement."

57 See proposed Exchange Act Rule 14a-17(e).

58 See proposed Exchange Act Rule 14a-17(f).

59 See proposed amendment to Exchange Act Rule 14a-6.

soliciting materials in addition to the proxy statement be filed publicly with the Commission so that such materials are available to all shareholders, to the company, and to the Commission staff for review. Accordingly, where a shareholder or company chooses to solicit outside the company proxy materials, we intend that the existing filing requirements applicable to definitive additional soliciting materials would apply.[60] Under these requirements, all soliciting materials are required to be filed with the Commission in the same form as the materials sent to shareholders no later than the date they are first sent or given to shareholders.[61]

**h. Proposed New Rule 14a-17(b)-(c) and Item 25 of Schedule 14A**

As noted above, one of the primary concerns with using Rule 14a-8 to establish a procedure for shareholders to nominate directors is that doing so would not provide shareholders with disclosure they otherwise would be given in a proxy contest. In this regard, we note that it is of substantial importance to provide shareholders with clear, transparent disclosure regarding any shareholder or group of shareholders using a nominating procedure established pursuant to a company's bylaws to nominate a candidate for director. Therefore, the additional disclosures that are proposed to be added to Schedule 13G for shareholder proponents of a bylaw amendment concerning shareholder director nominations also would apply to a nominating shareholder under an adopted bylaw. In this regard, we are proposing to add new Rule 14a-17(b), which would require any nominating shareholder to provide to the company the disclosures required by

[60] See Exchange Act Rule 14a-6(b) (17 CFR 240.14a-6(b)) and Exchange Act Rule 14a-12 (17 CFR 240.14a-12).

[61] Id.



Item 8A, Item 8B, and Item 8C of Schedule 13G.[62] These disclosures would be required at the time the shareholder forms any plans or proposals with respect to submission of a nominee for director to the company for inclusion in the proxy materials.[63] Immediately after the nominating shareholder provides the company with the disclosure, under Rule 14a-17(c), the company would be required to provide the information on its website or provide a link on its website to a website address where the disclosure would appear. In addition, pursuant to Item 25 of Schedule 14A, the company would be required to include the disclosure in its proxy statement or provide a link to a website address where the disclosure would appear in the Internet version of its proxy statement. Under Rule 14a-17(d), if a nominating shareholder fails to provide the required information, the shareholder's nominee will not be required to be included in the company's proxy materials.

**Request for Comment**

- As proposed, a nominating shareholder would be required to provide to the company, for inclusion in the company's proxy materials, disclosure responsive to Item 8A, Item 8B, and Item 8C of Schedule 13G, as well as Item 4(b), Item 5(b), Item 7, and Item 22(b) of Schedule 14A, as applicable. Is this the appropriate type and amount of disclosure for a nomination under a shareholder nomination procedure? If not, what

[62] In this regard, it is important to note that a shareholder director nomination bylaw may establish any ownership threshold for nominating a director. Because we believe that the disclosure required by these items is important for an informed voting decision by shareholders, we are proposing new Item 25 of Schedule 14A in order to provide complete disclosure regarding nominating shareholders utilizing procedures established in bylaw amendments that allow for nominations by shareholders.

[63] We have proposed a Note to Exchange Act Rule 14a-17(a) stating that the formation of any plans or proposals includes instances where the shareholder has indicated an intent to management to submit a nomination or has indicated an intent to management to refrain from submitting a nomination conditioned on the taking or not taking of a corporate action.

disclosure requirement would be appropriate? Is the timing requirement for providing this disclosure appropriate? If not, when should such disclosures be provided?

- Is it appropriate for the disclosure to be provided to the company for inclusion on its website and in its proxy materials, or should the shareholder instead be responsible for filing the information provided that they beneficially own more than 5% of the company's securities entitled to be voted and are eligible to file on Schedule 13G?
- Does the proposal make sufficiently clear that the nominating shareholder would be responsible for the information submitted to the company? Should the proposal include language addressing a company's responsibility for including statements made by the shareholder that it knows are not accurate?
- Should information provided by a nominating shareholder be deemed incorporated by reference into Securities Act or Exchange Act filings? If so, why?
- Should companies that receive a nomination for director from a shareholder be required to file their proxy statement in preliminary form, as is proposed? If not, why would it be appropriate for companies to file directly in definitive form?
- Should solicitations in favor of or against a nominee for director, by either the company or the shareholder, be filed as definitive additional soliciting materials on the date of first use, as is proposed? If not, how should such materials be filed?
- As proposed, a nominating shareholder would be required to provide the information required by Item 8A, Item 8B and Item 8C of Schedule 13G to the company for inclusion on the company's website and in its proxy. Would it be appropriate to add a disclosure requirement on Form 8-K that would apply where a company does not





maintain a website? Would it be appropriate to allow a company to choose between website disclosure and Form 8-K disclosure even where a company maintains a website? Why or why not?

- Is there disclosure other than that proposed concerning shareholder nominees that would be material to investors? If so, what are those disclosures and why would they be material? For example, should we require disclosure regarding the relationship between the nominating shareholder and shareholder nominee? If so, what disclosures would be appropriate and useful to shareholders?

**B. Electronic Shareholder Forums**

**1. Background**

The Commission's recent series of roundtables on the proxy process considered, among other issues, the role of technology in facilitating communications not only between shareholders and companies, but also among shareholders. Given the opportunities for collaborative discussion afforded by the Internet and related technological innovations, the proxy mechanism by comparison offers limited opportunities – usually only the annual meeting – for shareholders to provide advice to management. Accordingly, the proxy system may not be the only, or the most efficient, means of shareholder communication with management on purely advisory matters.

Alternatives or supplements to the proxy machinery that exploit the advantages of telecommunications technology have been suggested that could offer shareholders other means to communicate, including with regard to resolutions such as those typically submitted as non-binding proposals under Rule 14a-8. For example, an online forum, restricted to shareholders of the company whose anonymity is protected through

encrypted unique identifiers, could offer the opportunity for shareholders to discuss among themselves the subjects that most concern them, and which today are considered – if at all – only indirectly through the proxy process. Shareholder expressions of interest on particular suggested actions, tabulated based on their ownership interest, could be determined on a real-time basis. The company could use the form to provide information, such as a copy of press release information regarding record dates and expression of views by the company. Moreover, the opportunity for this enhanced level of shareholder participation could be extended throughout the year, rather than only at annual meetings. From the company's standpoint, such a shareholder forum could provide more frequent information about the interests and concerns of investors.

We are not seeking, through the proxy rules or otherwise, to devise an approved regulatory version of an electronic shareholder forum. Myriad uses of the Internet to facilitate shareholder communication are already well under way, and as technology continues to develop, individuals and entities will find increasingly creative ways to address the challenges they face in presenting proposals to companies, determining support for proposals among other shareholders, conducting referenda on non-binding proposals, and organizing online petitions to management, among other potential activities. The Commission strongly encourages these developments. Rather than prescribe any specific approach to an online shareholder forum in the proxy rules, the proposed amendment is designed to remove any unnecessary real and perceived impediments to continued private sector experimentation and use of the Internet for communication among shareholders, and between shareholders and their company.

**2. Proposed Amendment to Facilitate the Use of Electronic Shareholder Forums**





We propose to facilitate greater online interaction among shareholders by removing obstacles in the current rules to the use of an electronic shareholder forum. To facilitate the establishment of such forums, which can be conducted and maintained in any number of ways, we propose to clarify that a company is not liable for independent statements by shareholders on a company's electronic shareholder forum. In addition, in order to enhance the efficacy of the forum, we propose to address any ambiguity concerning whether use of an electronic shareholder forum could constitute a proxy solicitation.

Proposed Rule 14a-18(a) would make clear that both companies and shareholders are entitled to establish and maintain an electronic shareholder forum under the federal securities laws, provided that the forum is conducted in compliance with the federal securities laws, applicable state law, and the company's charter and bylaws. While the proxy rules currently do not prohibit or delimit such activities, neither were they written in contemplation of the wide-ranging communications potential of the Internet. By addressing specific concerns relating to the use of the electronic shareholder forum in the proposed rule, we are seeking to remove legal ambiguity that might inhibit shareholders and companies from energetic exploitation of the potential of communications technology, and to encourage shareholders and companies to take advantage of this technology to facilitate better communication among shareholders and between shareholders and companies.

Liability for statements made on an electronic shareholder forum is one area of concern for companies and shareholders when making the decision whether to establish such a forum. To alleviate this concern, we propose to clarify in Rule 14a-18(b) that, for

simply establishing, maintaining, or operating the electronic shareholder forum, a company or shareholder would not be liable under the federal securities laws for any statement or information provided by another person to the forum. The intent is for the person establishing, maintaining, or operating an electronic shareholder forum to be protected from liability in a similar way as the federal telecommunications laws protect an interactive computer service.[64]

Persons providing information to or making statements on the electronic shareholder forum would remain liable for the content of those communications under traditional liability theories in the federal securities laws, such as those in Section 17(a) of the Securities Act and Section 10(b), Rule 10b-5, and Section 20(e) of the Exchange Act. The prohibitions in the anti-fraud laws against primary or secondary participation in fraud, deception, or manipulation would continue to apply to those supplying information to the site, and claims would not face any additional obstacle because of the new rule. Any other applicable federal or state law would also continue to apply to a person providing information or statements to an electronic shareholder forum.

An additional concern regarding the use of an electronic shareholder forum relates to the broad general application of our proxy rules under Section 14(a) of the Exchange Act. Under the proxy rules, a solicitation encompasses any request for a proxy, any request to execute or revoke a proxy, and the furnishing of a form of proxy or other communication under circumstances reasonably calculated to result in the procurement,

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64 See Section 230(c)(1) of the Telecommunications Act of 1996 (47 U.S.C. § 230(c)(1)) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").





withholding, or revocation of a proxy.[65] This broad definition of solicitation limits the kinds of activities that a shareholder or the company may undertake in a public forum when discussing issues that may be voted on at the company's annual or special meeting.

To facilitate greater use of the electronic shareholder forum concept and to encourage more robust communication with the company and among shareholders, we propose to exempt any solicitation in an electronic shareholder forum by or on behalf of any person who does not seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form or revocation, abstention, consent or authorization.[66] The solicitation would be exempt so long as it occurs more than 60 days prior to the date announced by the company for its annual or special meeting of shareholders or if the company announces the meeting less than 60 days before the meeting date the solicitation may not occur more than two days following the company's announcement.[67] We further propose to clarify in proposed Rule 14a-18(c) that a person who participates in an electronic shareholder forum and makes solicitations in reliance on the proposed exemption would continue to be eligible to solicit proxies outside of Rule 14a-2(b)(6) provided that any such solicitation complies with Regulation 14A.

The purpose of these amendments is to encourage the free flow of information, ideas, and opinions in an electronic shareholder forum. It is not the purpose of these

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65 See Exchange Act Rule 14a-1(l) (17 CFR 240.14a-1(l)).

66 See proposed Exchange Act Rule 14a-2(b)(6).

67 The proposal would not affect the application of any other exemptions under Regulation 14A. For example, a person could rely on the other applicable exemptions in Exchange Act Rule 14a-2 (17 CFR 240.14a-2).

amendments to allow such a forum to be used to circumvent the proxy or anti-fraud rules. We believe that there is less risk of an electronic shareholder forum being used for proxy solicitation more than 60 days prior to an annual or special meeting and therefore have proposed a 60-day limitation.[68] Communications within an electronic shareholder forum that occur less than 60 days prior to the annual or special meeting, or more than two days after the announcement of the meeting, would continue to be treated as any other communication would be treated today, and would be required to comply with our proxy rules if they are a solicitation unless they fall within an existing exemption. In addition, we propose to limit the exemption to persons who do not seek to act as a proxy for a shareholder or request a form of proxy from them.

We propose limitations to the exemption because, though we believe that an electronic shareholder forum should provide a medium for, among other things, open discussion, debate, and the conduct of referenda, we believe that the solicitation of proxies for an upcoming meeting is more appropriate under the protections of our proxy rules. Any proxies obtained prior to the application of our proxy rules would not benefit from the full and fair disclosure required under the regulations.

**Request for Comment**

- Our proposals are intended to provide a company or its shareholders with the flexibility under the federal securities laws to establish an electronic shareholder forum that permits interaction among shareholders and between shareholders and the

[68] 60 days corresponds with the maximum amount of time prior to a scheduled meeting that the company may fix the record date for determining the stockholders entitled to notice of or to vote at a meeting under the Delaware Code. See Del. Code title 8, §213 (2007).





company's management or board of directors, and permits the operator of the electronic shareholder forum to provide for non-binding referenda votes of forum participants. Do our proposals provide this flexibility? Are there additional steps that are necessary to assure that the federal securities laws do not hinder the development of these electronic shareholder forums?

- We propose to amend Regulation 14A to encourage the development of electronic shareholder forums that could be used by companies to better communicate with shareholders and by shareholders to better communicate both with their companies and among themselves. In addition, the electronic shareholder forum concept could offer shareholders a means of advancing referenda that might otherwise be proposed as non-binding shareholder proposals under Rule 14a-8. Is this appropriate and, if so, how can we further encourage the development of electronic shareholder forums?
- As proposed, the new rules would allow companies and shareholders to develop electronic shareholder forums as they see fit, as long as the forums are conducted in compliance with Section 14(a) of the Exchange Act, other federal laws, applicable state law, and the company's charter and bylaw provisions. Should we be more prescriptive in our approach, such as by providing direction or guidance relating to whether a forum is available for non-binding referenda, whether access is limited to shareholders, the frequency with which shareholder records are updated for purposes of enabling participation, or whether the forum assures the anonymity of shareholders who access it?
- As proposed, we make clear that a company or shareholder that establishes, maintains, or operates a forum is not liable for any statements or information

provided by another person. Does the proposed rule adequately address the liability concerns that might face sponsors of and participants in an electronic shareholder forum?

- In order to encourage use of electronic shareholder forums, we are proposing an exemption for solicitations on an electronic shareholder forum. As proposed, solicitations that do not seek to act as a proxy for a shareholder or request a form of proxy from them and occur more than 60 days prior to an annual or special meeting (or within two days of the announcement of the meeting) are exempt under the proxy rules. Is it appropriate to provide this exemption from regulation for communications on an electronic shareholder forum? Should the exemption apply more broadly to all communications? Would it be possible to conduct an effective proxy solicitation on the forum despite the limitations? Is the 60-day limitation sufficiently long to protect shareholders from unregulated solicitations? Should the time period be shortened (e.g., 30 or 35 days) or lengthened (e.g., 75 or 90 days)? Is there a better alternative that would encourage free and open communication on electronic shareholder forums, but limit the use of the forums as a way to solicit proxies without providing the full and fair disclosure required in our proxy rules?
- As proposed, we have provided no guidance on what should happen to the communications and data on the forum within the 60-day period prior to the annual or special meeting. Solicitations that remain posted on the forum that were exempt under proposed Rule 14a-2(b)(6) may no longer be exempt. Should we require that the electronic shareholder forums be taken down within 60 days of a scheduled meeting? Alternatively, if the forum continues to run, should shareholders who





continue making communications on the forum file any communications that are solicitations in compliance with Regulation 14A? Should those shareholders be required to file any solicitations on the forum that occurred more than 60 days prior to the meeting? How would the forums be policed to ensure that the responsible parties are properly filing?

- What would be the appropriate use of an electronic shareholder forum with regard to a bylaw proposal, as contemplated in this release? For example, should shareholders be able to use a forum to solicit other shareholders to form a 5% group in order to submit a bylaw proposal?

### C. Request for Comment on Proposals Generally

#### 1. Bylaw Amendments Concerning Non-Binding Shareholder Proposals

Several participants in the Commission's recent proxy roundtables expressed concern that by requiring the inclusion of non-binding shareholder proposals in company proxy materials, Rule 14a-8 expands rather than vindicates the framework of shareholder rights in state corporate law.[69] A number of other participants in the roundtables indicated, however, that non-binding shareholder proposals have a useful role in the proxy process and in corporate governance.[70] Based, in part, on these and other views expressed by participants at the roundtables, we are requesting comment as to whether

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[69] See, e.g., Leo E. Strine, Jr., Vice Chancellor, Court of Chancery of the State of Delaware, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 18-23.

[70] See, e.g., Ted White, Strategic Advisor, Knight Vinke Asset Management, Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law, May 7, 2007, at 94-95; Damon A. Silvers, Associate General Counsel, AFL-CIO, Transcript of Roundtable on Proposals of Shareholders, May 25, 2007, at 8-11. See also Form Letters B and C, available on the Commission's Web site at www.sec.gov.

the Commission should adopt rules that would enable shareholders, if they choose to do so, to determine the particular approach they wish to follow with regard to non-binding proposals. Such an approach was proposed once before by the Commission but ultimately was not adopted;[71] however, in light of developments in the last 25 years that may have diminished the concerns about shareholders' ability to act as a group, which formed the basis of arguments for a mandated federal approach, we are again requesting comment on this approach. These developments include the increasing importance of institutional investors in contemporary capital markets, the significant role of private organizations that collect and disseminate information to institutional investors concerning corporate governance issues, the prevalence of widely published voting guidelines for market participants of all sizes, and the significantly enhanced opportunities for collaborative discussion and decision-making afforded by the Internet and related technological innovations.

We therefore are requesting comment on whether a company or its shareholders should have the ability to propose and adopt bylaws that would establish the procedures

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[71] In 1982, during a comprehensive review of the shareholder proposal process, the Commission proposed permitting companies and shareholders to formulate and adopt procedures for including shareholder proposals in the company's proxy materials. See Release No. 34-19135 (Oct. 14, 1982) [47 FR 47420]. Under the proposed approach, the Commission would have continued to have a rule that specified the procedures governing the submission and inclusion of shareholder proposals, but would have adopted a supplemental rule to permit a company and its shareholders to adopt a plan providing their own procedures to govern the process. The proposed approach would have allowed a company's board of directors and shareholders, rather than the Commission or its staff, to make judgments as to what proposals should be included in the company's proxy materials at the company's expense. The plan could have been proposed by either the company's board of directors or shareholders, and subject to certain minimum requirements, the provisions of the plan could have been as liberal or restrictive as shareholders were willing to approve. In 1983, the Commission adopted final rules amending Exchange Act Rule 14a-8, but left the Exchange Act Rule 14a-8 framework intact, concluding that, at that time, a federal framework for including shareholder proposals in company proxy materials was in the best interests of shareholders and issuers. See Release No. 34-20091 (Aug. 16, 1983) [48 FR 38218].



that the company will follow for including non-binding proposals in the company's proxy materials. In addition to general comment, we encourage commenters to address the following specific questions:

- Would it be appropriate to require the shareholder (or group of shareholders) that submits the proposal to file a Schedule 13G that includes specified public disclosures regarding its background and its interactions with the company, that corresponds to the proposed disclosure requirements for shareholder proponents of bylaw amendments concerning shareholder director nominations?
- Should a shareholder (or group of shareholders) proposing such a bylaw amendment be required to have continuously held a certain percentage of the company's securities entitled to be voted on the proposal at the meeting? What would the appropriate percentage be? Should a holding period be required? If so, how long should the holding period be?
- Should a proposal be required to otherwise satisfy the requirements of Rule 14a-8 (e.g., the proposal would have to satisfy the procedural requirements of Rule 14a-8 and not fall within one of the other substantive bases for exclusion included in Rule 14a-8)?
- Under current Rule 14a-8, all shareholder proposals and supporting statements are limited to 500 words in total. Should the word limit be different for shareholder submissions of proposed bylaw amendments to establish procedures for non-binding proposals? If so, should the word limit be increased to 3,000 words in order to permit a more thorough description of the proposed procedural framework and in accordance with the approximate word count in current Rule 14a-8? If not 3,000, should the

word limit be higher or lower than 3,000 (e.g., 1,000, 2,000, 4,000)?

- Should the proxy statement for the shareholder vote be required to explain that approval of the bylaw would establish procedures that would govern in all circumstances with regard to shareholder requests for the inclusion of non-binding proposals? Should the bylaw itself be required to provide this explanation?
- Would it be appropriate for the Commission to provide that the substance of the procedure for non-binding proposals contained in a bylaw amendment would not be defined or limited by Rule 14a-8, but rather by the applicable provisions of state law and the company's charter and bylaws? For example, the Commission could provide that the framework could be more permissive or more restrictive than the requirements of existing Rule 14a-8 (e.g., the framework could specify different eligibility requirements than provided in current Rule 14a-8, different subject-matter criteria, different time periods for submitting non-binding proposals to the company, or different resubmission thresholds; or it could specify that non-binding proposals would not be eligible for inclusion in the company's proxy materials, or alternatively that all non-binding proposals would be included in the company's proxy materials without restriction, if these approaches were consistent with state law and the company's charter and bylaws).
- To ensure that any new rule is consistent with the principle that the federal proxy rules should facilitate shareholders' exercise of state law rights, and not alter those rights, should any rule adopted include a specific requirement that, to be included in a company's proxy materials, a shareholder proposal establishing bylaw procedures for non-binding proposals would have to be binding on the company under state law if





approved by shareholders?

- Would it be appropriate for the Commission to provide that, if shareholders approve a bylaw procedure for non-binding proposals, interpretation and enforcement of that procedure would be the province of the appropriate state court? Under such an approach, the Commission and its staff would not resolve such questions. Should the Commission or its staff instead become involved in interpreting or enforcing the company's bylaws? Is there any reasonably foreseeable situation where intervention by the Commission or its staff would be critical to the proper functioning of bylaw procedures for non-binding proposals? In addition, we solicit comments with respect to the practicality and feasibility of relying on state courts as the arbiter of disagreements between companies and shareholder proponents over the company's bylaws as they apply to non-binding shareholder resolutions.
- Should the Commission encourage the proponent of any bylaw procedure governing non-binding proposals to include in the procedure a fair and efficient mechanism for resolving any disagreements between the company and the shareholder as to the bases for inclusion or exclusion of a proposal?
- Should the Commission specify that, even after the shareholders approve a bylaw procedure for non-binding shareholder proposals, a shareholder meeting the proposed eligibility requirements could later submit another bylaw procedure that removes or amends the previously-adopted non-binding procedure and that bylaw would not generally be excludable by a company under Rule 14a-8(i)(2) or Rule 14a-8(i)(3)?
- How might shareholders' overall ability to communicate with management and other shareholders be improved or diminished if shareholders were able to choose different

procedures for non-binding proposals than those currently in Rule 14a-8? Are there additional or different procedures that the Commission should require, encourage or seek to prevent?

With respect to subjects and procedures for shareholder votes that are specified by the corporation's governing documents, most state corporation laws provide that a corporation's charter or bylaws can specify the types of binding or non-binding proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting. Further, most state corporation laws permit a company's board of directors to adopt, amend, or repeal bylaws without a shareholder vote. Because a company's board of directors could adopt a bylaw establishing procedures for the consideration of non-binding proposals at meetings of shareholders, we have not included in the above request for comment any discussion of a board of directors adopting bylaws that would limit the ability of shareholders to raise non-binding proposals for a vote at meetings of shareholders. To the extent a company had in place a bylaw under which non-binding shareholder proposals were not permitted to be raised at meetings of shareholders, a company may be able to look to Rule 14a-8(i)(1) with regard to the exclusion of such proposals. Such ability to exclude the proposals would, of course, be reliant on the bylaw's compliance with applicable state law and the company's governing documents. In light of the board's power to adopt such a bylaw under state law, please consider the following specific requests for comment:

- Should the board of directors be able to adopt a bylaw setting up a separate procedure for non-binding shareholder proposals and be able, under our proxy rules, to follow that procedure in lieu of Rule 14a-8 with regard to non-binding proposals? Should





such procedures be deemed to comply with Rule 14a-8 if the bylaw is not approved by a shareholder vote, provided that state law authorizes the adoption of such a bylaw without a shareholder vote?

- Should a bylaw proposed and adopted by a company prior to becoming subject to Exchange Act Section 14(a) be deemed to comply with Rule 14a-8 once the company became subject to Exchange Act Section 14(a)? If so, should such companies be required to provide disclosure regarding the rights of shareholders with respect to the submission of non-binding shareholder proposals for inclusion in the company's proxy materials as part of the description of its equity securities in its Securities Act and Exchange Act registration statements. If not, should companies instead be required to submit the bylaw to a shareholder vote once the company becomes public and subject to Section 14(a) of the Exchange Act, either at a special meeting or an annual meeting?
- Is there a concern that affiliates of a company could obtain a sufficient number of votes to adopt a bylaw without obtaining a vote of the non-affiliates? Should the federal proxy rules further restrict the operation of bylaw provisions that are otherwise permissible under state law by requiring, for example, that once a company is subject to Section 14(a), the shareholders who are not affiliates of the company ratify the bylaw, or that the bylaw procedure be periodically re-approved by shareholders after its initial approval? Does the fact that the company's bylaws can generally be revised or repealed at any time after adoption mitigate the need for such extraordinary procedures?

- Should the Commission adopt a provision to enable companies to follow an electronic petition model for non-binding shareholder proposals in lieu of Rule 14a-8? Such a model could include some or all of the following parameters:
  - Electronic petitions would be submitted by shareholders and posted by the company on the electronic proxy notice and access website;
  - Only shareholders as of the record date could sign the electronic petition through the close of the applicable shareholder meeting;
  - Execution of the electronic petition would occur through the same control numbers used to vote under electronic proxy;
  - Communications would be subject to Rule 14a-9, but otherwise would be minimally restricted by the proxy rules;
  - Results of petitions would be reported as a percentage of total outstanding shares;
  - The decision to sign or not to sign an electronic petition would not be considered a shareholder vote;
  - Petitions would follow current Rule 14a-8 guidelines (e.g., would be limited to 500 words) and require the identification of the shareholder-sponsor;
  - Companies would be permitted to post a response to each petition; and
  - Petition sponsors could use an "electronic-only" solicitation approach with no obligation to send paper copies.
- Are there additional changes to Rule 14a-8 that would improve operation of the rule? If so, what changes would be appropriate and why? For example, should the Commission amend the rule to change the existing ownership threshold to submit



other kinds of shareholder proposals? If so, what should the threshold be? Would a higher ownership threshold, such as $4,000 or $10,000, be appropriate? Should the Commission amend the rule to alter the resubmission thresholds for proposals that deal with substantially the same subject matter as another proposal that previously has been included in the company's proxy materials? If so, what should the resubmission thresholds be – 10%, 15%, 20%? Are there any areas of Rule 14a-8 in which changes or clarifications should be made (e.g., Rule 14a-8(i)(7) and its application with respect to proposals that may involve significant social policy issues)? If so, what changes or clarifications are necessary?

- Currently, Item 4 in Part I of Form 10-K and Form 10-KSB and Item 4 in Part II of Form 10-Q and 10-QSB require a company to disclose information regarding the submission of matters to a vote of security holders. The required disclosure includes a description of each matter voted upon at the meeting and the number of votes cast for, against, or withheld, as well as the number of abstentions and broker non-votes as to each such matter. In the interest of increased transparency, should additional disclosure be provided with regard to the voting results for non-binding shareholder proposals? For example, should the company be required to disclose votes for non-binding shareholder proposals as a percentage of the total outstanding securities entitled to vote on the proposal? Or as a percentage of the total votes cast? Would shareholders benefit from receiving this type of information?

**2. Other Requests for Comment**

- Would adoption of the proposed rules conflict with any state law, federal law, or rule of a national securities exchange or national securities association? To the extent you

indicate that the proposed rules would conflict with any of these provisions, please be specific in your discussion of those provisions that you believe would be violated.

- As the Commission staff noted in its July 15, 2003 Staff Report entitled "Review of the Proxy Process Regarding the Nomination and Election of Directors,"[72] the cost to shareholders of soliciting proxies in opposition to the company's solicitation has been considered to be prohibitive and, as such, has been a key component of arguments in favor of increasing the opportunity for the inclusion of shareholder nominees for director in the company's proxy materials. Significant recent technological advances appear to have the potential to substantially reduce the costs of such a proxy solicitation, including the Commission's recently adopted "E-Proxy" rules[73] and the electronic shareholder forum discussed in this release. Will these technological advances reduce the costs of proxy solicitations for both companies and those that solicit in opposition to a company?
- Should bylaw proposals establishing a shareholder director nomination procedure be subject to a different resubmission standard than other Rule 14a-8 proposals? If so, what standard would be appropriate and why?
- As proposed, the federal proxy rules would not establish a threshold for the votes required to adopt a bylaw procedure. This is because the voting thresholds for the adoption of bylaw amendments are established by state law and a company's governing documents. Is this reliance on state law and the company's governing

[72] See Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Appendix A (Summary of Comments in Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules) (July 15, 2003).

[73] Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148].





documents appropriate? Should the proxy rules establish a different federal standard for the required vote to adopt a bylaw procedure, such as the majority of shares present in person or represented by proxy and entitled to vote on the proposal, or a supermajority vote?

- Our proposals assume that the existing exemptions for solicitations are sufficient to include soliciting activities of shareholders that are seeking to form a more than 5% group. Accordingly, the release does not address any such soliciting activities or propose any new rules in this regard. Is our assumption that the existing exemptions are sufficient for the purpose of forming a shareholder group to submit a bylaw proposal correct? If not, what would be the appropriate scope of any new exemption or amendment to an existing exemption?
- Is there an alternative to the proposal regarding shareholder director nomination bylaws that would provide a preferable method by which shareholders could establish procedures to place their candidates for director in the company proxy materials? For example, should shareholders be able to propose a bylaw amendment only where there has been a majority withhold vote for a specified director or directors, and the director or directors do not resign? If so, what ownership threshold would be appropriate in those circumstances?
- In light of developments that reduce the costs of proxy solicitations by shareholder proponents, such as the adoption of "E-proxy," general advances in communication technology, the proposals concerning electronic shareholder forums, and, in some instances the ability of shareholders to request and receive reimbursement for election contest expenses, is there an alternative to the proposal regarding shareholder director

nomination bylaws that would enable shareholders to conduct election contests without incurring the expense of a traditional contest and without being placed on the company ballot? For example, should our proxy rules be amended to permit pure electronic solicitation? Should we amend Rule 14a-2(b)(1) to enable shareholders to solicit a greater number of other shareholders than currently is permitted under the rule (the rule limits the number solicited to ten) without being required to furnish a proxy statement?

- Would additional amendments to the system for reporting beneficial and other ownership interests in securities be appropriate? If so, what additional amendments would be appropriate and why? Are there areas where additional disclosures would be appropriate (e.g., with regard to the exercise of voting rights without an economic interest in the underlying security)? Are there ways in which the system could be simplified (e.g., by combining the reports required to report beneficial and other ownership interests)?

**III. General Request for Comment**

We request and encourage any interested person to submit comments regarding:

- the proposed amendments that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

**IV. Paperwork Reduction Act**

**A. Background**

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995, the PRA.[74] We are submitting the proposal to the Office of Management and Budget for review in accordance with the PRA.[75] The titles for the collections of information are:

(1) "Proxy Statements - Regulation 14A (Commission Rules 14a-1 through 14a-15 and Schedule 14A)" (OMB Control No. 3235-0059); and

(2) "Securities Ownership - Regulation 13D and 13G (Commission Rules 13d-1 through 13d-7 and Schedules 13D and 13G)" (OMB Control No. 3235-0145).

These regulations were adopted pursuant to the Exchange Act and the Investment Company Act of 1940 and set forth the disclosure requirements for securities ownership reports filed by investors and proxy statements filed by companies to help investors make informed voting or investing decisions.

The hours and costs associated with preparing and filing the disclosure, filing the forms and schedules and retaining records required by these regulations constitute reporting and cost burdens imposed by each collection of information. An agency may

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[74] 44 U.S.C. 3501 et seq.

[75] 44 U.S.C. 3507(d); 5 CFR 1320.11.

not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**B. Summary of Proposals**

The proposed amendments would establish a new procedure by which shareholders could use Rule 14a-8 to propose bylaw amendments establishing procedures that would permit eligible shareholders to nominate candidates for the board of directors in the company's proxy materials.[76] As proposed, Rule 14a-8 would be amended to require inclusion of such proposals, provided that the proposals comply with the procedural requirements of Rule 14a-8 and the additional proposed disclosure requirements. To be included, the bylaw amendments would be required to be submitted by a shareholder proponent that is eligible to, and has, filed a Schedule 13G including all required disclosures and has continuously held more than 5% of the company's securities entitled to be voted on the proposal for at least one year. We also propose to amend Schedule 13G and add Item 24 and Item 25 of Schedule 14A to require disclosure regarding the shareholder proponent's background and relationships with the company. This disclosure would be provided by the shareholder proponent and the company, respectively.

In addition to the proposed amendments concerning shareholder proposals to amend company bylaws, we propose several amendments to require disclosure about shareholder nominees for director and nominating shareholders when shareholder

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[76] Proposed Rule 14a-18 would establish special provisions in the proxy rules applicable to electronic shareholder forums in order to encourage shareholders and companies to take advantage of these forums. These rules are intended to allow issuers and shareholders broad latitude with regard to the forums and do not impose any new paperwork burdens.



nominees are included in the company's proxy material. Proposed Rule 14a-17 would require nominating shareholders to provide the company with certain Schedule 14A information regarding each director nominee for inclusion in the proxy statement or on a website to which the proxy statement refers. In addition, proposed Rule 14a-17 would require a nominating shareholder to provide information regarding the background of the nominating shareholder and its relationships with the company that would be required by proposed Items 8A, 8B and 8C of Schedule 13G to the company.

The proposed information collection requirements would be mandatory and responses would not be confidential. The hours and costs associated with preparing and filing forms and retaining records constitute reporting and cost burdens imposed by the collection of information requirements. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

**C. Paperwork Reduction Act Burden Estimates**

The proposed amendments would, if adopted, require additional disclosure on Schedule 14A and Schedule 13G, as well as in a company's registration statements.

**1. Proposed Amendments to Rule 14a-8 Concerning Bylaw Proposals for Shareholder Nominations of Directors**

Schedule 14A prescribes the information that a company must include in its proxy statements to provide security holders with material information relating to voting decisions. For purposes of the PRA, we currently estimate that compliance with Regulation 14A, including preparation of Schedule 14A, requires 475,781 hours of company personnel time (approximately 66 hours per company) and costs $63,437,000

for the services of outside professionals (approximately $8,750 per company).[77] The proposed amendment to Rule 14a-8 would require the company to include shareholder proposed bylaw amendments that provide procedures for shareholder nominations of directors unless the shareholder has failed to comply with the procedural requirements of Rule 14a-8.

Historically shareholders have made relatively few binding proposals. In the 2006-2007 proxy season, companies received 1,250 shareholder proposals, of which only 100 were binding proposals.[78] Of those 100, only three related to bylaw amendments providing for shareholder nominees to appear in the company's proxy materials.[79] These three proposals were not subject to the additional disclosure requirements that would apply to shareholders under the proposed rules. In light of this historical data and given the proposed eligibility requirements to submit such proposals, we estimate that there would be a limited number of shareholder proposals to amend the bylaws to provide for shareholder nominees to be included in the company's proxy materials. We note, however, that by establishing procedures for submission of theses types of proposals, we are likely to encourage more bylaw amendment proposals than we currently receive. We

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77 These figures assume 7,250 respondents that file Schedule 14A under Regulation 14A with the Commission. We estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. The hourly cost estimate is based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing with the Commission.

78 Rachel McTague, 39 Securities Regulation & Law Report 911 (June 11, 2007) (stating that, according to data complied by the Institutional Shareholder Services, nearly 1,250 shareholder proposals were submitted to companies during the 2006 proxy season).

79 Tomoeh Murakami Tse, The Washington Post, March 15, 2007, at D2 (stating that three proxy access proposals were submitted by shareholders during the 2006 proxy season).



therefore assume some increase in such proposals and estimate that the number would be 30 per year.[80]

For purposes of the PRA, we estimate that the proposed amendments to Rule 14a-8 would create an incremental burden of six hours of company personnel time and costs of $800 for the services of outside professionals. In sum, we estimate that the amendments to Regulation 14A will increase the annual paperwork burden by approximately 180 hours of company personnel time and a cost of approximately $24,000 for the services of outside professionals. These burdens and costs would include the additional disclosure in proposed Item 24 and Item 25 of Schedule 14A as well as the burdens and costs associated with including the proposal in the company's proxy materials.

**2. Proposed Amendments to Schedule 13G Requiring Disclosure from Shareholder Proponents**

Exchange Act Schedule 13G is a short-form filing for persons to report ownership of more than 5% of a class of voting equity securities registered under Section 12 of the Exchange Act. Generally, the filer must certify that the securities have not been acquired and are not held for the purpose of, or with the effect of, changing or influencing the control of the issuer of the securities. For purposes of the PRA, we currently estimate that compliance with the Schedule 13G requirements under Regulation 13D requires 98,800 burden hours, broken down into 24,700 hours (or 2.6 hours per respondent) of

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80 We estimate that the number of proposals for bylaw amendments to allow shareholder nominations of directors received last proxy season (3) would increase tenfold (30).

respondent personnel time and costs of $22,230,000 (or $2,340 per respondent) for the services of outside professionals.[81]

The proposed amendment to Rule 14a-8 would require the company to include certain shareholder proposed bylaw amendments only if they are submitted by a shareholder proponent that is eligible to, and has, filed a Schedule 13G that complies with proposed Schedule 13G Items 8A, 8B, and 8C. As explained above, we estimate that the number of shareholder proponents submitting such proposals under Rule 14a-8 would be 30. Rather than presume that any of the shareholder proponents previously filed a Schedule 13G on an individual or group basis, we assume for purposes of the PRA that each person or group will be a new Schedule 13G filer. This would increase the number of Schedule 13G filers. In addition, the proposed disclosure of each shareholder proponent's background and relationships with the company would be different and more detailed than the disclosure currently required by Schedule 13G, increasing the reporting burden associated with this schedule.

For purposes of the PRA, we estimate that the proposed amendments to Schedule 13G would create an incremental burden of 4.1 hours per response, which we would add to the existing Schedule 13G burden resulting in a total burden of 14.5 hours.[82] Each of the 30 additional filers would incur a burden of approximately 3.6 hours of respondent

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[81] These figures assume 9,500 respondents that file Schedule 13G with the Commission. We estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the issuer. These figures assume an average cost of $300 per hour. The Commission has increased the cost estimate $100 since our last estimate provided to OMB based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing with the Commission. In our PRA submission, we will increase the cost of outside professionals to meet the new $400 per hour estimate.

[82] We currently estimate the burden for preparing a Schedule 13G filing to be 10.4 hours.



personnel time (25% of the total burden) and costs of $4,350 for the services of outside professionals (75% of the total burden). In sum, we estimate that the amendments to Schedule 13G will increase the annual paperwork burden by approximately 108 hours of respondent personnel time and a cost of approximately $130,000 for the services of outside professionals.

**3. Proposed Rule 14a-17 to Require Disclosure from Nominating Shareholders and Shareholder Nominees**

Proposed Rule 14a-17 would require nominating shareholders and their nominees to provide disclosure relating to their backgrounds and relationships with the company for inclusion in a Schedule 14A. As explained above, we estimate that there will be 30 proposals for bylaw amendments to allow shareholder nominations of directors annually. Of these, for purposes of this analysis we estimate that 50% will be successful. If we assume that in every case where a bylaw amendment is successful a shareholder nominee is proposed, the additional disclosure would be required 15 times annually.

For purposes of the PRA, we estimate that proposed Rule 14a-17 would create an incremental burden of six hours of company personnel time and costs of $800 for the services of outside professionals for each shareholder nominee included in a Schedule 14A. In sum, we estimate that the amendments will increase the annual paperwork burden of Regulation 14A by approximately 90 hours of company personnel time and a cost of approximately $12,000 for the services of outside professionals.




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**D. Solicitation of Comments**

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-16-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-16-07, and be submitted to the Securities and Exchange Commission, Office of the Secretary - Records Management Branch, 100 F Street, NE, Office of Filings and Information Services, Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its



full effect if OMB receives it within 30 days of publication.

**V. Cost-Benefit Analysis**

We propose to revise and update the proxy rules to more effectively serve their essential purpose of facilitating the exercise of shareholders' rights under state law. We request any relevant data from commenters that would be helpful in quantifying these costs and benefits.

**A. Benefits**

The proposed amendments to Rule 14a-8 concerning binding bylaw proposals relating to shareholder nominations of directors on the company's proxy would help shareholders to exercise rights under state law to nominate and elect directors of their choosing. A bylaw amendment that allowed shareholder nominees to be included in the company's proxy materials would reduce the cost for a shareholder to nominate candidates for election on the board since the nominating shareholder would not need to incur the cost of preparing separate proxy materials and mailing those materials to other shareholders. Allowing shareholders to propose bylaw amendments that would enable them to include shareholder nominees on the company's proxy may provide shareholders a more effective voice than simply being able to recommend candidates to the nominating committee or being able to nominate candidates in person at a shareholder meeting.

The proposed amendment would require additional disclosure on Schedule 13G and Schedule 14A by shareholder proponents, nominating shareholders and shareholder nominees about their background and relationships with the company. This additional

information provided by such disclosures would help provide transparency to shareholders in voting on bylaw amendments and shareholder nominees.

Finally, the proposed amendments to Regulation 14A regarding the electronic shareholder forum seek to remove unnecessary barriers to the use of technology to increase constructive communication between shareholders and between shareholders and the company. The exemption for communications more than 60 days prior to the announced meeting date would allow for more open and unfettered communication between parties. The enhanced communication may result in better coordination among the views of shareholders, more effective exercise of state law rights, and a better alignment between the interests of shareholders and the company.

**B. Costs**

The proposed amendments would impose some direct costs on companies and shareholders who are subject to the new rules. For purposes of the PRA, we estimate that the annual additional burden to companies of preparing the required proxy disclosure would be approximately 270 hours of company personnel time and a cost of approximately $36,000 for the services of outside professionals. In addition, for purposes of the PRA, we estimate that the annual incremental burden to prepare the required disclosure for shareholder proponents, nominating shareholders and nominees would be approximately 108 hours of personnel time and a cost of approximately $130,000 for the services of outside professionals.

The bulk of the additional disclosure required by the amendments to Regulation 14A would be provided to the company by shareholder proponents and nominating shareholders. The proposed amendments would add costs to the preparation and





dissemination of this information in the company's proxy statement where shareholders have chosen to make proposals or put forth nominees.

If shareholders have adopted a shareholder nomination bylaw amendment and chose to allocate company resources to facilitate shareholder nominations, the cost of preparing the company's proxy materials would be increased by the need to prepare and include information relating to the shareholder nominees. In addition, the company could incur increased costs relating to the solicitation of proxies in support of the board's candidates and against the shareholder nominees.

The proposed amendments to Regulation 14A and Schedule 13G would impose costs on shareholder proponents. Shareholder proponents would be required to provide extensive background information and information on their relationships with the issuer on Schedule 13G. Under the proposed amendments, a company would also incur preparation and filing costs associated with disclosing the nature and extent of its relationships with a shareholder proponent. In addition, companies may incur costs for procedures to monitor its relationships with shareholder proponents.

If a shareholder nomination bylaw amendment were adopted, shareholder nominees and nominating shareholders would also incur costs associated with the Rule 14a-17 disclosure requirements. Nominating shareholders and their nominees might also bear solicitation costs in seeking support for the nominee's election. However, these disclosure and solicitation costs are not expected to exceed the costs that would be incurred from a separate proxy contest.

Under the proposed rules, companies may choose to incur additional costs to establish more responsive policies and procedures in an attempt to avoid having

shareholders seek bylaw amendments or propose shareholder nominees. The company and the board may spend more time on shareholder relations instead of the business of the company. In addition, it is possible that electing a shareholder nominee to the board could have a disruptive effect on boardroom dynamics.

**Request for Comment**

We are sensitive to the costs and benefits imposed by our rules, and have identified certain costs and benefits related to these proposals. We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs and benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments.

- What are the costs and benefits of a 5% threshold as opposed to alternative thresholds? How would the private costs of assembling a 5% coalition vary across different types or sizes of companies?
- What are the potential costs and benefits of facilitating an increase in the variation of nomination rules across companies?
- What are the costs and benefits of potentially moving away from a dual-slate structure in which voting shareholders choose between the management card and the dissident card toward a unitary slate voting system in which voters choose among items on a single proxy card?

## VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[83] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[84] and Section 2(c) of the Investment Company Act[85] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The proposed rules are intended to promote the exercise of shareholder rights under state law and provide shareholders with information about shareholder proponents of, and shareholder nominees under, shareholder nomination bylaw amendments. The proposed rules, if adopted, would establish a fair and transparent mechanism for shareholders to propose and adopt bylaw amendments to establish procedures relating to shareholder director nominations inclusion in the company proxy materials.

The disclosure requirements in the proposed rules would require detailed information regarding the background and relationships of shareholder proponents of the bylaw amendments to be disclosed by the shareholder proponents and the company. This disclosure would provide shareholders a better informed basis for deciding whether to approve the bylaw amendments. Changes to the company's bylaws should therefore better reflect shareholders' preferences regarding director nomination procedures. Investors may value the information about whether companies have subjected these

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83 15 U.S.C. 78w(a)(2).

84 15 U.S.C. 78c(f).

85 15 U.S.C. 80a-2(c).

preferences to a vote and provided a specified alternative procedure for inclusion of shareholder nominees in the company's proxy materials. This may promote the efficiency of the exercise of shareholder rights under state law.

If the shareholders adopt a bylaw amendment and the company is required to include shareholder nominees in its proxy materials, there may be increased competition for board positions, which might encourage or discourage qualified candidates from running. The proposed rules focus on improving and streamlining information flow between investors and with the company, which we believe would give more direct effect to shareholder preferences regarding shareholder director nominees. We believe these changes are likely to have a limited effect on efficiency, competition and capital formation. The effects of the proposed rules could be positive or negative depending on what shareholders deem is best for them given the additional information. We request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their view, if possible.

**VII. Initial Regulatory Flexibility Act Analysis**

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms under the Exchange Act that would permit shareholders to propose bylaw amendments to establish procedures relating to shareholder director nominations for inclusion in the company's proxy materials. The proposed revisions would also facilitate the use of an electronic shareholder forum by companies and shareholders.

**A. Reasons for, and Objectives of, Proposed Action**





The proposed rules are intended to open up communication between the company and its shareholders, promote the exercise of shareholder rights under state law, and provide shareholders with better information to make an informed voting decision by requiring disclosure about shareholder proponents and shareholder nominees under any shareholder nomination bylaw amendments.

The proposals, if adopted would facilitate the exercise of shareholders' rights under state law. As proposed, shareholders who have held more than 5% of the company's securities entitled to be voted at the meeting for at least one year by the date of their submission may submit binding proposals to amend the company bylaws to establish procedures for shareholder nominations of directors. Enabling shareholders to establish the company's procedures for inclusion of shareholder nominees on the company's proxy would provide shareholders with greater control over the use of the company's proxy process.

In addition, encouraging the use of electronic shareholder forums and the Internet may have the effect of improving shareholder communication. Any electronic shareholder forum may enhance shareholders' ability to communicate not only with management, but also with each other. Such direct access may improve shareholder relations to the extent shareholders have improved access to management.

**B. Legal Basis**

We are proposing amendments to the forms and rules under the authority set forth in Sections 13, 14, and 23(a) of the Exchange Act, as amended and Section 20(a) and 38 of the Investment Company Act, as amended.

**C. Small Entities Subject to the Proposed Rules**

The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[86] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[87] A "small business" and "small organization," when used with reference to an issuer other than an investment company, generally means an issuer with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 issuers, other than investment companies, that may be considered reporting small entities.[88] For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[89] Approximately 215 investment companies meet this definition.[90] The proposed rules may affect each of the approximately 1,315 issuers that may be considered reporting small entities, to the extent companies and shareholders take advantage of the proposed procedures.[91] We request comment on the number of small

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[86] 5 U.S.C. 601(6).

[87] Securities Act Rule 157 (17 CFR 230.157) and Exchange Act Rule 0-10 (17 CFR 240.0-10) contain the applicable definitions.

[88] The estimated number of reporting small entities is based on 2007 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database.

[89] Rule 0-10 under the Investment Company Act [17 CFR 270.0-10] contains the applicable definition.

[90] The estimated number of reporting investment companies that may be considered small entities is based on December 2006 data from the Commission's EDGAR database and a third-party data provider.

[91] The proposed amendments to Rule 14a-8 would not impact open-end investment companies that may be small entities because shareholders of those entities are not eligible to file Schedule 13G,



entities that would be impacted by our proposals, including any available empirical data.

**D. Reporting, Recordkeeping and Other Compliance Requirements**

The proposals would require all companies, including small entities, to permit certain shareholders to submit the specified binding proposals to amend the company bylaws. Shareholder proponents, including proponents that are small entities, would be required to provide the proposed Schedule 13G disclosure regarding background and relationships with the company and companies would be required to include similar disclosure provided by the shareholder proponent with the company's proxy.

If a bylaw amendment with an alternate shareholder nomination procedure is adopted, issuers would be required to meet the new procedural requirements and provide disclosure relating to the shareholder nominee in the proxy and the nominating shareholders and shareholder nominees would be required to provide additional information regarding their background and relationships with the company.

**E. Duplicative, Overlapping or Conflicting Federal Rules**

We believe that there are no rules that conflict with or duplicate the proposed rules.

**F. Significant Alternatives**

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective of our proposals, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments and rules, we considered the following alternatives:

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which must be filed in order to rely upon the proposed rule. Of the 215 investment companies that may be considered small entities, 131 are open-end investment companies.

- the establishment of different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- the clarification, consolidation, or simplification of the rule's compliance and reporting requirements for small entities;
- the use of performance rather than design standards; and
- an exemption from coverage of the proposed rules, or any part thereof, for small entities.

The Commission has considered a variety of reforms to achieve its regulatory objectives. The proposed amendments, if adopted, would require companies to include binding bylaw amendments relating to procedures for shareholder nominations of directors. The proposals are being made in order to more effectively serve the essential purpose of the proxy rules to facilitate the exercise of shareholders' rights under state law. The proposed amendments also would require additional disclosure by the shareholder proponent (or any subsequent nominating shareholder or shareholder nominee) and the company of the background of the proponent and its relationships with the issuer.[92] We believe this additional disclosure will assist investors in making an informed voting decision. It is not clear how applying separate compliance or reporting standards to small entities would further encourage facilitation of the exercise of these rights. However, we are considering what level of disclosure would be appropriate for shareholder proponents, nominating shareholders and shareholder nominees regarding their background and relationships with the company. If we require less disclosure from

[92] The proposed ability for shareholder proponents to propose bylaw amendments to be included in the company's proxy material is linked to their filing on Schedule 13G. A lower ownership threshold for small entities would not be appropriate due to the loss of the additional disclosure and safeguards provided by Schedule 13G.



smaller issuers we are concerned that shareholders may not receive sufficient information with which to make an informed decision.

We considered the use of performance standards rather than design standards in the proposed rules. The proposal contains both performance standards and design standards. We are proposing design standards to the extent that we believe that compliance with particular requirements are necessary. However, to the extent possible, we are proposing rules that impose performance standards. By allowing companies to establish their own procedures relating to shareholder nominations, we seek to provide companies, shareholder proponents and nominating shareholders with the flexibility to devise the means through which they can comply with the standards.

We request comment on whether separate requirements for small entities would be appropriate. The purpose of the amendments is to provide certain shareholders with the ability to amend the bylaws to establish their own procedures for shareholder nominations of directors and to improve shareholder communications. Exempting small entities would not appear to be consistent with these goals. The establishment of any differing compliance or reporting requirements or timetables or any exemptions for small business issuers may not be in keeping with the objective of the proposed rules.

**G. Solicitation of Comment**

We encourage comments with respect to any aspect of this initial regulatory flexibility analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and

- How to quantify the impact of the proposed rules.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the final regulatory flexibility analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

**VIII. Small Business Regulatory Enforcement Fairness Act**

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[93] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

**IX. Statutory Basis and Text of Proposed Amendments**

We are proposing amendments to rules pursuant to Sections 13, 14, and 23(a) of the Exchange Act, as amended, and Sections 20(a) and 38 of the Investment Company Act, as amended.

**List of Subjects**

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[93] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 50 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. §601).



**17 CFR Part 240**

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations as follows:

**PART 240 – GENERAL RULES AND REGULATION, SECURITIES EXCHANGE ACT OF 1934**

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et. seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. §240.13d-102 Schedule 13G is amended by:

a. Removing the authority citation following the section; and

b. Adding Items 8A, 8B and 8C.

The additions are to read as follows:

**§ 240.13d-102 Schedule 13G - Information to be included in statements filed pursuant to §240.13d–1(b), (c), and (d) and amendments thereto filed pursuant to §240.13d–2.**

* * * * *

Item 8A. Shareholder Proponents

(a) Definition of shareholder proponent: In this item, the term "shareholder proponent" means:

(1) A person or group that has formed any plans or proposals regarding an amendment to a company's bylaws, in accordance with § 240.14a-8(i)(8);

(2) A nominating shareholder as defined in § 240.14a-17(a);

(3) Any affiliate, executive officer or agent acting on behalf of the person (or group) described above in Item 8A(a)(1)-(2) with respect to the plans or proposals; and

(4) Anyone acting in concert with, or who has agreed to act in concert with, the person (or group) described above in Item 8A(a)(1)-(2) with respect to the plans or proposals.

(b) A shareholder proponent, as defined in section (a), shall provide the additional disclosure required by Items 8B and 8C.

Note to Item 8A. For purposes of this Item 8A and for the disclosures required by Item 8B and Item 8C, the term "plans or proposals" shall include, but not be limited to, the submission of a proposal to amend a company's bylaws, and instances where a shareholder proponent has indicated an intent to management to submit such a proposal or has indicated an intent to management to refrain from submitting such a proposal conditioned on the taking or not taking of a corporate action. The term also shall include a shareholder nomination for director pursuant to a bylaw procedure established pursuant to Rule 14a-8(i)(8), and instances where a shareholder proponent has indicated an intent to management to submit such a nomination or has indicated an intent to management to refrain from submitting such a nomination conditioned on the taking or not taking of a corporate action.

Item 8B. Relationships with the Company of Shareholder Proponents

(a) A shareholder proponent, as defined in Item 8A, must describe the following:





(1) Any direct or indirect interest in any contract between the shareholder proponent and the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any pending or threatened litigation in which the shareholder proponent is a party or a material participant, involving the company, any of its officers or directors, or any affiliate of the company; and

(3) Any other material relationship between the shareholder proponent and the company or any affiliate of the company not otherwise disclosed.

Note to Item 8B(a)(3). Any other material relationship of the shareholder proponent with the company or any affiliate of the company may include, but is not limited to, whether the shareholder proponent currently has, or has had in the past, an employment relationship with the company or any affiliate of the company (including consulting arrangements).

(b) A shareholder proponent must describe the following items where they occurred during the 12 months prior to the formation of any plans or proposals, or during the pendency of any proposal or nomination:

(1) Any material transaction of the shareholder proponent with the company or any affiliate of the company; and

(2) Any discussion regarding the proposal or nomination between the shareholder proponent and a proxy advisory firm.

(c) If the shareholder proponent holds more than 5% of any enterprise with the same Standard Industrial Classification code as the company, the shareholder proponent

must describe the number and percentage of securities held in the competitor, as of the date the shareholder proponent first formed any plans or proposals.

(d) Describe any material relationship of the shareholder proponent with any enterprise with the same Standard Industrial Classification code as the company other than as a shareholder, as of the date the shareholder proponent first formed any plans or proposals.

(e) Disclose any meetings or contacts, including direct or indirect communication by the shareholder proponent, with the management or directors of the company that occurred during the 12 months prior to the formation of any plans or proposals or during the pendency of any proposal or nomination, including:

(1) Reasonable detail of the content of such direct or indirect communication;

(2) A description of the action or actions sought to be taken or not taken;

(3) The date of the communication;

(4) The person or persons to whom the communication was made;

(5) Whether that communication included any reference to the possibility of such a proposal or nomination; and

(6) Any response by the company or its representatives to that communication prior to the date of filing the required disclosure.

Note to Item 8B(e). To the extent that a shareholder proponent conducts regularly scheduled meetings or contacts with management or directors of a company, the shareholder proponent may describe the frequency of the meetings and the subjects covered at the meetings rather than providing information separately for each meeting. However, if an event or discussion occurred at a specific meeting that is material to the





shareholder proponent's decision to submit a proposal or nomination, that meeting should be discussed in detail separately.

Item 8C. Background Information Regarding Shareholder Proponents

(a) If the shareholder proponent is not a natural person, provide:

(1) The identity of the natural person or persons associated with the entity responsible for the formation of any plans or proposals;

(2) The manner in which such person or persons were selected, including a discussion of whether or not the equity holders or other beneficiaries of the shareholder proponent entity played any role in the selection of such person or persons or otherwise played any role in connection with any plans or proposals;

(3) Whether the person or persons associated with the entity responsible for the formation of any plans or proposals have, in forming such plans or proposals, a fiduciary duty to the equity holders or other beneficiaries of the entity;

(4) The qualifications and background of such person or persons relevant to the plans or proposals; and

(5) Any interests or relationships of such person or persons, and of that entity, that are not shared generally by the other shareholders of the company and that could have influenced the decision by such person or persons and the entity to submit a proposal or nomination.

(b) If the shareholder proponent is a natural person, disclose:

(1) The qualifications and background of such person or persons relevant to the plans or proposals; and

(2) Any interests or relationships of such person or persons that are not shared

generally by the other shareholders of the company and that could have influenced the decision by such person or persons to submit a proposal or nomination.

Note to Item 8C(a)(5) and Item 8C(b)(2). Examples of interests or relationships of the shareholder proponent not shared by other shareholders of the company include, but are not limited to, contractual arrangements, current or previous employment with the company, employment agreements, consulting agreements, and supplier or customer relationships.

3. § 240.14a-2 is amended by adding paragraph (b)(6) to read as follows:

**§ 240.14a-2 Solicitations to which § 240.14a-3 to § 240.14a-15 apply.**

* * * * *

(b) * * *

(6) Any solicitation in an electronic shareholder forum established pursuant to the provisions of Rule 14a-18 by or on behalf of any person who does not seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization provided that the solicitation is made more than 60 days prior to the date announced by a registrant for its next annual or special meeting of shareholders or if the registrant announces the date of its next annual or special meeting of shareholders less than 60 days before the meeting date, then the solicitation may not be made more than two days following the date of the registrant's announcement of the meeting date.

4. § 240.14a-6 is amended by:

a. Removing the period at the end of the undesignated paragraph following



paragraph (a)(6), prior to Note 1, and adding a comma in its place; and

b. Adding “or where the proxy materials include a shareholder nominee submitted pursuant to a bylaw adopted in accordance with § 240.14a-8(i)(8).” after that new comma.

5. § 240.14a-8 is amended by:

a. Revising paragraph (b)(1); and

b. Revising paragraph (i)(8);

The revisions read as follows:

**§ 240.14a-8 Shareholder proposals.**

* * * * *

(b) ***

(1) In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company’s securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal; except where additional eligibility requirements are specified in this rule. You must continue to hold those securities through the date of the meeting.

* * * * *

(i) * * *

(8) Relates to election: If the proposal relates to a nomination or an election for membership on the company’s board of directors or analogous governing body or a procedure for such nomination or election, except for a proposal to establish a procedure by which shareholder nominees for election of director would be included in the company’s proxy materials, where that proposal:

(i) Relates to a change in the company's bylaws that would be binding on the company if approved by the shareholders; and

(ii) Is submitted by a shareholder (or group of shareholders) that:

(A) Has continuously held more than 5% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the shareholder submits the proposal;

(B) Is eligible to file a Schedule 13G (§ 240.13d-102) as an institutional investor or a passive investor, including pursuant to Rule 13d-1(l) (§ 240.13d-1(l)); and

(C) Has filed a statement of beneficial ownership on Schedule 13G (§ 240.13d-102), or an amendment thereto, that contains all required information;

* * * * *

6. Add § 240.14a-17 and § 240.14a-18 to read as follows:

**§ 240.14a-17 Shareholder nominations for election as director.**

(a) A nominating shareholder is any shareholder (or group of shareholders) that forms any plans or proposals regarding the submission of a nominee or nominees for director to the company for inclusion in the company proxy materials, in accordance with a company bylaw that has been adopted by shareholders, as provided in § 240.14a-8(i)(8).

Note to Rule 14a-17(a). The formation of any plans or proposals includes instances where the shareholder has indicated an intent to management to submit a nomination or has indicated an intent to management to refrain from submitting a nomination conditioned on the taking or not taking of a corporate action.

(b) A nominating shareholder shall provide the information required by Item 8A,





Item 8B, and Item 8C of Schedule 13G (§ 240.13d-102) to the company at the time the shareholder forms any plans or proposals with regard to submission of a nominee or nominees for director. Immediately after receiving the information from the nominating shareholder, the company shall provide the information on its website, or provide a link to a website address where the information would appear. The company also shall include the information provided by the nominating shareholder pursuant to this section in its proxy statement or on a website to which the proxy statement refers.

(c) At the time that a nominating shareholder submits to the company for inclusion in the company proxy materials a nominee or nominees, in accordance with a company bylaw that has been adopted by shareholders, as provided in § 240.14a-8(i)(8), the nominating shareholder must provide to the company, for inclusion in the company proxy statement or on a website to which the proxy statement refers, the following:

(1) Information meeting the disclosure requirements of Item 4(b) of Schedule 14A, as applicable;

(2) Information meeting the disclosure requirements of Item 5(b) of Schedule 14A, as applicable;

(3) Information meeting the disclosure requirements of Item 7 of Schedule 14A, as applicable;

(4) Information meeting the disclosure requirements of Item 22(b) of Schedule 14A, as applicable; and

(5) The consent of the nominee or nominees to be named in the company's proxy statement and to serve if elected.

(d) Where a nominating shareholder fails to provide any of the information required under paragraphs (b) and (c) of this rule, the shareholder's nominee will not be required to be included in the company's proxy materials.

(e) The company will not be responsible for the information provided to the company by the nominating shareholder and included in the company's proxy statement or on a website to which the proxy statement refers, in satisfaction of the company's disclosure obligations under Regulation 14A.

(f) Information about a shareholder nominee or nominees that has been provided to the company by a nominating shareholder, and which is disclosed in the company's proxy statement or on a website to which the proxy statement refers, in satisfaction of the company's disclosure obligations under Regulation 14A, will not be deemed incorporated by reference into any filing under the Securities Act of 1933 or the Act, except to the extent that the registrant specifically incorporates that information by reference.

**§ 240.14a-18 Electronic Shareholder Forums.**

(a) A company or shareholder may establish, maintain, or operate an electronic shareholder forum to facilitate interaction among shareholders and between the company and its shareholders as the company or shareholder deems appropriate. Subject to (b) and (c) of this Rule, the forum must comply with the federal securities laws, including Section 14(a) of the Act and its associated regulations, other applicable federal laws, applicable state law, and the company's charter and bylaw provisions.

(b) No company or shareholder because of establishing, maintaining, or operating an electronic shareholder forum is liable under the federal securities laws for any statement or information provided by another person to the electronic shareholder forum.





Nothing in this Rule 14a-18 prevents or alters the application of other provisions of the federal securities laws, including the provisions for liability for fraud, deception, or manipulation, or other applicable federal and state laws to a person or persons providing a statement or information to an electronic shareholder forum.

(c) Reliance on the exemption in Rule 14a-2(b)(6) to construct, maintain, support, or participate in an electronic shareholder forum does not eliminate a person's eligibility to solicit proxies after the date that the exemption in Rule 14a-2(b)(6) is available, provided that any such solicitation is conducted in accordance with this regulation.

7. § 240.14a-101 is amended by adding Item 24 and Item 25 to read as follows:

**§ 240.14a-101 Schedule 14A. Information required in proxy statement.**

Schedule 14A Information

* * * * *

Item 24. Relationships with Shareholder Proponents. Disclose the nature and extent of relationships between the shareholder proponent, any affiliate, executive officer or agent of such shareholder proponent, or anyone acting in concert with, or who has agreed to act in concert with, such shareholder proponent with respect to the proposed bylaw amendment submitted in accordance with § 240.14a-8(i)(8), on the one hand, and the company, on the other, including:

(a) Any direct or indirect interest of the shareholder proponent in any contract with the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);

(b) Any pending or threatened litigation in which the shareholder proponent is a party or a material participant, involving the company, any of its officers or directors, or

any affiliate of the company; and

(c) Any other material relationship between the shareholder proponent, the company, or any affiliate of the company not otherwise disclosed.

Note to Paragraph (c): Any other material relationship between the shareholder proponent and the company or any affiliate of the company may include, but is not limited to, whether the shareholder proponent currently has, or has had in the past, an employment relationship with the company (including consulting arrangements).

(d) With respect to the 12 months prior to a shareholder proponent forming any plans or proposals, or during the pendency of any proposal, regarding an amendment to a company's bylaws in accordance with § 240.14a-8(i)(8):

(1) Any material transaction of the shareholder proponent with the company or any affiliate of the company; and

(2) Any meeting or contact, including direct or indirect communication by the shareholder proponent, with the management or directors of the company, including:

(i) Reasonable detail of the content of such direct or indirect communication;

(ii) A description of the action or actions sought to be taken or not taken;

(iii) The date of the communication;

(iv) The person or persons to whom the communication was made;

(v) Whether that communication included any reference to the possibility of such a proposal; and

(vi) Any response by the company or its representatives to that communication prior to the date of filing the required disclosure.

Note to Paragraph (d)(2): To the extent that a shareholder proponent conducts



regularly scheduled meetings or contacts with management or directors of a company, the company may describe the frequency of the meetings and the subjects covered at the meetings rather than providing information separately for each meeting. However, if to the company's knowledge, an event or discussion occurred at a specific meeting that is material to the shareholder proponent's decision to submit a proposal, that meeting should be discussed in detail separately.

Note to Item 24. For purposes of the disclosures required by this item, the company will be entitled to rely upon the Schedule 13G disclosures of the shareholder proponent concerning the date upon which the shareholder proponent formed any plans or proposals with regard to the submission of a proposal to amend a company's bylaws.

Item 25. Relationships with Nominating Shareholders. (a) Provide the information submitted to the company by any nominating shareholder as required by §240.14a-17(b) and (c).

(b) Disclose the nature and extent of relationships between the nominating shareholder, any affiliate, executive officer or agent of such nominating shareholder, or anyone acting in concert with, or who has agreed to act in concert with, such nominating shareholder with respect to a nomination pursuant to a bylaw adopted in accordance with Rule 14a-8(i)(8), on the one hand, and the company, on the other, including:

(1) Any direct or indirect interest of the nominating shareholder in any contract with the company or any affiliate of the company (including any employment agreement, collective bargaining agreement, or consulting agreement);

(2) Any pending or threatened litigation in which the nominating shareholder is a party or a material participant, involving the company, any of its officers or directors, or

any affiliate of the company; and

(3) Any other material relationship between the nominating shareholder, the company, or any affiliate of the company not otherwise disclosed.

Note to Paragraph (b)(3): Any other material relationship between the nominating shareholder and the company or any affiliate of the company may include, but is not limited to, whether the nominating shareholder currently has, or has had in the past, an employment relationship with the company (including consulting arrangements).

(c) With respect to the 12 months prior to a nominating shareholder forming any plans or proposals to submit a nomination for director for inclusion in the company's proxy statement, or during the pendency of any nomination:

(1) Any material transaction of the nominating shareholder with the company or any affiliate of the company; and

(2) Any meeting or contact, including direct or indirect communication by the nominating shareholder, with the management or directors of the company, including:

(i) Reasonable detail of the content of such direct or indirect communication;

(ii) A description of the action or actions sought to be taken or not taken;

(iii) The date of the communication;

(iv) The person or persons to whom the communication was made;

(v) Whether that communication included any reference to the possibility of such a nomination; and

(vi) Any response by the company or its representatives to that communication prior to the date of submitting the nomination.

Note to Paragraph (c)(2): To the extent that a nominating shareholder conducts





regularly scheduled meetings or contacts with management or directors of a company, the company may describe the frequency of the meetings and the subjects covered at the meetings rather than providing information separately for each meeting. However, if to the company's knowledge, an event or discussion occurred at a specific meeting that is material to the nominating shareholder's decision to submit a nomination, that meeting should be discussed in detail separately.

Note to Item 25. For purposes of the disclosures required by this item, the company will be entitled to rely upon the disclosures of the nominating shareholder submitted to the company as required by Rule 14a-17(c) concerning the date upon which the nominating shareholder formed any plans or proposals with regard to the submission of a nominee or nominees to be included in the company's proxy materials.

* * * * *

By the Commission.

Nancy M. Morris
Secretary

Dated: July 27, 2007

**Securities and Exchange Commission**

**17 CFR PART 240**

**[Release No. 34-56161; IC-27914; File No. S7-17-07]**

**RIN 3235-AJ95**

**Shareholder Proposals Relating to the Election of Directors**

**Agency:** Securities and Exchange Commission.

**Action:** Proposed rule.

**Summary:** The Securities and Exchange Commission is publishing this interpretive and proposing release to clarify the meaning of the exclusion for shareholder proposals related to the election of directors that is contained in Rule 14a-8(i)(8) under the Securities Exchange Act of 1934. Rule 14a-8 is the Commission rule that provides shareholders with an opportunity to place a proposal in a company's proxy materials for a vote at an annual or special meeting of shareholders. The Commission is publishing its interpretation of and proposing amendments to Rule 14a-8(i)(8) to provide certainty regarding the meaning of the exclusion in that Rule.

**DATES:** Comments should be received by October 2, 2007.

**ADDRESSES:** Comments may be submitted by any of the following methods:

**Electronic Comments**:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-17-07 on the subject line; or



- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

**Paper Comments:**

- Send paper comments in triplicate to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-17-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Lillian Brown, Steven Hearne, or Tamara Brightwell, at (202) 551-3700, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3010.

**SUPPLEMENTARY INFORMATION:** We are publishing our interpretation of Rule 14a-8(i)(8)[1] under the Securities Exchange Act of 1934.[2] We also are proposing

[1] 17 CFR 240.14a-8(i)(8).

[2] 15 U.S.C. 78a et seq.

amendments to Rule 14a-8(i)(8).

## I. Overview

### A. Federal Regulation of the Proxy Process

Regulation of the proxy process is a core function of the Commission and is one of the original responsibilities that Congress assigned to the agency in 1934. Section 14(a) of the Exchange Act[3] stemmed from a Congressional belief that "fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange."[4] The Congressional committees recommending passage of Section 14(a) proposed that "the solicitation and issuance of proxies be left to regulation by the Commission."[5] Congress intended that Section 14(a) give the Commission the "power to control the conditions under which proxies may be solicited"[6] and that this power would be exercised "as necessary or appropriate in the public interest or for the protection of investors."[7] Because the Commission's authority under Section 14(a) encompasses both disclosure and proxy mechanics,[8] the proxy rules have long governed not only the

3 15 U.S.C. 78n(a).

4 Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970), quoting H. R. Rep. No. 1383, 73d Cong., 2d Sess., at 13 (1934). See also J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

5 S. Rep. No. 792, 73d Cong., 2d Sess., at 12 (1934).

6 H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 14 (1934). The same report demonstrated a congressional intent to prevent frustration of the "free exercise of the voting rights of stockholders." Id.

7 15 U.S.C. 78n(a).

8 See Business Roundtable v. SEC, 905 F.2d 406, 411 (D.C. Cir. 1990) ("We do not mean to be taken as saying that disclosure is necessarily the sole subject of §14"); Roosevelt v. E.I. du Pont de Nemours & Co., 958 F.2d 416, 421-22 (D.C. Cir. 1992) (Congress "did not narrowly train section 14(a) on the interest of stockholders in receiving information necessary to the intelligent exercise of their" state law rights); SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947) (in which the Commission's authority to promulgate Exchange Act Rule 14a-8 was upheld), cert. denied, 332 U.S. 847 (1948). See also John C. Coffee Jr., Federalism and the SEC's Proxy Proposals, New York Law Journal 5 (March 18, 2004) (Section 14(a) "does not focus exclusively on disclosure; rather, it contemplates SEC rules regulating procedure in order to grant shareholders a 'fair' right of corporate suffrage"); Louis Loss & Joel Seligman, Securities Regulation 1936-37 (3d ed. 1990) (The Commission's "power under §14(a) is not necessarily limited to ensuring full disclosure. The statutory language is considerably more general than it is under the specific disclosure philosophy of the [Securities Act of 1933].")



information required to be disclosed to ensure that shareholders receive full disclosure of all information that is material to the exercise of their voting rights under state law and the corporation's charter, but also the procedure for soliciting proxies.[9]

### B. Exchange Act Disclosure Requirements for Contested Elections

Several Commission rules, including Exchange Act Rule 14a-12,[10] regulate contested proxy solicitations to assure that investors receive adequate disclosure to enable them to make informed voting decisions in elections. The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a-3,[11] which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A.[12] Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a-12(c). A solicitation is subject to Rule 14a-12(c) if it is made "for the purpose of opposing" a solicitation by any

9 E.g., Exchange Act Rule 14a-4 (17 CFR 240.14a-4), Exchange Act Rule 14a-7 (17 CFR 240.14a-7), and Exchange Act Rule 14a-8 (17 CFR 240.14a-8). Each specifies procedural requirements that companies must observe in soliciting proxies. Exchange Act Rule 14a-4(b)(2) requires that the form of proxy furnish the security holder with the means to withhold approval for the election of a director. Exchange Act Rule 14a-7 provides a procedure under which a security holder may be able to obtain a list of security holders. Exchange Rule 14a-8 provides a procedure under which a qualifying security holder can obligate the company to include certain types of proposals, along with statements in support of those proposals, in the company's proxy statement.

10 17 CFR 240.14a-12.

11 17 CFR 240.14a-3.

12 Rule 14a-3 provides, in pertinent part, that "[n]o solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A…."

other person "with respect to the election or removal of directors…."[13] Thus, the result of Schedule 14A's cross-referencing of Rule 14a-12(c) is to trigger, when a solicitation with respect to the election of directors is conducted in opposition to another solicitation, a number of disclosures relevant in proxy contests, including disclosure of:[14]

- by whom the solicitation is made;
- the methods to be employed to solicit;
- total expenditures to date and anticipated in connection with the solicitation;
- by whom the cost of the solicitation will be borne;
- any substantial interest of each participant in the solicitation;
- the name, address, and principal occupation or principal business of each participant;
- whether any participant has been convicted in a criminal proceeding within the past 10 years;
- the amount of each class of securities of the company owned by the participant and the participant's associates;
- information concerning purchases and sales of the company's securities by each participant within the past two years;
- whether any part of the purchase price or market value of such securities is represented by funds borrowed;

[13] Because numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to another solicitation, the requirements regarding disclosures and procedures in contested elections do not contemplate the presence of nominees from different vying factions in the same proxy materials.

[14] See 17 CFR 240.14a-101, Items 4(b) and 5(b).





- whether a participant is a party to any contract, arrangements or understandings with any person with respect to securities of the company;
- certain related party transactions between the participant or its associates and the company;
- whether the participant or any of its associates have any arrangement or understanding with any person with respect to any future employment with the company or its affiliates, or with respect to any future transactions to which the company or its affiliates will or may be a party; and
- with respect to any person who is a party to an arrangement or understanding pursuant to which a nominee is proposed to be elected, any substantial interest that such person has in any matter to be acted upon at the meeting.[15]

In addition, Item 7 of Schedule 14A requires the furnishing of additional information as to nominees for director, including nominees of "persons other than the [company]" (e.g., shareholders), including:[16]

- any arrangement or understanding between the nominee and any other person(s) (naming such person(s)) pursuant to which the nominee was or is selected as a nominee;[17]

[15] For purposes of Items 4 and 5, a "participant" in the solicitation includes: (i) any person who solicits proxies; (ii) any director nominee for whose election proxies are being solicited; and (iii) any committee or group, any member of a committee or group, and other persons involved in specified ways in the financing of the solicitation. See Item 4, Instruction 3. Thus, for each of the numerous disclosures required as to a "participant," the information must be disclosed as to all of such persons.

[16] See 17 CFR 240.14a-101, Item 7. See also 17 CFR 240.14a-101, Item 22(b).

[17] See Item 401(a) of Regulation S-K [17 CFR 229.401(a)], which is referenced in Item 7 of Schedule 14A.

- business experience of the nominee;[18]
- any other directorships held by the nominee in an Exchange Act reporting company;[19]
- the nominee's involvement in certain legal proceedings;[20]
- certain transactions between the nominee and the company;[21] and
- whether the nominee complies with independence requirements.[22]

Finally, and of critical importance, all of these disclosures are covered by the prohibition on the making of a solicitation containing false or misleading statements or omissions that is found in Rule 14a-9.[23]

**C. The Shareholder Proposal Process**

Rule 14a-8 creates a procedure under which shareholders, subject to certain requirements, may present in the company's proxy materials a broad range of binding and non-binding proposals. The rule permits a shareholder owning a relatively small amount of the company's shares[24] to submit his or her proposal to the company, and requires the company to include the proposal alongside management's proposals in the company's proxy materials. In all cases, the proposal may be excluded by the company if it fails to satisfy the rule's procedural requirements or falls within one of the rule's thirteen substantive categories of proposals that may be excluded.[25]

Rule 14a-8 specifies that companies must notify the Commission when they intend to exclude a shareholder's proposal from their proxy materials. This notice goes to the staff of the Division of Corporation Finance or the Division of Investment Management. In the notice, the company provides the staff with a discussion of the basis or bases upon which the company intends to exclude the proposal and requests that the staff not recommend enforcement action if the company excludes the proposal. A shareholder proponent may respond to the company's notice, but is not required to do so. Generally, the staff responds to each notice with a "no-action" letter to the company, a copy of which is provided to the shareholder, in which the staff either concurs or declines to concur with the company's view that there is a basis for excluding the proposal.[26]

**II. The Election Exclusion in Rule 14a-8(i)(8)**

**A. Introduction**

Rule 14a-8(i)(8) sets forth one of several substantive bases upon which a company may exclude a shareholder proposal from its proxy materials. Specifically, it

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18 See Item 401(e)(1) of Regulation S-K [17 CFR 229.401(e)(1)], which is referenced in Item 7 of Schedule 14A.

19 See Item 401(e)(2) of Regulation S-K [17 CFR 229.401(e)(2)], which is referenced in Item 7 of Schedule 14A.

20 See Items 103 and 401(f) of Regulation S-K [17 CFR 229.103 and 17 CFR 229.401(f)], which are referenced in Item 7 of Schedule 14A.

21 See Item 404 of Regulation S-K [17 CFR 229.404], which is referenced in Item 7 of Schedule 14A.

22 See Item 407(a) of Regulation S-K [17 CFR 229.407(a)], which is referenced in Item 7 of Schedule 14A.

23 See 17 CFR 240.14a-9.

24 Exchange Act Rule 14a-8(b)(1) (17 CFR 240.14a-8(b)(1)) provides that a holder of at least $2,000 in market value, or 1% of the company's securities entitled to be voted, may submit a shareholder proposal subject to other procedural requirements and substantive bases for exclusion under the rule.

25 With respect to subjects and procedures for shareholder votes that are specified by the corporation's governing documents, most state corporation laws provide that a corporation's charter or bylaws can specify the types of proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting. Rule 14a-8(i)(1) supports these determinations by providing that a proposal that is violative of the corporation's governing documents may be excluded from the corporation's proxy materials.

26 The staff's response is an informal expression of its views, and does not necessarily reflect the view of the Commission. Either the shareholder proponent or the company may obtain a decision on the excludability of a challenged proposal from a federal court.

provides that a company need not include a proposal that "relates to an election for membership on the company's board of directors or analogous governing body." The purpose of this provision is to prevent the circumvention of other proxy rules that are carefully crafted to ensure that investors receive adequate disclosure and an opportunity to make informed voting decisions in election contests.

In administering Rule 14a-8(i)(8), the staff has applied the following explanation of the election exclusion that the Commission gave in 1976 when it proposed the exclusion:

> [T]he principal purpose of [Rule 14a-8(i)(8)] is to make clear, with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature, since other proxy rules, including Rule 14a-11, are applicable thereto. [27]

In its application of the Commission's explanation, the staff has permitted companies to exclude any shareholder proposal that may result in a contested election. For purposes of Rule 14a-8, the staff has expressed the position that a proposal may result in a contested election if it is a means either to campaign for or against a director nominee or to require a company to include shareholder-nominated candidates in the company's proxy materials. The staff's position is consistent with the explanation that the Commission gave in 1976, and with the Commission's interpretation of the election exclusion.

A recent decision by the U.S. Court of Appeals for the Second Circuit in American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.,[28] addressed the application of the election exclusion. In that decision, the Second Circuit held that AIG could not rely on Rule 14a-8(i)(8) to exclude a shareholder proposal seeking to amend a company's bylaws to establish a procedure under which a company would be required, in specified circumstances, to include shareholder nominees for director in the company's proxy materials. The Second Circuit interpreted the Commission's statement in 1976 as limiting the election exclusion "to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and reject[ing] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely."[29] It is the Commission's position that the election exclusion should not be limited in this way.[30]

We are concerned that the Second Circuit's decision has resulted in uncertainty and confusion with respect to the appropriate application of Rule 14a-8(i)(8) and may lead to contested elections for directors without adequate disclosure. In this regard, not only are shareholders and companies unable to know with certainty whether a proposal that could result in an election contest may be excluded under Rule 14a-8(i)(8), but the staff also is severely limited in their ability to interpret Rule 14a-8 in responding to

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[27] Exchange Act Release No. 34-12598 (July 7, 1976) [41 FR 29982].

[28] American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc., 462 F.3d 121 (2d Cir. 2006) (AFSCME v. AIG).

[29] Id. at 128.

[30] In this regard, we note that the Second Circuit noted in its decision that "…if the SEC determines that the interpretation of the election exclusion embodied in its 1976 Statement would result in a decrease in necessary disclosures or any other undesirable outcome, it can certainly change its interpretation of the election exclusion, provided that it explains its reasons for doing so." Id. at 130.

companies' notices of intent to exclude shareholder proposals. Therefore, to eliminate any uncertainty and confusion arising from the Second Circuit's decision, we are issuing this release to confirm the Commission's position that shareholder proposals that could result in an election contest may be excluded under Rule 14a-8(i)(8). We also are soliciting comment as to whether we should adopt proposed changes to Rule 14a-8(i)(8) to further clarify the rule's application. If clarification of the text of Rule 14a-8(i)(8) would be helpful, we are seeking input as to whether the text of the proposed amendment provides adequate clarity.

**B. The Purpose of the Election Exclusion**

The proper functioning of the election exclusion is critical to prevent the circumvention of other proxy rules that are carefully crafted to ensure that investors receive adequate disclosure in election contests. Because the board of directors of a company most often will include its own director nominees in its proxy materials, allowing shareholders to include their nominees in company proxy materials would create what is, in fact, a contested election of directors, without the shareholders conducting a separate proxy solicitation.

The detailed and carefully crafted regulatory regime governing contested elections does not contemplate the presence of nominees from different vying factions in the same proxy materials. As explained above, numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to another solicitation. Accordingly, were the election exclusion to be applied as contemplated in the Second Circuit's decision in AFSCME v. AIG, it would be possible for a person to wage an election contest without conducting a separate proxy solicitation, and thus



without providing the disclosures required by the Commission's present rules governing such contests, and potentially without liability under Rule 14a-9 for misrepresentations made by that person in its proxy solicitations. Such a result would be inconsistent with the Commission's 1976 statement regarding Rule 14a-8(i)(8) and the staff's application of that statement in responding to Rule 14a-8 notices of companies' intent to exclude proposals.

**C. Application of the Election Exclusion Since 1976**

Since the Commission made its original statement regarding the intended purpose of the election exclusion in 1976, the Commission has made few statements regarding the exclusion, instead leaving application of the exclusion to the staff to implement in accordance with its stated intent at adoption. When the Commission has had occasion to comment on the exclusion or to review staff positions in applying the exclusion, however, it has done so in a manner that is consistent with its longstanding view of the exclusion's purpose.

The Division issued a series of letters in 1990 that addressed nomination proposals similar to that presented in the AFSCME v. AIG matter. In those letters, the Division set forth its framework for applying Rule 14a-8(i)(8) to nomination proposals:

> There appears to be some basis for [the company's] view that the proposal may be omitted pursuant to rule 14a-8[(i)](8). That provision allows the omission of a proposal that "relates to an election to office." In this regard, the staff particularly notes that the Commission has indicated that the "principal purposes of [rule 14a-8(i)(8)] is to make clear [that] with respect to corporate elections, that [r]ule 14a-8 is not the proper means for

> conducting campaigns . . . since other proxy rules, including rule [14a-12] are applicable thereto." Securities Exchange Act Release No. 12598 (July 7, 1976). Insofar as it seeks to implement a common ballot procedure, it appears that this proposal . . . would establish a procedure that may result in contested elections to the board which is a matter more appropriately addressed under Rule 14a-12. Accordingly, this Division will not recommend enforcement action to the Commission if the Company excludes the proposal from its proxy materials.[31]

In 1992, in proposing reforms to the proxy rules, the Commission acknowledged the "difficulty experienced by shareholders in gaining a voice in determining the composition of the board of directors" but noted further that:

> Proposals to require the company to include shareholder nominees in the company's proxy statement [rather than in the dissident's own proxy statement] would represent a substantial change in the Commission's proxy rules. This would essentially mandate a universal ballot including both management nominees and independent candidates for board seats.[32] (emphasis added).

The Division continued to include the "may result in contested elections" language in its letters regarding shareholder nomination proposals and Rule 14a-8(i)(8) for 10 years.[33] In 1998, the Division included this language in its letter to Storage

[31] See Division letter to Amoco (Feb. 14, 1990).

[32] See Exchange Act Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276].

[33] In each of 1993 and 1995, the Division issued one letter that took a view that was counter to existing precedent and its own statements with regard to similar proposals. See Dravo Corp. (Feb. 21, 1995); and Pinnacle West Capital Corp. (Mar. 26, 1993) (not permitting exclusion under Rule 14a-8(i)(8) of proposals seeking to include qualified nominees in the company's proxy statement). The staff issued these letters in error, as they clearly are inconsistent with the Commission statement in the 1976 release proposing Rule 14a-8(i)(8) and numerous Division statements before and after. Further, these letters are inconsistent with later Commission statements, as described below.





Technology Corporation.[34] In that letter, the Division agreed that there was a basis for the company's view that it could exclude, under Rule 14a-8(i)(8), a proposal that sought to amend the company's governing instruments to provide that any three shareholders who owned a combined minimum of 3,000 shares could include a director nominee in the company's proxy materials.[35] The shareholder sought Commission review of this Division position, but the Commission declined to review the no-action determination.[36]

As noted above, the Division continued to include the "contested elections" language in its Rule 14a-8(i)(8) no-action letters through and beyond the Commission's 1998 letter to Storage Technology Corporation. While the Division has continued to follow this analysis in past seasons, it ceased repeating this language in its letters during the 2000 proxy season, as the analysis had been established definitively through 10 years of Division positions and the Commission's letter to Storage Technology.

In 2003, the Division agreed that there was a basis for the view of Citigroup Inc. that it could exclude, under Rule 14a-8(i)(8), a proposal that was substantially similar to the proposal that was submitted to AIG by AFSCME and that was the subject of the

[34] See Division letter to Storage Technology Corporation (Mar. 11, 1998) ("There appears to be some basis for your view that the first proposal may be omitted under rule 14a-8[(i)](8). It appears that the first proposal, rather than establishing procedures for nomination or qualification generally, would establish a procedure that may result in contested elections of directors, which is a matter more appropriately addressed under Rule [14a-12]. Accordingly, the Division will not recommend enforcement action to the Commission if the Company excludes the first proposal from its proxy materials in reliance upon Rule 14a-8[(i)](8)").

[35] See id.

[36] Letter of Jonathan Katz, Secretary of the Commission, to Dr. Seymour Licht P.E. (Apr. 6, 1998).

Second Circuit's recent opinion. In its letter to Citigroup Inc. (Jan. 31, 2003), the Division agreed that there was a basis for the Citigroup's view that the company could exclude a proposal because the proposal, "rather than establishing procedures for nomination or qualification generally, would establish a procedure that may result in contested elections of directors." The shareholder proposal at issue in Citigroup was submitted by AFSCME and, similar to the proposal submitted to AIG, would have amended the company's bylaws to require the company to include the name, along with certain disclosures and statements, of any person nominated for election to the board by a 3% or greater stockholder.

The shareholder sought Commission review of the Division's position in its 2003 letter to Citigroup. The Commission declined to review the staff's determination, stating:

> [t]he Commission has determined not to review the Division's no-action position under Rule 14a-8(i)(8). The Division's current no-action position is consistent with Division positions taken in recent years. Any change in the Division's current interpretation would require other significant adjustments in the system of proxy regulation under Section 14(a) of the Securities Exchange Act of 1934.[37]

While the Commission determined not to review the staff's position, it directed the Division of Corporation Finance to review the proxy rules regarding procedures for the election of corporate directors and provide the Commission with recommendations regarding possible changes to the proxy rules.

Following the Division's review of the proxy rules, in 2003 the Commission proposed a comprehensive new set of rules, based on the Division's recommendations, which would govern shareholder director nominations that are not control-related.[38] The Commission would not have taken such action had it believed that Rule 14a-8 provided an appropriate avenue for shareholder director nominations. In fact, in discussing alternatives considered but not chosen in proposing the rules, the Commission specifically noted the alternative of revising Rule 14a-8(i)(8) to enable shareholders to use the shareholder proposal rule to participate more fully in the director nomination process.[39]

**D. Commission Interpretation of Rule 14a-8(i)(8)**

As noted previously, the Commission stated clearly when it proposed amendments to Rule 14a-8 in 1976 that "Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature, since other proxy rules, including Rule 14a-11, are applicable thereto."[40] Thus, Rule 14a-8 expressly was not intended to be a substitute, or additional, mechanism for conducting contested elections (the type of elections that would involve the "conducting [of] campaigns"), or

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[37] See letter from Jonathan Katz, Secretary of the Commission, to Gerald W. McEntee (Apr. 14, 2003). In that letter, the Commission directed the Division to review the proxy rules and regulations, as well as the Division's interpretations, regarding procedures for the election of corporate directors. This review resulted in the Commission's proposal of revisions to the proxy rules in October 2003.

[38] Exchange Act Release No. 34-48626 (Oct. 14, 2003) [68 FR 60784].

[39] Id. See also AFSCME at 130, n. 8 (stating that, because of the court's determination, "there might very well be no reason for a rule based on Proposed Rule 14a-11 to co-exist with the procedure that our holding makes available to shareholders").

[40] Exchange Act Release No. 34-12598 (July 7, 1976). The Commission's reference in its 1976 statement to "other proxy rules, including Rule 14a-11," reflects the fact that, in 1976, Rule 14a-11 was the Commission proxy rule governing election contests. As part of a series of rule changes in 1999, the Commission rescinded Rule 14a-11 and moved many of the requirements of prior Rule 14a-11 to the current Rule 14a-12. [17 CFR 240.14a-12] See Securities Act Release No. 33-7760 (Oct. 22, 1999) [64 FR 61408]. Accordingly, the Commission's reference to Rule 14a-11 in 1976 was to the rules governing election contests, which now may be found generally elsewhere in the proxy rules and, in particular, in Rule 14a-12.

for effecting reforms in contested elections (elections whose "nature" involves campaigns). Based on the foregoing, it is the Commission's view that a proposal may be excluded under Rule 14a-8(i)(8) if it would result in an immediate election contest (e.g., by making or opposing a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings.

In the AFSCME opinion, the Second Circuit agreed with the Commission's view that shareholder proposals can be excluded under Rule 14a-8(i)(8) if they would result in an immediate election contest. The court, however, disagreed with the view that a proposal can be excluded under Rule 14a-8(i)(8) if it "establish[es] a process for shareholders to wage a future election contest."

We believe that the fact a proposal relates to the process for future elections rather than an immediate election is not dispositive in determining whether the election exclusion applies to the proposal. As the Commission stated in 1976, the express purpose of the election exclusion is to make clear that Rule 14a-8 is not a proper "means" to achieve election contests because "other proxy rules" are applicable to such contests. The use of Rule 14a-8 to require companies to include proposals that would require election contests to be conducted without compliance with the specific rules governing such contests would be contrary to the intent of the Commission's 1976 statement.

For these reasons, and to avoid such circumvention, the phrase "relates to an election" in the election exclusion cannot be read so narrowly as to refer only to a proposal that "relates to the current election," or a particular election, but rather must be



read to refer to a proposal that "relates to an election" in subsequent years as well. In this regard, if one looked only to what a proposal accomplished in the current year, and not to its effect in subsequent years, the purpose of the exclusion could be evaded easily. For example, such a reading might permit a company to exclude a shareholder proposal that nominated a candidate for election as director for the upcoming meeting of shareholders but not exclude a proposal that required the company to include the same shareholder-nominated candidate in the company's proxy materials for the following year's meeting.

In implementing the Commission's intended meaning, the staff has taken care not to adopt an inappropriately broad reading of whether a proposal "relates to an election," as such a reading would permit the exclusion of all proposals regarding the qualifications of directors, the composition of the board, shareholder voting procedures, and board nomination procedures. We agree with the staff's application of the exclusion in this regard, as an inappropriately broad reading of the exclusion would deny shareholder access to the company proxy materials under Rule 14a-8 with respect to a vast category of election matters of importance to shareholders that would not result in an election contest between management and shareholder nominees, and that do not present significant conflicts with the Commission's other proxy rules.[41]

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[41] In this regard, the staff has taken the position that a proposal relates to "an election for membership on the company's board of directors or analogous governing body" and, as such, may be excluded under Rule 14a-8(i)(8) if it could have the effect of, or proposes a procedure that could have the effect of, any of the following:

- disqualifying board nominees who are standing for election;
- removing a director from office before his or her term expired;
- questioning the competence or business judgment of one or more directors; or
- requiring companies to include shareholder nominees for director in the companies' proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to management-chosen nominees.

Conversely, the staff has taken the position that a proposal may not be excluded under Rule 14a-8(i)(8) if it relates to any of the following:

- qualifications of directors or board structure (as long as the proposal will not remove current directors or not disqualify current nominees);

Our interpretation of the election exclusion is fully consistent with the Commission's statement in 1976, that the rule was not intended "to cover proposals dealing with matters previously not held not excludable by the Commission, such as cumulative voting rights, general qualifications for directors…" In the AFSCME v. AIG opinion, the Second Circuit inferred from this Commission statement that the Commission "reject[ed] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures for making election contests more likely." Our view that Rule 14a-8(i)(8) allows companies to exclude shareholder proposals that could result in election contests without compliance with the contested election proxy rules is consistent with the Commission's statement in 1976. As explained above, the analysis under Rule 14a-8(i)(8) does not focus on whether the proposal would make election contests more likely, but whether the resulting contests would be governed by the Commission's proxy rules for contested elections. The Commission's references in 1976 to proposals relating to "cumulative voting rights" and "general qualifications for directors" simply reflect the long-held belief that these proposals generally do not trigger the contested elections proxy rules and therefore are not excludable under Rule 14a-8(i)(8). Accordingly, the Commission's 1976 statement should not be interpreted to mean that Rule 14a-8(i)(8) is inapplicable to proposals establishing procedures for elections generally.

**III. Proposed Amendments to Rule 14a-8(i)(8)**

In addition to the guidance provided in this release regarding our interpretation of

- voting procedures (such as majority or cumulative voting);
- nominating procedures; or
- reimbursement of shareholder expenses in contested elections.



Rule 14a-8(i)(8), we are considering whether it would be appropriate to amend that rule to further clarify the meaning of its exclusion. The text of Rule 14a-8(i)(8) currently specifies only that a proposal may be excluded "[i]f the proposal relates to an election for membership on the company's board of directors or analogous governing body." To clarify the meaning of the exclusion, consistent with the Commission's interpretation of that exclusion, we are proposing to revise the exclusion to read:

> If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election.

We believe that the added references to "nomination" and "procedure" in the rule text will reflect more appropriately the purpose of the election exclusion. Further, if adopted, we would indicate clearly that the term "procedures" referenced in the election exclusion relates to procedures that would result in a contested election, either in the year in which the proposal is submitted or in subsequent years, consistent with the Commission's interpretation of the exclusion.

As discussed above, we are proposing amendments to Rule 14a-8 that would clarify the operation of the exclusion in Rule 14a-8(i)(8) in a manner that is consistent with the Commission's interpretation of that exclusion. With regard to this proposed amendment, we are soliciting comment as to the following:

- Would the proposed amendments to Rule 14a-8(i)(8) provide sufficient certainty regarding the scope of the exclusion? If not, what additional amendments are necessary?
- Should the exclusion specify those procedures that the staff historically has

found to fall within the exclusion?

- What additional clarification would be helpful and/or appropriate?

For further clarity, should the proposed amendments include a specific reference to the interpretation of the exclusion with respect to procedures that could not result in a contested election? An example of such a further clarification would be:

> In this regard, a proposal relates to "a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election" if it could have the effect of, or proposes a procedure that could have the effect of, any of the following: (A) disqualifying board nominees who are standing for election; (B) removing a director from office before his or her term expired; (C) questioning the competence or business judgment of one or more directors; or (D) requiring companies to include shareholder nominees for director in the companies' proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to management-chosen nominees.

## IV. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- the proposed amendments that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors, and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and



analysis of the issues addressed in those comments. We will consider all comments responsive to this inquiry in complying with our responsibilities under Section 23(a) of the Exchange Act.[42]

## V. Paperwork Reduction Act

### A. Background

The proposed amendments affect "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995, the PRA.[43] The title for the affected collection of information is "Proxy Statements - Regulation 14A (Commission Rules 14a-1 through 14a-16 and Schedule 14A)" (OMB Control No. 3235-0059). This regulation was adopted pursuant to the Exchange Act and sets forth the disclosure requirements for proxy statements filed by companies to help investors make informed voting decisions.

The hours and costs associated with preparing and filing the disclosure, filing the forms and schedules and retaining records required by these regulations constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### B. Summary of Proposals

Rule 14a-8 is the Commission rule that provides shareholders with an opportunity to place a proposal in a company's proxy materials for a vote at an annual or special meeting of shareholders. The proposed amendments to that rule are intended to clarify

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[42] 15 U.S.C. 78w(a).

[43] 44 U.S.C. 3501 et seq.

the scope of the exclusion in Rule 14a-8(i)(8), consistent with the Commission's interpretation of the exclusion. The amendments would provide certainty regarding the meaning of the exclusion in that rule.

**C. Paperwork Reduction Act Burden Estimates**

Adoption of the Rule 14a-8(i)(8) amendments would merely revise the text of the rule in a manner that is consistent with the Commission's interpretation of the rule. As such, the amendments proposed today would not change the information that companies are required to provide on Schedule 14A; the same information will be required if the proposed amendments are adopted.

**D. Solicitation of Comments**

We request comment on this Paperwork Reduction Act Analysis. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information;
- determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
- evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct



the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-17-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-17-07, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Assistance, Washington, DC 20549.

**VI. Cost-Benefit Analysis**

We propose amendments that would clarify existing rules. The opinion in American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.[44] has created uncertainty regarding the Commission staff's longstanding administration of Rule 14a-8(i)(8), making it difficult for shareholders and companies to assess the operation of that rule. The proposed amendments to that rule are intended to clarify the scope of the exclusion in Rule 14a-8(i)(8), consistent with the Commission's interpretation of the rule. Without such clarification, shareholders and companies may be uncertain as to the range of shareholder proposals that are required to be included in company proxy materials and may be uncertain as to the proper range of proposals that shareholders may submit to companies for inclusion in those proxy materials. For example, without clarification of the exclusion in Rule 14a-8(i)(8), shareholders may incur costs in preparing and submitting proposals that a company may properly exclude from its proxy materials.

[44] 462 F.3d 121 (2d Cir. 2006) (AFSCME).

Because the proposed amendments would clarify that the scope of the exclusion in Rule 14a-8(i)(8) is consistent with the Commission's interpretation of that exclusion, shareholders and companies would not incur additional costs to determine the appropriate scope of that exclusion. Further, companies would not incur additional costs with regard to the inclusion of shareholder proposals in proxy materials.

The proposed amendments should improve the ability of shareholders to prepare and submit proposals that will be required to be included in a company's proxy materials, as those shareholders will have a clear understanding of the scope of the Rule 14a-8(i)(8) exemption. Further, without the clarification of the proper scope of the Rule 14a-8(i)(8) exclusion that would be provided by the amendments, shareholders and companies may incur substantial expense in litigating disputes regarding that exclusion.

**Request for Comment**

We are sensitive to the costs and benefits imposed by our rules. We have identified no costs and certain benefits related to these proposals. We request comment on all aspects of this cost-benefit analysis, including identification of any costs and additional benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments.

## VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[45] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the

[45] 15 U.S.C. 78w(a)(2).



Exchange Act. Section 3(f) of the Exchange Act[46] and Section 2(c) of the Investment Company Act of 1940[47] requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The AFSCME opinion has created uncertainty regarding the Commission staff's longstanding administration of Rule 14a-8(i)(8), making it difficult for companies and shareholders to assess the operation of that rule. This has resulted in uncertainty regarding whether Rule 14a-8 requires companies to include in their proxy materials shareholder proposals that would establish procedures under which shareholder nominees for director, despite the exclusion provided by Rule 14a-8(i)(8). This uncertainty has made it difficult for shareholders and companies to assess the proper operation of the shareholder proposal rule and has generated economic inefficiency by introducing potential litigation costs, and costs incurred to prepare and respond to shareholder proposals.

The proposed amendments are intended to clarify the scope of the exclusion in Rule 14a-8(i)(8), consistent with the Commission's interpretation of the rule. This should improve shareholders' and companies' ability to assess shareholder proposals with a clear understanding whether Rule 14a-8 will require inclusion of the proposal. Informed decisions in this regard generally promote market efficiency and capital formation. We believe the proposed amendments to Rule 14a-8 would not impose a burden on

[46] 15 U.S.C. 78c(f).

[47] 15 U.S.C. 80a-2(c).

competition.

We request comment on whether the proposed amendments, if adopted, would impose a burden on competition. We also request comment on whether the proposed amendments, if adopted, would promote efficiency, competition and capital formation. Finally, we request commenters to provide empirical data and other factual support for their views if possible.

**VIII. Initial Regulatory Flexibility Act Analysis**

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed amendments to Rule 14a-8 that would clarify the application of the exclusion provided by paragraph (i)(8) of that rule.

**A. Reasons for, and Objectives of, Proposed Action**

The purpose of the proposed amendments is to clarify the requirements of companies to include in their proxy materials shareholder proposals relating to procedures for the inclusion of shareholder nominees for directors in company proxy materials. The proposed amendments would clarify the scope of Rule 14a-8(i)(8), which permits companies to omit certain such proposals from their proxy materials.

The proposals, if adopted, should improve shareholders' and companies' ability to assess shareholder proposals with a clear understanding whether Rule 14a-8 will require inclusion of the proposal.

**B. Legal Basis**

We are proposing amendments to the rules under the authority set forth in Sections 14 and 23(a) of the Exchange Act, as amended, and Sections 20(a) and 38 of the Investment Company Act of 1940, as amended.



**C. Small Entities Subject to the Proposed Rules**

The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[48] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[49] A "small business" and "small organization," when used with reference to a company other than an investment company, generally means an company with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 companies, other than investment companies, that may be considered reporting small entities.[50] The proposed rules may affect each of the approximately 1,315 small entities that are subject to the Exchange Act reporting requirements.

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

**D. Reporting, Recordkeeping and Other Compliance Requirements**

The proposed amendments would impose no new reporting, recordkeeping, or compliance requirements. The impact of these proposals relates to clarifying the scope of the requirement to include shareholder proposals in company proxy materials.

**E. Duplicative, Overlapping or Conflicting Federal Rules**

We believe that there are no rules that conflict with or duplicate the proposed

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[48] 5 U.S.C. 601(6).

[49] Securities Act Rule 157 (17 CFR 230.157), Exchange Act Rule 0-10 (17 CFR 240.0-10) and Investment Company Act Rule 0-10 (17 CFR 270.0-10) contain the applicable definitions.

[50] The estimated number of reporting small entities is based on 2007 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database. Approximately 215 investment companies meet this definition.

rules.

**F. Significant Alternatives**

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective of our proposals, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments and rules, we considered the following alternatives:

1. the establishment of different compliance or reporting requirements or timetables that take into account the resources available to small entities;
2. the clarification, consolidation, or simplification of the rule's compliance and reporting requirements for small entities;
3. the use of performance rather than design standards; and
4. an exemption from coverage of the proposed rules, or any part thereof, for small entities.

Regarding Alternative 1, we believe that differing compliance or reporting requirements for small entities would be inconsistent with Rule 14a-8, the Commission's intent when it adopted that rule, and the Commission's purpose of providing certainty in the application of that rule. Regarding Alternative 2, the proposals are concise and would clarify the Rule 14a-8(i)(8) exclusion for all entities, including small entities. Regarding Alternative 3, we believe that design rather than performance standards are appropriate because use of performance standards for small entities would not be consistent with the purpose of Rule 14a-8. Finally, an exemption for small entities is not appropriate because the proposals are designed to provide certainty and consistency regarding the application of the exclusion provided by Rule 14a-8.



**G. Solicitation of Comment**

We encourage comments with respect to any aspect of this initial regulatory flexibility analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
- How to quantify the impact of the proposed rules.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the final regulatory flexibility analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

**IX. Small Business Regulatory Enforcement Fairness Act**

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[51] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;

[51] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 50 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. §601).

- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

**X. Statutory Basis and Text of Proposed Amendments**

We are proposing amendments to rules pursuant to Sections 14, and 23(a) of the Exchange Act, as amended, and Sections 20(a) and 38 of the Investment Company Act of 1940, as amended.

**List of Subjects**

**17 CFR Part 240**

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations as follows:

**PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

1. The authority citation for Part 24 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et. seq.; and 18 U.S.C. 1350, unless otherwise noted.

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2. Amend §240.14a-8 by revising paragraph (i)(8) to read as follows:

**§240.14a-8 Shareholder proposals.**

* * * * *

(i) * * *



(8) Relates to election: If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election;

* * * * *

By the Commission.

Nancy M. Morris
Secretary

Dated: July 27, 2007

**MAJORITY VOTING IN DIRECTOR ELECTIONS**

I. The Trend from Plurality Voting toward Majority Voting

A. Traditionally, to be elected to a board, a candidate must receive a plurality of the votes. This means that if X board seats are to be filled in the election, the X candidates receiving the most votes will win. Under this standard, a candidate who receives a plurality of the votes is elected even if the votes cast against that candidate exceed the votes cast in favor of that candidate.

B. The advantage of plurality voting is that it provides assurance that all board seats will be filled. However, it has been criticized for making it impossible for investors to unseat an underperforming director other than through an expensive proxy fight to elect a competing candidate.

C. In recent years there has been a strong trend, particularly among larger companies, to adopt vote standards that resemble majority voting. As of the early 2007, slightly more than half of the companies in the S&P 500 and almost half of the Fortune 500 companies had adopted a majority voting standard of some form.

D. ISS favors a majority vote standard and includes it as a factor in determining a company's CGQ.

II. Voluntarily Adoption of Majority Voting – Harder Than It Sounds

A. Under most state corporation laws, an incumbent director continues to serve until his or her successor is elected. Thus, if an incumbent director is not reelected, he or she will remain on the board until the company holds another election or the "holdover" director resigns.

B. Companies have sought to overcome this problem by having directors submit conditional resignation letters that would take effect upon the director's failure to win reelection under the company's majority vote standard. However, such resignations normally are not irrevocable.

C. At least one state, California, has enacted a majority vote provision that provides that, where a company has adopted majority voting and a director does not receive the requisite vote for reelection, the director's term will end within a specified period after the vote occurred (as discussed below). Such a remedy addresses the holdover problem, but at the risk of leaving the board short-handed.

III. Recent Changes in Corporation Laws to Make Majority Voting Easier to Implement

A. Delaware General Corporation Law – amended in August 2006

1. Section 141(b) amended to include a clause permitting irrevocable resignations that are conditioned upon directors failing to receive a specified vote for reelection.



2. Section 216 (which sets forth standards for quorum and stockholder voting and provides that such standards may be superseded by certificate of incorporation or bylaws) amended to provide that a bylaw amendment adopted by stockholders specifying the votes necessary to elect directors may not be amended or repealed by the board.

B. California Corporations Code – Section 708.5 added in January 2007

1. Permits a "listed corporation" to amend its articles or bylaws to require majority voting in uncontested elections (i.e., where the number of candidates does not exceed the number of seats to be filled), provided the corporation has eliminated cumulative voting.

2. Under this voting standard, directors are elected by "approval of the shareholders" (defined as the affirmative vote of a majority of the shares voted, provided that the number of shares voted affirmatively represents at least a majority of a quorum).

3. If a director fails to achieve the required vote, his or her term ends 90 days after determination of the voting results, or such earlier date as the board selects a person to fill the vacancy.

C. Model Business Corporation Act – Amended by ABA in June 2006

1. Permits companies to adopt "modified plurality" standard in bylaws under which a director who receives more "against" votes than "for" votes (with "withhold" votes and abstentions being disregarded) is required to resign by the earlier of 90 days following the vote or such time as the seat is filled by vote of the other directors.

2. If such bylaw provision is adopted by the shareholders, it may be repealed only by the shareholders; if adopted by the board, it may be repealed only by the board.

3. Companies are permitted to adopt resignation policies requiring binding resignations that are effective upon certain events, such as failure to receive requisite vote for reelection.

4. Such bylaw provisions are not effective if the articles of incorporation prohibit such provisions, alter the plurality vote standard specified by the MBCA, or provide for cumulative voting.

5. ISS has criticized the MBCA provisions for allowing board to fill the resulting vacancy rather than the shareholders.

IV. Issues to Consider when Adopting Majority Voting

A. Vote Threshold

1. Votes “for” exceed votes “withheld”

2. Votes “for” represent a majority of the shares present and entitled to vote

3. Majority of outstanding shares (very high threshold; adopted by only a small handful of companies)

B. In most instances, majority voting has been adopted in the form of a modified plurality standard, under which the Board has discretion to evaluate the apparent reasons for the large proportion of negative votes in determining whether to accept the director’s resignation.



**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR PARTS 240, 249 and 274**

**[RELEASE NOS. 34-55146; IC-27671; File No. S7-10-05]**

**RIN 3235-AJ47**

**INTERNET AVAILABILITY OF PROXY MATERIALS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule; request for comment on Paperwork Reduction Act burden estimates.

**SUMMARY:** We are adopting amendments to the proxy rules under the Securities Exchange Act of 1934 that provide an alternative method for issuers and other persons to furnish proxy materials to shareholders by posting them on an Internet Web site and providing shareholders with notice of the availability of the proxy materials. Issuers must make copies of the proxy materials available to shareholders on request, at no charge to shareholders. The amendments put into place processes that will provide shareholders with notice of, and access to, proxy materials while taking advantage of technological developments and the growth of the Internet and electronic communications. Issuers that rely on the amendments may be able to significantly lower the costs of their proxy solicitations that ultimately are borne by shareholders. The amendments also might reduce the costs of engaging in a proxy contest for soliciting persons other than the issuer. The amendments do not apply to business combination transactions. The amendments also do not affect the availability of any existing method of furnishing proxy materials.

**DATES:** Effective Date: March 30, 2007.

Compliance Date: Persons may not send a Notice of Internet Availability of Proxy Materials to shareholders prior to July 1, 2007.

Comment Due Date: Comments on the Paperwork Reduction Act burden estimate should be received on or before March 30, 2007.

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/final.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-10-05 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-10-05. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on its Internet Web site (http://www.sec.gov/rules/final.shtml). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from



submissions. You should submit only information that you wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Raymond A. Be, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** We are amending Rules 14a-2,[1] 14a-3,[2] 14a-4,[3] 14a-7,[4] 14a-8,[5] 14a-12,[6] 14a-13,[7] 14b-1,[8] 14b-2,[9] 14c-2,[10] 14c-3,[11] 14c-5,[12] 14c-7,[13] Schedule 14A,[14] Schedule 14C,[15] Form 10-K,[16] Form 10-KSB,[17] Form 10-Q,[18] and Form 10-QSB,[19] under the Securities Exchange Act of 1934[20] and Form N-SAR[21] under the

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1 17 CFR 240.14a-2.
2 17 CFR 240.14a-3.
3 17 CFR 240.14a-4.
4 17 CFR 240.14a-7.
5 17 CFR 240.14a-8.
6 17 CFR 240.14a-12.
7 17 CFR 240.14a-13.
8 17 CFR 240.14b-1.
9 17 CFR 240.14b-2.
10 17 CFR 240.14c-2.
11 17 CFR 240.14c-3.
12 17 CFR 240.14c-5.
13 17 CFR 240.14c-7.
14 17 CFR 240.14a-101.
15 17 CFR 240.14c-101.
16 17 CFR 249.310.
17 17 CFR 249.310a.
18 17 CFR 249.308a.
19 17 CFR 249.308b.
20 15 U.S.C. 78a et seq.
21 17 CFR 249.330 and 274.101.

Exchange Act and the Investment Company Act of 1940.[22] We also are adding new Rule 14a-16 under the Exchange Act.

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[22] 15 U.S.C. 80a-1 et seq.



## I. Introduction

On December 8, 2005, we proposed amendments to update the proxy rules to take greater advantage of communications technology by supplementing the existing regulatory framework with an alternative "notice and access" proxy model that could reduce significantly the printing and mailing costs associated with furnishing proxy materials to shareholders.[23] Under the notice and access model that we proposed, an issuer would be able to satisfy its obligations under the Commission's proxy rules by posting its proxy materials on a publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and providing shareholders with a notice informing them that the materials are available and explaining how to access those materials. Under the proposal, an issuer relying on the model would be required to provide a requesting shareholder with a copy of the proxy materials in paper or by e-mail, at no charge to the

[23] Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597]. For purposes of this release only, the term "proxy materials" includes proxy statements on Schedule 14A, proxy cards, information statements on Schedule 14C, annual reports to security holders required by Rules 14a-3 and 14c-3 of the Exchange Act, notices of shareholder meetings, additional soliciting materials, and any amendments to such materials. For purposes of this release, the term does not include materials filed under Rule 14a-12.

shareholder. We proposed that soliciting persons other than the issuer also would be able to rely on the notice and access model.

We received approximately 140 comment letters on the proposed notice and access model from a variety of interested parties, including issuers and their agents, shareholders, intermediaries and their agents, financial printers, manufacturers of mailing products, and academics. There was significant disagreement among the commenters regarding these key issues raised by the proposed model:

- The sufficiency of current Internet access among the U.S. population such that the proposed model would be desirable;[24]
- The effect that the proposed notice and access model might have on levels of proxy voting by shareholders; [25]
- The level of security and privacy on the Internet;[26]

[24] See, for example, letters suggesting that current rates of Internet access are sufficient from American Bar Association (ABA), America's Community Bankers (ACB), Association of Ameritech SBC Retirees (SBC Retirees), Business Roundtable (BRT), Computershare Ltd. (Computershare), Proxinvest, Gary Tannahill, Hermes, Investment Company Institute (ICI), Securities Transfer Association (STA), and Sullivan & Cromwell. But also see, for example, letters from Association of BellTel Retirees (BellTel Retirees), Todd Collier, Joel Brown, James Davis, Donna Garal, Clark Green, Heather Harper, Frank Inman, William Lafollette, James Phipps, Beth Spletter, Megan Stroinski, and the United States Postal Service (USPS) suggesting that those rates are not sufficient.

[25] Some commenters believed that the proposed model might result in a decline in voting by shareholders. See, for example, letters from Automatic Data Processing, Inc. (ADP), James Angel, Timothy Buchman, State Board of Administration of Florida (Florida State Board), Fund of Stockowners Rights (Stockowners Rights), IR Web Report, and Securities Industry Association (SIA). However, other commenters believed the rules may increase shareholder voting by facilitating the voting process. See, for example, letters from AFL-CIO, Robert Atkinson, Institutional Shareholder Services (ISS), Proxinvest, and Society of Corporate Secretaries and Governance Professionals (SCSGP).

[26] See, for example, letters from James Angel, Todd Collier, James Davis, William LaFollette, Matthew McGuire, and USPS.





- The extent of potential savings to issuers and those conducting proxy contests that choose to rely on the proposed model;[27] and
- Whether the proposed model may make the proxy delivery system, particularly as it relates to beneficial owners holding in street name through their brokers or other intermediaries, too complex.[28]

Several commenters suggested revisions related to the proposed notice and access model, including the following:

- The proposed rules should allow a shareholder to make an election to receive paper copies of the proxy materials with respect to any future solicitations that would remain in place until subsequently revoked by the shareholder;[29]
- An issuer should have to make the proxy card available to shareholders through the same medium it uses to make the proxy statement available to them;[30]
- The Commission should review and simplify the proxy delivery system as a whole rather than addressing the issue of electronic delivery of proxy materials in isolation;[31] and

[27] See, for example, letters from ADP and Computershare.

[28] See letter from ABA.

[29] See letters from American Business Council (ABC), AFL-CIO, James Angel, CALSTRS, Florida State Board, Ohio Public Employees Retirement System (OPERS), San Diego City Employees' Retirement System (San Diego Retirement), SIA, William Sjostrom, Stocklein Law Group, Swingvote, and Paul Uhlenhop.

[30] See letters from ACB, AFL-CIO, Amalgamated Bank of LongView Funds (Amalgamated Bank), BellTel Retirees, Council of Institutional Investors (CII), Florida State Board, Carl Hagberg, International Brotherhood of Teamsters (Teamsters), National Retiree Legislative Network (NRLN), San Diego Retirement, and Swingvote.

- The New York Stock Exchange ("NYSE") should review its current schedule of maximum fees that its member firms may charge issuers to forward issuers' proxy materials to beneficial owners.[32]

Although there was a mixed reaction to the proposal,[33] we believe that current levels of access to the Internet merit adoption of the notice and access model as an alternative to the existing proxy distribution system. In this regard, we note that more than 10.7 million beneficial shareholders already have given their affirmative consent to electronic delivery of proxy materials and approximately 87.8% of shares voted were voted electronically or telephonically during the 2006 proxy season.[34] Moreover, research submitted to us during the comment period indicates that approximately 80% of investors in the United States have access to the Internet in their homes, a greater percentage than we estimated at the proposing stage.[35] Several commenters expressed the view that the current level of Internet usage is sufficiently high to warrant adoption of the proposed notice and access model.[36] Although some commenters did not think that

31 See, for example, letters from BRT, Committee of Concerned Shareholders (Concerned Shareholders), Computershare, Carl Hagberg, Mellon, and STA.

32 See letters from BRT, Computershare, and SCSGP.

33 It appeared that many commenters opposing adoption mistakenly believed that they would lose the ability to receive paper copies. Others objected to having to request paper copies under the notice and access model. See, for example, letters from Arthur Comings, Dave Few, George Liddell, Robert Link, and Chloris Wolski.

34 According to data available on the Web site of ADP. See www.ics.adp.com/release11/public_site/about/stats.html.

35 See letter from ADP. At the proposing stage, we estimated that 75% of people in the United States had Internet access, but we did not have an estimate for the percentage of investors with Internet access.

36 See, for example, letters from ABA, ACB, BRT, Computershare, Hermes, ICI, Proxinvest, SBC Retirees, STA, Sullivan & Cromwell, and Gary Tannahill,.



Internet access is sufficiently widespread, particularly among seniors,[37] to warrant implementation of the proposed model at this time,[38] the requirement that any shareholder lacking Internet access, or preferring delivery of a copy of the proxy materials, can make a permanent request to receive a copy of the proxy materials (and all future proxy materials) at no charge should substantially mitigate the concern about Internet access.

Therefore, we are adopting the proposal substantially as proposed. The final rules are intended to allow issuers and other soliciting persons to establish procedures that will promote use of the Internet as a reliable and cost-efficient means of making proxy materials available to shareholders. Among those shareholders who access the proxy materials electronically, the rules also may increase the use of the Internet for voting proxies. An issuer's or other soliciting person's election to follow the notice and access model will be voluntary.[39]

Under the final rules, as discussed in more detail below, an issuer may satisfy its obligation under the Commission's proxy rules to furnish proxy materials to shareholders in connection with a proxy solicitation by posting its proxy materials on a publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and sending a Notice of Internet Availability of Proxy Materials ("Notice") to shareholders at least 40 calendar days before the shareholder meeting date indicating that the proxy

37 See, for example, letters from American Association of Retired Persons (AARP), BellTel Retirees, Timothy Buchman, Todd Collier, NRLN, Printing Industries of America (PIA), Stockowners Rights, and Telephone Pioneers of America.

38 See, for example, letters from BellTel Retirees, Joel Brown, Todd Collier, James Davis, Donna Garal, Clark Green, Heather Harper, Frank Inman, William Lafollette, James Phipps, Beth Spletter, Megan Stroinski, and USPS.

materials are available and explaining how to access those materials.[40] Shareholders must have a means to execute a proxy as of the time on which the Notice is sent.[41] The Notice also must explain how a shareholder can request a copy of the proxy materials and how a shareholder can indicate a preference to receive a paper or e-mail copy of any proxy materials distributed under the notice and access model in the future. An issuer may not send a proxy card along with the Notice; however, 10 calendar days or more after sending the Notice, the issuer may send a proxy card to shareholders.[42] If an issuer chooses to send a proxy card without a copy of the proxy statement under this provision, a copy of the Notice must accompany the proxy card so that recipients will be notified again about the Web site on which the proxy statement is accessible. Finally, the notice and access model may not be used in conjunction with a proxy solicitation related to a business combination transaction.

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39 In a companion release, the Commission is proposing to require issuers and other soliciting persons to follow a substantially similar model. See Release No. 34-55147.

40 An issuer or other soliciting person also must continue to comply with Exchange Act Rules 14a-6 [17 CFR 240.14a-6] and 14c-5 [17 CFR 240.14c-5], which require the issuer or other soliciting person to file its proxy statement (or information statement) and additional soliciting material with the Commission. An issuer also must continue to comply with Exchange Act Rules 14a-3(c) [17 CFR 240.14a-3(c)] and 14c-3(b) [17 CFR 240.14c-3(b)], which require an issuer to submit copies of its annual report to security holders to the Commission. The rules that we are adopting in this release do not affect any current Commission filing requirement, except that an issuer or other soliciting person following the notice and access model would be required to file the Notice as additional soliciting material under Exchange Act Rule 14a-6(b) [17 CFR 240.14a-6(b)].

41 As discussed in more detail in Section II.A.2 of this release, an issuer or any other soliciting person must provide a means for executing proxies available at the time the Notice is sent. It may not wait until it sends a paper or e-mail copy of the proxy card 10 calendar days or more after sending the Notice to provide shareholders with a means to execute a proxy.

42 An issuer may send a proxy card to shareholders before the conclusion of the 10-day period if the proxy card is accompanied or preceded by a copy, via the same medium, of the proxy statement and annual report to security holders if required by Rule 14a-3(b).





Shareholders and other persons conducting their own proxy solicitations may rely on the notice and access model under requirements substantially similar to the requirements that would apply to issuers. As a result, these rules may have the effect of reducing the cost of engaging in a proxy contest. However, unlike the requirements for an issuer, a soliciting person other than the issuer may selectively choose the shareholders from whom it desires to solicit proxies without the need to send an information statement to all other shareholders.

The new rules do not affect the availability of other means of providing proxy materials to shareholders, such as obtaining affirmative consents for electronic delivery pursuant to existing Commission guidance.[43] Thus, an issuer may rely on affirmative consents to furnish proxy materials to some shareholders, and rely on the notice and access model to furnish the materials to others.

We are making several significant revisions to the proposed notice and access model in response to commenters' concerns. First, the final rules do not permit a proxy card to accompany the Notice as we originally proposed, although the rules do permit an issuer or other soliciting person to send a proxy card 10 calendar days or more after it

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43 Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458] (the "1995 Interpretive Release") provided guidance on electronic delivery of prospectuses, annual reports to security holders and proxy solicitation materials under the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934, and the Investment Company Act of 1940. Release No. 33-7288 (May 9, 1996) [61 FR 24644] (the "1996 Interpretive Release") provided guidance on electronic delivery of required information by broker-dealers and transfer agents under the Securities Act, the Exchange Act, and the Investment Company Act. Release No. 33-7856 (Apr. 28, 2000) [65 FR 25843] (the "2000 Interpretive Release") provided guidance on the use of electronic media to deliver documents under the federal securities laws, an issuer's liability for Web site content, and basic legal principles that issuers and market intermediaries should consider in conducting online offerings.

sends the Notice, provided that a copy of the Notice or accompanies the proxy card.[44] Second, we are adopting a requirement that issuers and other soliciting persons send the Notice to shareholders at least 40 calendar days before the shareholder meeting date, rather than 30 calendar days before the meeting, as proposed. We are making this change so that issuers and other soliciting persons will still have at least a 30-day period in which they can send a proxy card to shareholders if they choose to do so.

Third, in addition to the proposed requirement that a shareholder be able to request a paper or e-mail copy of the proxy materials for a particular meeting, the final rules require an issuer to allow shareholders to elect to receive paper or e-mail copies of proxy materials that the issuer will distribute in the future in reliance on the notice and access model. Similarly, intermediaries must allow beneficial owners to elect to receive paper or e-mail copies of any proxy materials that will be distributed in the future in reliance on the notice and access model with respect to all securities held in the beneficial owner's account. Fourth, under the new rules, an intermediary must prepare its own Notice for distribution to beneficial owners.

Fifth, the intermediary's Notice sent to a beneficial owner will direct the owner to request paper or e-mail copies from his or her intermediary, rather than from the issuer. Finally, the final rules do not permit soliciting persons other than the issuer to engage in a conditional solicitation as proposed and, therefore, the rules require such persons to send

[44] An issuer or other soliciting person may, in the course of a solicitation, send several proxy cards to a shareholder. Under the notice and access model, the Notice must accompany each proxy card sent to a shareholder unless the issuer or other soliciting person sends a proxy statement with, or before, the proxy card and by the same medium as the proxy card is sent.



a copy of the proxy materials upon request from a shareholder to whom they have sent a Notice.

## II. Description of the Amendments

### A. The Notice and Access Model for Issuers

The notice and access model that we are adopting provides an alternative means for an issuer to furnish proxy materials to its shareholders. These proxy materials include:

- notices of shareholder meetings;
- Schedule 14A proxy statements and consent solicitation statements;
- forms of proxy (i.e., proxy cards);
- Schedule 14C information statements;
- annual reports to security holders;[45]
- additional soliciting materials;[46] and
- any amendments to such materials that are required to be furnished to shareholders.

In the proposing release, we sought comment on whether reliance on the notice and access model should be limited to particular types of issuers, shareholders, or transactions. The only restriction that we proposed was that the rules should not apply to business combination transactions. Commenters in favor of the notice and access model

[45] The requirement in Exchange Act Rules 14a-3(b) and 14c-3(a) to furnish annual reports to security holders does not apply to registered investment companies [17 CFR 240.14a-3(b) and 240.14c-3(a)]. The rules that we are adopting do not apply to the requirement in Section 30(e) of the Investment Company Act of 1940 [15 U.S.C. 80a-29(e)] and the rules thereunder that every registered investment company transmit reports to shareholders at least semi-annually.

generally supported broad availability of the notice and access model.[47] Therefore, the new rules permit any issuer to use the notice and access model to disseminate its proxy materials to all types of shareholders, whether registered or beneficial owners, and with respect to any solicitation except those related to business combination transactions.

**1. Notice of Internet Availability of Proxy Materials**

To notify shareholders of the availability of the proxy materials on an Internet Web site, an issuer relying on the notice and access model must send a Notice to shareholders 40 calendar days[48] or more in advance of the shareholder meeting date or, if no meeting is to be held, 40 calendar days or more in advance of the date that consents or authorizations may be used to effect the corporate actions.[49] We believe that it is important for the Notice to be furnished in a way that brings it to each shareholder's attention. Therefore, no other materials may accompany the Notice except for the notice of a shareholder meeting required under state corporation law.[50] An issuer also may combine the Notice with the state law notice unless state law prohibits such combination.

We have extended the proposed 30-day deadline for delivery of the Notice to a 40-day deadline to provide issuers with time to encourage shareholders who have not executed a proxy to participate in the voting process and to provide shareholders with sufficient time to receive the Notice, request copies of the materials, if desired, and review the proxy materials prior to executing a proxy. Under the new rules, an issuer may send a proxy card 10 calendar days or more after sending the Notice. If an issuer chooses to send a proxy card under this provision, a proxy statement and annual report need not accompany the proxy card.[51] However, if a copy of the proxy statement and annual report do not accompany or precede the proxy card, a copy of the Notice must accompany the proxy card so that shareholders can access the specified Web site without referring to the earlier Notice. This 10-day waiting period is designed to provide shareholders with sufficient time to access the proxy materials, or request a copy of the proxy materials, before the issuer sends a proxy card without an accompanying proxy statement and annual report.

If an issuer chooses to follow the notice and access model, the Notice of Internet Availability of Proxy Materials must include the following information in clear and understandable terms:[52]

- A prominent legend in bold-face type that states:

  **"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**

  - **This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the**

46 Our rules permit, but do not require, delivery of additional soliciting materials. See Rule 14a-6(b).

47 See, for example, letters from ABC, ACB, Association of Corporate Counsel (ACC), Proxinvest, SCSGP, STA, and Sullivan & Cromwell.

48 For purposes of determining this 40-day period under the new rules, the first day of this period would be the day on which the issuer sends the Notice. The 40th day would be the day prior to the meeting date or date of the corporate action.

49 The Notice could be sent electronically to shareholders who have previously provided affirmative consent, or other evidence to show delivery, pursuant to our earlier guidance on electronic delivery. See the 1995 Interpretive Release and the 2000 Interpretive Release.

50 The rules also permit a reply card for requesting a paper or e-mail copy of the proxy materials to accompany the Notice.

51 Of course, an issuer still would be obligated to send a copy of the proxy statement and annual report if a shareholder requests a copy. An issuer also may send a proxy card before the end of the 10-day period if it is accompanied by the proxy statement and annual report.

52 Appropriate changes must be made to the Notice if the issuer is providing an information statement pursuant to Regulation 14C or seeking to effect a corporate action by written consent.

**important information contained in the proxy materials before voting.**

- **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**
- **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."**

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer's recommendations regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- (1) A toll-free telephone number; (2) an e-mail address; and (3) an Internet Web site address where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;
- Any control/identification numbers that the shareholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement and annual report; and





- Information on how to obtain directions to be able to attend the meeting and vote in person.

In response to commenters, we have added certain items to this list of permissible Notice information. First, we are clarifying that the Notice must contain instructions on how to access the proxy card. Such information should include any control or identification numbers necessary for the shareholder to execute a proxy, but may not include a means to execute a proxy, such as a telephone number, which would enable the shareholder to execute a proxy without having access to the proxy statement and annual report.

A shareholder's execution of a proxy via an Internet voting platform indicates that the shareholder has access to the Internet and, as such, is able to access the proxy materials electronically under the new rules. Similarly, if a shareholder executes a proxy via a telephone number placed on the Internet Web site which provides electronic access to the proxy materials, that indicates the shareholder has access to the Internet. However, if a telephone number for executing a proxy is placed on the Notice, there can be no assurance that a shareholder executing a proxy by means of that telephone number has access to the Internet Web site. Accordingly, placing such a telephone number on the Notice is not permitted. A telephone number for executing a proxy may, however, be provided on a proxy card sent to shareholders 10 calendar days or more after the Notice was sent because, by that time, a shareholder is likely to have had sufficient time to access the materials on the Internet or request copies.

Also, in response to comments, we have revised the rules to require an issuer or other soliciting person to include instructions in the Notice about: (1) how a shareholder

can request delivery of copies of proxy materials in paper or by e-mail in the future;[53] and (2) how to attend the shareholder meeting and vote in person. The new rules also require the Notice to include an Internet Web site on which a shareholder can request a copy of the proxy materials, in addition to a toll-free telephone number and an e-mail address for that purpose.

The Notice may include only the information specified above, unless it is being combined with the state law meeting notice, in which case any information required by state law also may be included in the Notice. While not required, to reduce the chance of parties creating false Notices to extract confidential information from shareholders, the Notice also may contain a statement advising shareholders that they are not required to provide any personal information, other than the identification or control number provided in the Notice (if such a number is used), to execute a proxy.

To ensure that the Notice is clear and understandable, it must meet substantially the same plain English principles as apply to key sections of Securities Act prospectuses pursuant to Securities Act Rule 421(d).[54] Both commenters remarking on the plain English aspect of the proposal supported such a requirement.[55]

Several commenters recommended that issuers should be able to include more information in the Notice than we proposed. They suggested that the rules should allow the Notice to incorporate information from the proxy statement and annual report that those commenters believe is the most important information contained in those documents. They believed that presenting this information on the Notice would enable

[53] See letters from ABA, Mellon Investor Services (Mellon), and SCSGP.

[54] 17 CFR 230.421(d).

[55] See letters from Florida State Board and Proxinvest.



shareholders to make an informed decision based on the Notice alone.[56] We believe that the proxy statement and annual report to security holders represent the information necessary to make an informed voting decision. The Notice is intended merely to make shareholders aware that these proxy materials are available on an Internet Web site; it is not intended to serve as a stand-alone basis for making a voting decision. Because the disclosures in the proxy statement and annual report represent the information necessary for a voting decision, we do not believe it is appropriate to permit issuers and other soliciting persons to present only selected information from the proxy statement or annual report to security holders in the Notice.

The form of the Notice will constitute other soliciting material that the issuer or other soliciting person must file with the Commission pursuant to Rule 14a-6(b)[57] no later than the date on which it is first sent or given to shareholders.[58]

**a. Householding**

Consistent with the proposal, the final rules permit an issuer to "household" the Notice pursuant to Rule 14a-3(e).[59] Accordingly, an issuer could send a single copy of the Notice to one or more shareholders residing at the same address if the issuer satisfies all of the Rule 14a-3(e) conditions.[60] An issuer is not required to re-solicit specific

[56] See letters from Carl Hagberg, Hermes, and James Reed. For example, one commenter suggested that each proposal be accompanied by the "pros and cons" associated with that proposal. See letter from James Reed. Another commenter recommended that the president's letter, Management's Discussion and Analysis and selected financial information be included. See letter from Carl Hagberg.

[57] 17 CFR 240.14a-6(b).

[58] See Rule 14a-16(i) [17 CFR 240.14a-16(i)].

[59] 17 CFR 240.14a-3(e).

[60] If the Notice is sent via e-mail, the householding rules do not permit the sending of only one copy of the Notice to all shareholders in the household. Instead the Notice must be

consent regarding the householding of the Notice from shareholders if it has obtained their consent to householding of proxy materials in the past. However, an issuer following the notice and access model must allow each householded account to execute separate proxies. Therefore, the issuer must provide separate identification or control numbers, if it uses such numbers, to each account at the shared address, as required by the current householding rule.[61] Alternately, an issuer also may send separate Notices for each householded account in a single envelope. Commenters generally supported this aspect of the proposal.[62]

**b. Security and Privacy on the Internet**

Several commenters were concerned about security and confidentiality of shareholder information that may be transmitted over the Internet.[63] We believe that the final rules ameliorate many of these concerns. We address those concerns below.

**i. Theft of Identification or Control Numbers**

Some commenters were concerned that computer hackers may use any identifying information sent to shareholders to access their accounts.[64] The Notice may contain identification or control numbers for executing proxies or providing voting instructions, if

separately e-mailed to each shareholder. See Rule 14a-3(e)(1)(ii)(B)(4) [17 CFR 240.14a-3(e)(1)(ii)(B)(4)].

61 Issuers also are required to share a listing of the shareholders that have consented to householding with soliciting shareholders, or afford the benefit of such consents to a soliciting shareholder if the issuer is mailing proxy materials on the shareholder's behalf. See Rule 14a-7(a)(2) [17 CFR 240.14a-7(a)(2)].

62 See letters from BRT, Computershare, Proxinvest, and SCSGP.

63 See, for example, letters from James Angel, Todd Collier, James Davis, William LaFollette, Matthew McGuire, and USPS.

64 Record holders could not be subject to such manipulation because they do not hold their securities in a trading account with the company in the same sense as beneficial owners hold their securities in a brokerage account.



an issuer or intermediary uses such numbers. We understand that these numbers, which are in common use today, usually provide the user only with access to execute proxies or provide voting instructions; they do not enable the user to buy or sell securities in a shareholder's account or transfer funds from that account. Thus, more sensitive activities, such as trading securities or transferring funds, could not be performed by someone who has stolen this identifying information. Finally, we note that 85% of shares voted already are voted electronically using such identification or control numbers.

**ii. "Phishing"**

One commenter expressed concern that, if Notices are sent electronically, shareholders may be tricked into disclosing personal information to persons fraudulently purporting to be issuers or intermediaries by fake "phishing" e-mails purporting to be official Notices, but designed to extract personal information from a shareholder.[65] We do not believe that the rules would provide significant opportunity for abuse through phishing for the following reasons.

First, an issuer may send a Notice by e-mail only if the shareholder has affirmatively consented to such delivery. Second, the Notice is not permitted to request any confidential information from the shareholder. Rather, the only confidential information that a shareholder must provide to access the proxy card would be a confidential identification or control number used by many issuers and intermediaries to track votes. As noted above, this number does not provide access to a shareholder's brokerage or bank account or permit the transfer of funds from a shareholder's account. Therefore, the shareholder's account number and other personal financial information

65 See letter from William LaFollette.

would not be in jeopardy of being stolen. The rules do permit an issuer or other soliciting person to include on the Notice a protective warning to shareholders, advising them that no personal information other than the identification or control number is necessary to execute a proxy.[66]

**iii. Misuse of Information by Issuers and Other Soliciting Persons**

Other commenters were concerned that issuers themselves, or other soliciting persons, may use shareholder information inappropriately. For example, they were concerned that an issuer may use shareholders' e-mail addresses for purposes other than proxy communications, such as advertising, or sell the e-mail addresses to third parties.[67] As a protective measure, one commenter suggested that the Internet Web site on which the proxy statement is posted should not require installation of cookies on the shareholder's computer as a prerequisite for access to the Web site.[68]

We agree that shareholder information gathered under the amended rules should be used only for the purposes of furnishing proxy materials to shareholders. Thus, we have revised the final rules to clarify that an issuer or its agent must maintain the Internet Web site on which the proxy materials are posted in a manner that does not infringe on the anonymity of a shareholder accessing that Web site.[69] For example, it may not track the identity of persons accessing that Web site to view the proxy statement.[70] In addition, the Web site cannot require the installation of any "cookies" or other software that might

66 See Rule 14a-16(f)(3) [17 CFR 240.14a-16(f)(3)].

67 See letter from Thomas Richardson.

68 See letter from Bowne & Co.

69 See Rule 14a-16(k)(1) [17 CFR 240.14a-16(k)(1)].



collect information about the accessing person. Further, the issuer and its agents may not use any e-mail address obtained from a shareholder for the purpose of requesting a copy of proxy materials for any purpose other than to send a copy of those materials to that shareholder. Finally, an issuer may not transfer a shareholder's e-mail address to other persons without the shareholder's express consent, except in connection with the distribution of proxy materials, such as an agent handling the proxy distribution on the issuer's behalf.[71]

**2. Proxy Card**

Under the notice and access model that we are adopting, an issuer is not permitted to furnish the proxy card together with the initial Notice for a particular solicitation. An issuer following the notice and access model must post the proxy card on the Web site with the proxy statement and any annual report no later than the time at which the Notice is sent to shareholders so that the documents are electronically available at the time shareholders receive the Notice.[72] In addition, on that Web site, the issuer must concurrently provide shareholders with at least one method of executing a proxy vote.[73] We believe that a shareholder who accesses proxy materials on the Internet Web site should be able to execute a proxy as soon as the shareholder is able to electronically access the proxy statement. An issuer may provide a means to execute a proxy through a variety of methods, including by providing an electronic voting platform linked to the

70 Of course, the issuer would be permitted to track the identity, by means of the shareholder entering an issuer-provided control/identification number, of persons voting on an electronic platform in order to validate the election results.

71 See Rule 14a-16(k)(2) [17 CFR 240.14a-16(k)(2)]. Rule 14a-16(k) is not designed to create new duties in private rights of action under the federal securities laws.

72 See Rule 14a-16(b)(1) [17 CFR 240.14a-16(b)(1)].

73 See Rule 14a-16(b)(4) [17 CFR 240.14a-16(b)(4)].

Web site where the proxy materials are posted or a telephone number for executing a proxy. Merely providing a shareholder with a means to request a paper proxy card would not be sufficient because a shareholder would not be able to execute a proxy at the time it accesses the proxy materials.

We received a significant number of comments on the aspect of our proposal that would have permitted the proxy card to accompany the Notice. Numerous commenters were concerned that physically separating the card from the proxy statement, as originally proposed, may lead to the type of uninformed voting that the proxy rules are intended to prevent.[74] Some commenters were concerned that issuers may attempt to structure their solicitations in a manner that discourages access to the proxy statement, particularly with respect to shareholder proposals.[75] Others, however, believed that separating the card from the proxy statement would not lead to such problems.[76]

We note these concerns and have revised the rules to require the proxy card to be accessible on the Internet along with the proxy statement and any annual report when the Notice is sent. The issuer may not send a proxy card with its initial Notice. However, we recognize that an issuer may wish to undertake subsequent soliciting activities to encourage shareholders who have not executed a proxy to do so. Currently, issuers often send replacement proxy cards accompanied by additional soliciting materials to shareholders who have not yet voted. To facilitate this re-solicitation process, the rules permit an issuer that is following the notice and access model to send a proxy card 10

[74] See, for example, letters from ACB, AFL-CIO, Amalgamated Bank, BellTel Retirees, CII, Florida State Board, Carl Hagberg, NRLN, San Diego Retirement, Swingvote, and Teamsters.

[75] See, for example, letters from AFL-CIO, Florida State Board, and Teamsters.



calendar days or more after sending the Notice. This 10-day waiting period still provides a 30 day period during which an issuer can encourage shareholders to execute a proxy. Any such subsequent solicitation efforts may, but need not, include a copy of the proxy statement and any annual report to security holders. However, if the subsequent communication includes a proxy card, it also must include either a copy of the proxy statement and any annual report or a copy of the Notice.[77]

**3. Internet Web Site Posting of Proxy Materials**

All proxy materials to be furnished through the notice and access model, other than additional soliciting materials, must be posted on a specified Internet Web site by the time the issuer sends the Notice to shareholders.[78] These materials must remain on that Web site and be accessible to shareholders through the conclusion of the related shareholder meeting, at no charge to the shareholder. As discussed above, the Notice must identify clearly the Internet Web site address at which the proxy materials are available. The Internet Web site address must be specific enough to lead shareholders directly to the proxy materials,[79] rather than to the home page or other section of the Web Site on which the proxy materials are posted, so that shareholders do not have to browse the Web site to find the materials. The Internet Web site that an issuer uses to electronically furnish its proxy materials to shareholders must be a publicly accessible

[76] See, for example, letters from ABA, ACC, BRT, Computershare, ISS, New York State Bar Association (NY State Bar), and Proxinvest.

[77] See Rule 14a-16(h) [17 CFR 240.14a-16(h)].

[78] Additional soliciting materials used after the Notice is sent must be posted on the specified Web site no later than the day on which those materials are first sent or given to shareholders.

[79] This Web site could be a central site with prominent links to each of the proxy-related disclosure documents listed in the Notice, as well as proxy materials posted on the Web site after the Notice is sent.

Internet Web site other than the Commission's EDGAR Web site.[80] Commenters agreed that simply providing a link to the proxy materials on EDGAR was insufficient.[81]

Commenters were divided with respect to the type of document format that issuers or other soliciting persons should be required to use to post proxy materials on the Web site. This disagreement centered on whether most shareholders would prefer to be able to print out the document and read the hard copy version or read the document online. The final rules require the electronically posted proxy materials to be presented on the Internet Web site in a format, or formats, convenient for both printing and viewing online.[82] Under technology commonly in use today, this may require posting the materials in two different formats. First, the materials should be posted in a format that provides a version of those materials, including all charts, tables, graphics, and similarly formatted information, that is substantially identical to the paper version of the materials.

In addition, to take better advantage of the capabilities of the Internet, the materials also must be presented in a readily searchable format, such as HTML. This type of format would make the proxy materials easier to read on a computer screen. In addition, such a version may incorporate additional user-friendly features such as hyperlinks from a table of contents to enable shareholders to quickly and easily navigate through the document. Many Internet Web sites today provide documents in dual formats such as this. We believe this requirement will impose minimal burden on issuers.

[80] An issuer must continue to comply with Rules 14a-6 and 14c-5, which require the soliciting person to file its proxy statement (or information statement) and additional soliciting material with the Commission. An issuer also must continue to comply with Rules 14a-3(c) and 14c-3(b), which require an issuer to submit copies of its annual report to security holders to the Commission. The issuer must comply with these requirements by the time it posts the materials on the Web site.

[81] See letters from James Angel, SCSGP, and Swingvote.



We also believe that, as technology progresses, new formats may be developed that will improve shareholders' ability to print copies and read copies on their screens. Finally, to the extent a shareholder may need additional software to view the document, the Web site must contain a link to enable the shareholder to obtain the software free of charge.[83]

**4. Period of Reliance**

The decision by an issuer or other soliciting person to follow the notice and access model is effective only with respect to a particular meeting. An issuer's choice to rely on the notice and access model for one meeting therefore does not affect its determination of whether to rely on the model for subsequent meetings.[84] Similarly, a shareholder that does not request a paper or e-mail copy of the proxy materials for one meeting is not bound by that decision with respect to any other shareholder meeting. Each time an issuer chooses to rely on the notice and access model for a shareholder meeting, it must comply anew with all of the requirements under that model, including delivery of the Notice and the 40-day notice period.

We are adopting one important exception to this general principle. Numerous commenters were concerned that a shareholder desiring a paper or e-mail copy would have to request such a copy every year from each issuer in which he or she owns securities.[85] We agree with commenters that this could be unduly burdensome for a

[82] See Rule 14a-16(c) [17 CFR 240.14a-16(c)].

[83] See the 1995 Interpretive Release No. 33–7233, at n. 24 and the accompanying text; Release No. 33–8128 (Sep. 16, 2002) [67 FR 58480]; Release No. 33–8230 (May 7, 2003) [68 FR 25788]; and Release No. 33-8518 (Dec. 22, 2004) [70 FR 1505].

[84] To the extent the Commission adopts the universal Internet availability model in companion Release 34-55147, this option will no longer be available to issuers.

[85] See, for example, letters from ABC, AFL-CIO, James Angel, CALSTRS, Florida State Board, OPERS, San Diego Retirement, SIA, William Sjostrom, Stocklein Law Group, Swingvote, and Paul Uhlenhop.

shareholder who owns numerous securities. The commenters recommended that a provision be made that permits a shareholder to make a single election to receive a paper or e-mail copy of the proxy materials on a continuing basis in the future. We agree with those commenters and have revised the rules to enable shareholders to make a permanent election to receive paper or e-mail copies from each issuer.[86]

**5. State Law Notices**

State business and corporation laws typically set forth shareholder meeting requirements, including meeting notice and voting requirements. The new rules are not intended to affect any applicable state law requirement concerning the delivery of any document related to a shareholder meeting or proxy solicitation. Thus, to the extent that state law requires a notice of shareholder meeting and proxy materials to be delivered by a particular means, the rules do not alter those requirements.[87] For example, if the state in which an issuer is incorporated requires notices of shareholder meetings and proxy materials to be transmitted directly to shareholders in paper, the notice and access model does not provide an issuer with an option to satisfy its state law obligations by posting those materials on an Internet Web site.

[86] A shareholder that elects to receive paper or e-mail copies may, in the future, revoke that election. However, an issuer may continue to request that shareholder to accept electronic delivery or the notice and access model or seek that shareholder's affirmative consent to electronic delivery. Nothing in the proxy rules prohibits an issuer from structuring incentives to encourage shareholders to accept electronic delivery or the notice and access model.

[87] See Rule 14a-16(e) [17 CFR 240.14a-16(e)]. Issuers typically include the meeting notices required by state law at the beginning of their proxy statements. As discussed previously, the new rules would permit any information necessary to meet a state law requirement to accompany or be combined with the Notice.



**6. Additional Soliciting Materials**

New Rule 14a-16 and revised Rules 14c-2 and 14c-3 require an issuer to post any additional soliciting materials required to be filed under Rule 14a-6(b) on the same Internet Web site on which the proxy materials are posted no later than the day on which the additional soliciting materials are first sent to shareholders or made public.[88] Beyond the posting of the additional soliciting materials on the Internet Web site, issuers may decide which additional means, if any, are most effective for disseminating these materials (e.g., direct mail, e-mail, newspaper publication, etc.).

**7. Requests for Copies of Proxy Materials**

An issuer that satisfies its requirement to furnish proxy materials through the notice and access model has a separate requirement under Rule 14a-16(j)[89] to deliver a copy of the proxy statement, annual report to security holders (if applicable) and proxy card to a requesting shareholder. Upon receipt of a request from a shareholder for a copy of the proxy statement, annual report, or proxy card, the issuer must send a copy (in paper or by e-mail, as requested) of those proxy materials to the shareholder within three business days after receiving the request, even if the request is made after the date of the shareholder meeting or corporate action to which the proxy materials relate. However, under the final rules, an issuer would be obligated to provide copies of the proxy materials only up until one year after the conclusion of the meeting or corporate action to which the materials relate. When the issuer provides a paper copy of the proxy materials

[88] Exchange Act Rule 14a-6(b) requires an issuer or other soliciting person choosing to deliver additional soliciting materials to file them with the Commission, in the same form that they are sent to shareholders, no later than the date that they are first sent or given to shareholders.

[89] 17 CFR 240.14a-16(j).

in response to a shareholder request, the issuer must use first class mail or other reasonably prompt means of delivery.

A few commenters believed that a requirement to send copies of the proxy statement after the shareholder meeting has been held would be an unnecessary burden.[90] However, the proxy statement contains a portion of the total package of annual disclosure for public companies; in fact, many public companies satisfy their obligation to include information in Part III of the Form 10-K by including the information in their proxy statements and incorporating that information by reference into the Form 10-K.[91] Just as the proxy rules require issuers to undertake in their proxy statements or annual reports to shareholders to provide copies of annual reports on Form 10-K for the most recent fiscal year to requesting shareholders,[92] we believe it is appropriate to require issuers to provide copies of the proxy materials to requesting shareholders even after the shareholder meeting date. However, because the proxy statement (like the Form 10-K) is filed on EDGAR, we believe there should be a limit on the length of the period during which a shareholder may request a copy of the proxy materials from the issuer. Therefore, the final rules require issuers to provide the proxy statement and annual report to security holders only for one year after the conclusion of the meeting to which those materials relate.[93]

We agree with the views of commenters that the proposed two-business day timeframe may be too short for issuers to respond efficiently to paper requests of the

90 See letters from BRT and SCSGP.

91 See Instruction G(3) to Form 10-K, referenced in 17 CFR 249.310.

92 See Rule 14a-3(b)(10) [17 CFR 240.14a-3(b)(10)].

93 See Rule 14a-16(j)(3) [17 CFR 240.14a-16(j)(3)].



proxy materials.[94] Further, it is likely that a longer response period that enables an issuer to better cumulate batches of copies would reduce the cost of complying with the rules. However, these concerns must be balanced against our view that requests for copies be handled promptly. Thus, we have extended the response time to three business days.[95]

The requirements that an issuer deliver the Notice at least 40 calendar days before the shareholder meeting date and respond to a request for a copy of the proxy materials within three business days are designed to provide a shareholder with sufficient time to request a copy, receive it, review the proxy materials and make an informed voting decision. Several commenters believed that placing a deadline on shareholders to request copies would be appropriate.[96] We do not believe such a deadline would be appropriate, particularly because the proxy statement is part of the "package" of disclosures we have deemed important for investors, as discussed above. However, under the rules, it is incumbent on the shareholder to request a copy in sufficient time to receive the copy of the proxy materials, review that copy, and execute a proxy. The rules require the issuer to insert a date in the Notice by which a shareholder should request a copy to ensure timely delivery.[97]

Finally, we recognize that some issuers may be hesitant to adopt the notice and access model because of the potential dangers of significantly underestimating, or overestimating, the number of paper copies of the proxy materials that will be needed. If

94 See, for example, letters from BRT, Computershare, ICI, NY State Bar, SCSGP, SIA, and Sullivan & Cromwell.

95 See letters from Computershare, ICI, and STA.

96 See letters from Computershare, SCSGP, and Sullivan & Cromwell.

97 See Rule 14a-16(d)(1) [17 CFR 240.14a-16(d)(1)]. This date is intended to be a recommendation to shareholders to facilitate timely delivery, but does not restrict a shareholder's ability to request copies after that date.

an issuer underestimates that number, the cost of printing additional copies may be great. Similarly, overestimating that number would lead to unnecessary cost. We note that there is nothing in the rules that would prevent an issuer from sending a shareholder a communication well in advance of a proxy solicitation to determine the shareholder's interest in receiving paper copies.[98] Indeed, such a communication may be used to start creating a list of shareholders that wish to receive paper copies in the future. This may help issuers to estimate the number of paper copies that it needs to print for the solicitation.

**B. The Role of Intermediaries**

**1. Background**

The 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.[99] The proxy rules include four rules, Exchange Act Rule 14a-13, Rule 14b-1, Rule 14b-2, and Rule 14c-7 referred to collectively as the "shareholder communications rules," that impose obligations on issuers and intermediaries to ensure that beneficial owners receive proxy materials and are given the opportunity to participate in the shareholder voting process. Basically, these rules require issuers to send their proxy materials to intermediaries for forwarding to the beneficial owners.

98 A communication to shareholders that is limited to explaining the notice and access model generally and determining whether shareholders wish to receive future proxy materials in paper or by e-mail would not be associated with a particular solicitation and therefore would not be considered a Notice under the new rules.

99 The discussion in this section of "beneficial owners" refers to beneficial owners whose names and addresses do not appear directly in issuers' stock registers because they hold their securities through a broker, bank, trustee, or similar intermediary.



Exchange Act Rule 14b-1 sets forth the obligations of registered brokers and dealers in connection with the prompt forwarding of certain issuer communications to beneficial owners. Rule 14b-2 sets forth similar obligations of banks, associations, and other entities that exercise fiduciary powers. Under these rules, upon request by the issuer, these intermediaries are required to indicate to the issuer within seven business days of receiving the request:

- the approximate number of customers of the intermediary that are beneficial owners of the issuer that are held of record by the intermediary;
- if the issuer has indicated pursuant to Rule 14a-13(a)[100] or 14c-7(a)[101] that it will distribute the annual report to security holders to beneficial owners who have not objected to disclosure to the issuer of their names, addresses, and securities positions, the number of beneficial owners who have objected to such disclosure;[102] and
- the identity of any agents of the intermediary acting on the intermediary's behalf to fulfill its obligations under the rule.

Pursuant to Rules 14b-1 and 14b-2, within five business days of receiving proxy materials from the issuer, the intermediary must forward the materials to beneficial owners who will not receive those materials directly from the issuer pursuant to Rule 14a-13(c)[103] or Rule 14c-7(c).[104] Beneficial owners typically do not execute proxy cards

100 17 CFR 240.14a-13(a).

101 17 CFR 240.14c-7(a).

102 In the case of bank intermediaries, Rule 14b-2 requires a bank to disclose the number of customers with accounts opened on or before December 28, 1986, who gave affirmative consent to disclosure to the issuer and the number of customers with accounts opened after December 28, 1986, who did not object to such disclosure.

103 17 CFR 240.14a-13(c).

because, under most state laws, only the record owner (i.e., the intermediary) has the authority to vote on matters presented to shareholders. As a result, intermediaries forward the proxy materials, other than the proxy card, along with a request for voting instructions. The request for voting instructions is similar to the proxy card, but is prepared by the intermediary instead of the issuer and the beneficial owner returns his or her voting instructions to the intermediary rather than to the issuer or independent vote tabulator. The intermediary is required to vote the beneficial owner's shares in accordance with the owner's voting instructions when formally executing the proxy card.[105] The intermediary then returns the proxy card to the issuer or its vote tabulator.

**2. Discussion of the Amendments**

Under the amendments, an intermediary may follow the notice and access model only if the issuer requests it to do so and, in such cases, must follow that model. The amendments revise Rules 14b-1 and 14b-2 to require brokers, banks, and similar intermediaries, at the request of an issuer, to furnish proxy materials, including a Notice of Internet Availability of Proxy Materials, to beneficial owners of the issuer's securities based on the notice and access model.[106] If an issuer does not request intermediaries to follow the notice and access model, an intermediary could, on its own initiative, continue to rely on any other permitted method of furnishing proxy materials to beneficial owners, including the electronic delivery of proxy materials by affirmative consents, but could not follow the notice and access model on its own initiative. Comments varied on whether an intermediary should be allowed to follow the notice and access model on its own

104 17 CFR 240.14c-7(c).

105 See Rule 14b-2(b)(3) [17 CFR 240.14b-2(b)(3)].

106 See Rules 14b-1(d) and 14b-2(d) [17 CFR 240.14b-1(d) and 240.14b-2(d)].



initiative.[107] We believe that the issuer should be allowed to determine the best means for distributing its proxy materials, because the issuer ultimately pays the costs of that distribution.

With respect to beneficial owners, an issuer or other soliciting person relying on the notice and access model must provide the intermediary with all information necessary for the intermediary to prepare its own Notice of Internet Availability of Proxy Materials in sufficient time for the intermediary to prepare and send its Notice to beneficial owners at least 40 days before the meeting date.[108] We understand that issuers, intermediaries and their agents currently coordinate a similar exchange of information to enable intermediaries to prepare and print requests for voting instructions ahead of their receipt of the proxy statement and annual report to security holders for forwarding to beneficial owners.[109] We expect such coordination to continue to facilitate timely preparation of the intermediary's Notice. Therefore, we have not included a specific timeframe in the rules for delivery of this information.[110] Upon receipt of that information, the intermediary or its agent must prepare its own Notice, tailored for the intermediary's

107 See, for example, letters from ABA, ACC, Computershare, and SCSGP, supporting issuer control, as opposed to the letters from SIA, Swingvote, and University Bancorp, urging more control by intermediaries.

108 See Rule 14a-16(a)(2) [17 CFR 240.14a-16(a)(2)].

109 Our rules set forth a series of timeframes regarding distribution of proxy materials to beneficial owners to facilitate timely delivery of those materials.

110 Rule 14a-16(a)(2) requires an issuer to provide the information to an intermediary "in sufficient time" for the intermediary to prepare its own Notice. Other soliciting persons would be expected to provide their information to intermediaries in sufficient time to meet their applicable deadlines.

beneficial owner customers.[111] The intermediary must send this Notice to beneficial owners at least 40 calendar days before the date of the shareholder meeting.[112]

The intermediary's Notice will generally contain the same information as an issuer's Notice,[113] with certain revisions to reflect the differences between registered holders and beneficial owners. Specifically, the intermediary's Notice must contain the following information:

- A prominent legend in bold-face type that states:

  **"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**[114]

  - **This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.**
  - **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**
  - **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."**

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111 An intermediary's Notice prepared in accordance with this rule would be impartial for purposes of Rule 14a-2(a)(1) [17 CFR 240.14a-2(a)(1)] and need not be filed pursuant to Rule 14a-6(b) [17 CFR 240.14a-6(b)] unless an intermediary solicits proxies on its own behalf.

112 In the case of a Notice of a soliciting person other than the issuer, the intermediary must send the Notice to beneficial owners by the later of: (1) 40 calendar days prior to the meeting; or (2) 10 calendar days after the issuer first sends its proxy materials to investors. See Section II.C of this release.

113 See Rule 14a-16(d) [17 CFR 240.14a-16(d)].

114 Appropriate changes must be made to the Notice if the issuer is providing an information statement pursuant to Regulation 14C or if the issuer or other soliciting person is seeking to effect a corporate action by written consent.





- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer's or other soliciting person's recommendations regarding those matters, but no supporting statements; and
- A list of the materials being made available at the specified Web site.

The intermediary may choose whether to direct beneficial owners to the issuer's Web site or to its own Web site to access the proxy disclosure materials. If it directs beneficial owners to its own Web site, access to that website must be free of charge and may not compromise a beneficial owners' anonymity. If it directs beneficial owners to the issuer's Web site, the intermediary must inform beneficial owners that they can submit voting instructions to the intermediary, but cannot execute a proxy directly in favor of the issuer unless the intermediary has executed a proxy in favor of the beneficial owner. In addition, the intermediary must provide the following information in its Notice, which is similar to the information in the issuer's Notice, but applicable only to beneficial owners:

- (1) A toll-free telephone number of the intermediary or its agent, (2) an e-mail address of the intermediary or its agent, and (3) an Internet Web site of the intermediary or its agent where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;

- Any control/identification numbers that the beneficial owner needs to access his or her request for voting instructions;
- Instructions on how to access the request for voting instructions on the Web site of the intermediary or its agent, provided that such instructions do not enable a beneficial owner to provide voting instructions without having access to the proxy statement and annual report;
- Information on how to obtain directions to be able attend the meeting and vote in person;[115] and
- A brief description, if applicable, of the rules that permit the intermediary to vote the securities if the beneficial owner does not return his or her voting instructions.[116]

The intermediary's Notice must contain instructions on how to access the request for voting instructions on the Web site of the intermediary or its agent. Such information should include any control or identification numbers necessary for the beneficial owner to provide voting instructions. However, the intermediary's Notice cannot include a means, such as a telephone number, which would enable the beneficial owner to provide voting instructions without having access to the proxy statement and annual report. A telephone number that a beneficial owner can use to provide voting instructions may be provided on the Internet Web site on which the request for voting instructions is posted (as well as on a paper request for voting instructions sent to shareholders 10 days or more after the intermediary's Notice was sent). Like an issuer, the intermediary cannot include a

[115] A beneficial owner wishing to attend the meeting and vote in person must obtain proxy voting authority from the intermediary through which he or she owns the security.

[116] See NYSE Rule 452.





request for voting instructions with its Notice. However, at the issuer's request, the intermediary will be required to send a copy of the request for voting instructions to beneficial owners, provided that 10 days have passed since the intermediary's Notice was first sent. A copy of the intermediary's Notice, or a copy of the proxy statement, must accompany that request for voting instructions.

**3. Request for Copies by Beneficial Owners**

The intermediary's Notice must provide instructions on how a beneficial owner can request a copy of the proxy materials from the intermediary, rather than from the issuer. Under the new rules, a beneficial owner may not request a paper or e-mail copy directly from the issuer as originally proposed. We are making this revision to the proposal for several reasons. First, an issuer has no means to track the identity and preferences of beneficial owners for future solicitations because these owners are not registered in an issuer's records as shareholders of the company. This tracking can be performed most efficiently by the intermediary because only it maintains records of the beneficial owner's security holdings. Second, the intermediary is able to apply a beneficial owner's request for paper or e-mail copies across all of a beneficial owner's security holdings on an account-wide basis, making it easier for beneficial owners to elect to receive such copies with respect to all of the securities held by the beneficial owner.

If a beneficial owner requests a copy of the materials from the intermediary, the intermediary must in turn request such a copy from the issuer or other soliciting person within three business days of receiving the request from the beneficial owner. The intermediary also would have to forward the materials to the beneficial owners within

three business days after receipt from the issuer or other soliciting person.[117] As originally proposed, the intermediary will be allowed to charge the issuer or other soliciting person for the cost it incurs in forwarding the copy of the proxy materials to the requesting beneficial owner.[118]

We also note that intermediaries typically keep records of whether a beneficial owner has affirmatively consented to electronic delivery of proxy materials on an account-wide basis. That is, a beneficial owner's election for electronic delivery applies to all securities in the beneficial owner's account, rather than to specific issuers. To make it clear to beneficial owners electing to receive copies of the proxy materials on an ongoing basis, the intermediary's Notice must clarify that a permanent election to receive copies of the proxy materials in paper or e-mail will apply to all securities in the beneficial owner's account.[119]

One commenter was concerned that the notice and access model only complicates an already complicated process for transmitting proxy materials to beneficial owners and

[117] Thus, the intermediary must request the copy from the issuer within three business days of receiving the shareholder's request. Then the issuer must send the copy to the intermediary, which is a record holder or respondent bank under the final rules, within three business days of receiving the intermediary's request. Finally, the intermediary is required to forward the copy to the requesting shareholder within three business days of receiving the copy from the issuer.

[118] See NYSE Rule 465. We note that a Proxy Working Group established by the NYSE is reviewing the NYSE's current schedule of the specific maximum fees that NYSE member firms can charge an issuer under our rules requiring issuers to reimburse intermediaries for their reasonable direct and indirect expenses for forwarding proxy materials. We intend to work closely with the NYSE to evaluate the types of revisions that may be appropriate in light of our adoption of the notice and access model, including revision of existing fees as well as the creation of any new fees that may be reasonable under the notice and access model. Although NYSE Rule 465 applies only to NYSE member firms, other national securities exchanges have a similar rule and fee schedule. Non-broker intermediaries, such as banks, also rely on the fee schedule as an industry standard.





may confuse shareholders.[120] Other commenters recommended that the Commission review the proxy delivery process as a whole, rather than layer this model over the existing distribution regime.[121] Although the Commission is sensitive to these concerns, a complete review of the proxy system at this time would only delay the potential benefits to issuers and shareholders offered by the notice and access model. As we gain additional experience with these rules, we will consider whether more extensive revisions to the proxy rules are warranted.

In summary, the amendments would impose the following responsibilities on intermediaries that are requested by an issuer to follow the notice and access model:

- The intermediary must prepare its own Notice and deliver this Notice to its beneficial owners after receiving the meeting information from the issuer or other soliciting person;
- The intermediary must send its Notice to beneficial owners at least 40 days prior to the meeting;
- The intermediary must post its request for voting instructions on an Internet Web site;
- The intermediary must maintain records of beneficial owners who make a permanent election to receive paper or e-mail copies of the proxy materials for all securities held in the beneficial owner's account; and

[119] See Rules 14b-1(d)(4)(iii) and 14b-2(d)(4)(iii) [17 CFR 240.14b-1(d)(4)(iii) and 240.14b-2(d)(4)(iii)].

[120] See letter from ABA.

[121] See, for example, letters from BRT, Concerned Shareholders, Computershare, Carl Hagberg, Mellon, and STA.

- The intermediary must request a copy of the proxy materials from the issuer or other soliciting person within three business days after receiving a request from its beneficial owner customer and must forward that copy to the beneficial owner customer within three business days after receiving the copy from the issuer or other soliciting person.

**C. Soliciting Persons Other Than the Issuer**

Under the amendments, a person other than the issuer who undertakes his or her own proxy solicitation also can rely on the notice and access model. This situation typically would occur in the context of a proxy contest between a shareholder and management. We anticipate that the notice and access model will provide an alternative that may decrease significantly the printing and mailing costs associated with a proxy solicitation. We also believe that the same arguments that support modifying the existing framework to facilitate an alternative dissemination option for issuers apply equally to soliciting persons other than issuers.

Several commenters supported extending the notice and access model to such parties.[122] However, some commenters were concerned about the possibility of abuse of the model by shareholders conducting nuisance contests.[123] These commenters recommended that the availability of the model be limited for soliciting persons other than the issuer.[124] The proposed limitations included requiring the solicitation of all shareholders,[125] requiring soliciting persons other than the issuer to provide copies of

[122] See, for example, letters from CALSTRS, Computershare, and Swingvote.

[123] See, for example, letters from Glen Buchbaum.

[124] See, for example, letters from ABA, ACC, BRT, ICI, ISS, Sullivan & Cromwell, and Swingvote.

[125] See letters from BRT and Swingvote.



their proxy materials upon request,[126] and imposing a minimum shareholding requirement in order for a soliciting person to take advantage of the model.[127] Although the amendments would reduce the cost of a proxy contest, they do not eliminate all costs, such as costs of preparing the soliciting materials, legal fees, proxy solicitor fees, and other significant soliciting expenses. We believe these surviving costs should discourage frivolous contests.

Although the mechanics of a solicitation under the notice and access model for a person other than the issuer are similar to those incurred by an issuer, we describe below several important differences in the way the amendments affect soliciting persons other than the issuer.

**1. Mechanics of Proxy Solicitations by Persons Other Than the Issuer**

The proxy rules currently treat persons other than the issuer differently from the issuer in a significant respect regarding the provision of information to shareholders regarding intended corporate actions. Specifically, an issuer must furnish to each shareholder either a proxy statement, if the issuer is soliciting proxies or consents from shareholders, or an information statement pursuant to Section 14(c) of the Exchange Act[128] regarding shareholder meetings where corporate action is to be taken but no proxy authority or consent is sought.

Soliciting persons other than the issuer are not subject to the requirements of Section 14(c). Thus, unlike the issuer, they have no obligation to furnish an information statement to shareholders from whom no proxy authority is sought. As a result, soliciting

[126] See letter from ABA.

[127] See letters from ABA, ICI and Sullivan & Cromwell.

[128] 15 U.S.C. 78n(c).

persons can limit the cost of a solicitation by soliciting proxies only from a select group of shareholders, such as those with large holdings, without furnishing other shareholders with any information. This enables a person other than the issuer to conduct a proxy contest in a variety of ways, some of which are not available to an issuer. The amendments that we are adopting relate only to the means of furnishing information to shareholders, and thus do not affect a soliciting person's ability to effect such targeted solicitations.

Under the new rules, a soliciting person other than the issuer may follow the same procedures as the issuer.[129] In particular, it may furnish a Notice and post the proxy statement on an Internet Web site. As with an issuer, such a soliciting person may not include a proxy card with the Notice. It may, however, send a proxy card to the shareholders it is soliciting without a proxy statement 10 calendar days or more after initially sending the Notice to them, if the proxy card is accompanied either by a copy of the proxy statement or by another copy of the Notice.

A soliciting person other than the issuer may selectively solicit shareholders under the notice and access model, just as it could under the current proxy rules (e.g., the soliciting person could choose to send the Notice only to certain shareholders, such as those owning more than a specified number of shares). As we discuss in more detail below, we have made revisions to Rule 14a-7 that will enable a soliciting person to distinguish between shareholders who have requested paper copies of the proxy materials

[129] As with the case of an issuer, the soliciting person also may solicit shareholders concurrently by any other means, for example, by sending a proxy statement and proxy card to certain shareholders.



and those who have not.[130] Under the notice and access model, a soliciting person other than the issuer may choose to send a Notice only to those shareholders who have not requested paper copies of the proxy materials.

In the proposing release, we proposed a provision that would have permitted a soliciting person other than the issuer to send a Notice that would condition the solicitation on a shareholder's willingness to access the proxy materials on an Internet Web site. One commenter suggested that a soliciting person should not be permitted to condition its solicitation in this manner and should have to provide a copy of its proxy statement to a requesting shareholder.[131] We are persuaded that a shareholder receiving a Notice reasonably may conclude that he or she is entitled to receive a copy of the materials. Therefore, the final rules require a soliciting person other than an issuer to send a paper or e-mail copy of the proxy statement to any requesting shareholder to whom it has sent a Notice.[132]

**2. Timeframe for Sending Notice of Internet Availability of Proxy Materials**

A solicitation in opposition to the issuer's proposals to be voted on at a shareholder meeting often is not initiated until after the issuer has filed its proxy statement. As we noted in the proposing release, we therefore believe that it may be unfair to apply the same timeframe for distributing the Notice to soliciting persons as the

[130] 17 CFR 240.14a-7.

[131] See letter from ABA.

[132] The proposing release also discussed the possibility of an electronic-only solicitation in which the soliciting person publishes a communication pursuant to Rule 14a-12 [17 CFR 240.14a-12], but does not send any Notices to shareholders. We are not adopting the electronic-only option that we discussed in the proposing release as part of the notice and access model. However, as noted in the final rules, the amendments do not affect the

timeframe that applies to issuers. Therefore, the amendments require a soliciting person other than the issuer that is following the notice and access model to send out its Notice by the later of: (1) 40 calendar days prior to the meeting; or (2) 10 calendar days after the issuer first sends out its proxy statement or Notice to shareholders. This is substantially the same requirement we proposed, except that we have changed the proposed 30-day deadline to 40 days to conform it to our revision of the deadline for issuers.

**3. Content of the Notice of Internet Availability of Proxy Materials of a Soliciting Person Other Than the Issuer**

The content of the Notice sent by a soliciting person other than the issuer could be different from the content of the issuer's Notice. For example, if a solicitation in opposition is launched before the issuer has sent its own proxy statement or Notice, the full shareholder meeting agenda may not be known to the soliciting person at the time it sends its Notice to shareholders. In such a case, the soliciting person must include the agenda items in its Notice only to the extent known.[133]

Also, there may be circumstances in which a person soliciting proxies in opposition to the issuer may provide a partial proxy card, that is, a proxy card soliciting proxy authority only for the agenda items in which the soliciting person is interested rather than for all of the items, or presenting only a partial slate of directors. Typically, such a proxy would revoke any previously-executed proxy and the shareholder may lose his or her ability to vote on matters or directors other than those presented on the soliciting person's card. To prevent a shareholder from unknowingly invalidating his or her vote on those other matters, a person soliciting in opposition that is presenting such a

availability of any existing means by which an issuer or other person may furnish proxy materials under the proxy rules.



card to shareholders must indicate clearly on its Notice whether execution of that card will invalidate the shareholder's earlier vote on the other matters or directors reflected on the issuer's proxy card.

**4. Shareholder Lists and the Furnishing of Proxy Materials by the Issuer**

Exchange Act Rule 14a-7 sets forth the obligation of issuers either to provide a shareholder list to a requesting shareholder or to send the shareholder's proxy materials on the shareholder's behalf. That rule provides that the issuer has the option to provide the list or send the shareholder's materials, except when the issuer is soliciting proxies in connection with a going-private transaction or a roll-up transaction.[134] Under the amendments, if the issuer is providing its shareholder list to a soliciting person, the issuer would be required to indicate which of those shareholders have permanently requested paper copies of proxy materials.[135] The proposed rules would have required an issuer to share all information about its shareholders regarding electronic delivery. We have decided to limit this requirement.

One commenter was concerned that a requirement to share information on affirmative consents may violate the issuer's privacy policies and the terms of the consent agreement between the issuer and shareholder.[136] The commenter also was concerned about divulging employees' internal company e-mail addresses. We agree with this

133 See Rule 14a-16(l)(3)(i) [17 CFR 240.14a-16(l)(3)(i)].

134 See Exchange Act Rule 14a-7(b) [17 CFR 240.14a-7(b)]. If the issuer is soliciting proxies in connection with a going-private transaction or a roll-up transaction, the shareholder has the option to request the shareholder list or have the issuer send its materials.

135 See proposed Note 3 to Exchange Act Rule 14a-7.

136 See letter from SCSGP.

comment and are not adopting that aspect of the proposal. However, the new rules do require an issuer to share information regarding whether a shareholder has made a permanent election to receive paper copies of the proxy materials. Such disclosure would not necessitate disclosure of a shareholder's e-mail address. In addition, a shareholder who has made a permanent election to receive paper copies of the issuer's proxy materials might reasonably expect to receive paper copies of proxy materials from other soliciting persons. Once that shareholder has made a permanent election, he or she should not be required to ask again for a paper copy of proxy materials.[137]

Similarly, if, under Rule 14a-7, the issuer elects to send the soliciting person's proxy materials, the amendments require the issuer to refrain from forwarding the other soliciting person's Notice to any shareholder who has made a permanent election to receive paper copies.[138] If the soliciting person requests that the issuer follow the notice and access model, the soliciting person would be responsible for providing the issuer with copies of its Notice for all shareholders to whom it intends to provide a Notice. In that case, the issuer would have to send the soliciting person's Notice with reasonable promptness after receipt from the soliciting person. An issuer could not decide on its own whether to send a soliciting person's materials in paper or electronically. If the other soliciting person wishes to send a proxy card to shareholders 10 or more days after it first

[137] As noted above, this election would be effective until a shareholder revokes that election.

[138] The other soliciting person could, of course, provide paper copies of the proxy statement and proxy card to the issuer for forwarding to those shareholders who have elected to receive paper copies.



sends the Notice, the issuer would be required to forward those proxy cards in a similar fashion.[139]

**5. The Role of Intermediaries With Respect to Solicitations by Persons Other Than the Issuer**

Intermediaries generally furnish proxy materials to beneficial owners on behalf of soliciting persons other than the issuer under the conditions set forth in Exchange Act Rules 14b-1 and 14b-2.[140] Although intermediaries historically have transmitted a soliciting person's proxy materials in reliance on the procedures set forth in Rules 14b-1 and 14b-2, these two rules do not explicitly address an intermediary's obligations with respect to the forwarding of a soliciting person's proxy materials. As proposed, the amendments clarify that intermediaries are obligated to send proxy materials on behalf of soliciting persons other than the issuer.

**D. Business Combination Transactions**

As adopted, the notice and access model is not available with regard to proxy materials related to a business combination transaction, which includes transactions covered by Rule 165 under the Securities Act,[141] as well as transactions for cash consideration requiring disclosure under Item 14 of Schedule 14A. Several commenters[142] agreed that business combination transactions constitute highly extraordinary events for some issuers and frequently involve an offering of securities that

[139] As noted above, the issuer may alternatively provide the other soliciting person with a list of shareholders pursuant to Rule 14a-7.

[140] See Randall S. Thomas & Catherine T. Dixon, Aranow & Einhorn on Proxy Contests for Corporate Control, at §8.03(C) (3d ed. 2001).

[141] 17 CFR 230.165. This prohibition would extend to persons who solicit proxies that are not parties to the transaction and any proxy materials in opposition to the transaction.

[142] See, for example, letters from ABA, Hermes, and Sullivan & Cromwell.

must be registered under the Securities Act and require delivery of the prospectus.[143] They also typically involve proxy statements of considerable length and complexity. Other commenters nonetheless believed that the model should be extended to such transactions.[144] They noted that even more savings may be realized by extending the model to such larger documents. The Commission desires to gain more experience with the notice and access model before extending it to business combination transactions. Based on our experience with the model once it is being used for more straightforward corporate actions, we will consider at a later date whether it is appropriate to extend the model to business combination transactions.

**E. Compliance Date and Monitoring**

No issuer may send a Notice to shareholders before July 1, 2007. Issuers and intermediaries typically hire third parties to handle the logistics of proxy distribution. These companies will require time to adjust their systems to accommodate the notice and access model. Therefore, an issuer may not use the new model for meetings before August 10, 2007 because of the 40-day deadline. Similarly, if an issuer's meeting will be on or after August 10, 2007, it may only send the Notice on or after July 1, 2007, even if the issuer wishes to send the Notice more than 40 days prior to the meeting date.

We desire to track the industry's experience with the notice and access model to determine whether the rules are achieving their intended purposes. However, we do not currently intend to impose a requirement for issuers and other parties to provide us with

143 The prospectus delivery requirements applicable to business combination transactions were not impacted by our securities offering reform initiative because such transactions were excluded. See Release No. 33-8591 (July 19, 2005) [70 FR 44271].

144 See, for example, letters from BRT, CALSTRS, Computershare, ICI, ISS, McData Corp, NY State Bar, Swingvote, SCSGP, William Sjostrom, and University Bancorp.



data and experiences with the model. We welcome information from issuers and all other parties involved in the proxy distribution process about their experience with the notice and access model on a voluntary basis. Such information would include itemized costs of proxy solicitation before and after adoption of the model, shareholder voting data before and after adoption, the number of copies requested, and any problems encountered with implementing the program. Although such information may be aggregated with the data and experiences of others and presented to the public, we do not intend to divulge the identity of responding parties.

**IV. Conforming and Correcting Revisions to the Proxy Rules**

The adopted rules reflect numerous amendments to terms used in the current proxy rules to explicitly accommodate the notice and access model. The changes are as follows:

- We substitute the term "send" and other tenses of the verb for the term "mail" and its other tenses to avoid any misunderstanding that "mail" means only paper delivery through the U.S. mail system.[145]
- We clarify that the term "address" includes an electronic mail address.[146]

Furthermore, we clarify the use of the term "annual report(s)" in the proxy rules by changing all references to either "annual report(s) to security holders" or "annual report(s) on Form 10-K and/or Form 10-KSB," as appropriate.[147] Finally, we are

145 Rules 14a-4(c)(1), 14a-8(e)(2), 14a-8(e)(3), 14a-8(m)(3), 14a-13(a)(5), 14a-13(c), 14b-1(c)(2)(ii), 14b-2(c)(2)(ii), 14c-5(a) and 14c-7(a)(5). Also Note 2 to Rule 14a-13(a), Instruction 2 to paragraph (d)(2)(ii)(L) of Item 7 of Rule 14a-101, Note 2 to Rule 14c-7(a) and Instruction 1 to Item 4 of Rule 14c-101.

146 Rules 14a-7(f), 14a-13(e), 14b-1(a)(2) and 14b-2(a)(4).

147 Rules 14a-3(b)(1), 14a-3(b)(10), 14a-3(b)(13), 14a-3(e)(1)(i), 14a-3(e)(1)(i)(A), 14a-3(e)(1)(i)(B), 14a-3(e)(1)(i)(C), 14a-3(e)(1)(i)(E), 14a-3(e)(1)(ii)(A),

updating Rule 14a-2 and Forms 10-Q, 10-QSB, 10-K, 10-KSB, and N-SAR to revise outdated references to Exchange Act Rule 14a-11, which the Commission rescinded in 1999.[148]

## V. Paperwork Reduction Act

### A. Background

The amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[149] We published a notice requesting comment on the collection of information requirements in the proposing release, and submitted requests to the Office of Management and Budget for approval in accordance with the PRA.[150] These requests were approved by OMB. Some of the revisions that we are making to the original proposal affect these collections of information. We will submit requests for approval of the revisions to OMB. We are requesting comment in this release with respect to these revisions.

The titles for the collections of information are:[151]

14a-3(e)(1)(ii)(B)(2), 14a-3(e)(1)(ii)(B)(2)(ii), 14a-3(e)(1)(ii)(B)(2)(iii), 14a-3(e)(1)(ii)(B)(3), 14a-3(e)(1)(iii), 14a-3(e)(2), 14a-3(e)(2)(i), 14a-3(e)(2)(ii), 14a-12(c)(1), 14b-1(b)(2), 14b-1(c)(2)(ii), 14b-1(c)(3), 14b-2(b)(3), 14b-2(c)(2)(ii), 14b-2(c)(4), 14c-2(a)(2), 14c-3(a)(1) and 14c-3(c). Also Note to paragraph (e)(1)(i)(B) of Rule 14a-3, Note D(3) to Rule 14a-101, Note G(1) to Rule 14a-101, Instruction 1 to paragraph (d)(2)(ii)(L) of Item 7 of Rule 14a-101, paragraph (e)(2) of Item 14 of Rule 14a-101, Item 23 of Rule 14a-101, paragraph (a), (b), (c) and (d) of Item 23 to Rule 14a-101, Note 1 to paragraph (b)(2) of Rule 14b-1, Note 1 to paragraph (b)(3) of Rule 14b-2, section heading to Rule 14c-3, Item 5 of Rule 14c-101 and paragraph (a), (b), (c) and (d) of Item 5 of Rule 14c-101.

148 See Release No. 33-7760 (Oct. 22, 1999) [64 FR 61408].

149 44 U.S.C. 3501 et seq.

150 44 U.S.C. 3507(d) and 5 CFR 1320.11.

151 In the proposing release, we described the proposed Notice of Internet Availability of Proxy Materials as a new collection of information, rather than a part of our existing collections of information related to Regulations 14A and 14C. However, we subsequently submitted to OMB a PRA analysis based on revisions to the Regulation



Regulation 14A (OMB Control No. 3235-0059)

Regulation 14C (OMB Control No. 3235-0057)

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### B. Summary of Amendments

The amendments will apply to a particular issuer or other soliciting person only if the issuer or soliciting person voluntarily chooses to rely on the notice and access model. However, if the issuer or soliciting person opts to rely on the new alternative model, compliance with the components of the model is mandatory. The Notices, the proxy materials posted on the Web site, and copies of the proxy materials sent in response to shareholder requests will not be kept confidential.

The Notice must include the following prominent legend in bold-face type and other information described below:

**"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**[152]

- **This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.**

- **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

14A and Regulation 14C collections. Based on our burden estimates associated with the Notice, the collection of information approved by OMB related to revisions to existing collections of information (Regulations 14A and 14C) and therefore we refer to those collections of information in this PRA discussion.

152 Appropriate changes must be made to the Notice if the issuer is providing an information statement pursuant to Regulation 14C or seeking to effect a corporate action by written consent.

- **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."**

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted upon and the issuer's or other soliciting person's recommendations regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- (1) A toll-free telephone number; (2) an e-mail address; and (3) an Internet Web site address where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;
- Any control/identification number that the shareholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement and annual report; and
- Information on how to obtain directions to be able to attend the meeting and vote in person.



Intermediaries must provide a similar notice to beneficial owners. We expect that all of the factual information required to appear in the Notice will become available as part of the ordinary preparations for a shareholder meeting.

**C. Comments on PRA Estimates**

We requested comment on the PRA analysis contained in the proposing release. In the proposing release, we estimated the annual burden for an issuer or other soliciting person to prepare a Notice to be approximately 1.5 hours. We estimated that 75% of the burden would be prepared by the issuer and that 25% of the burden would be prepared by outside counsel retained by the issuer at an average cost of approximately $300 per hour.[153] Based on our receipt of 7,301 filings on Schedule 14A and 681 filings on Schedule 14C during our 2005 fiscal year, we estimated that 7,982 Notices would be filed annually, assuming that all issuers and other soliciting persons elected to follow the proposed notice and access model.[154] We further estimated that the total annual reporting burden would be approximately 8,980 hours.[155] Using the revised $400 average cost for retaining outside counsel, we are adjusting our annual cost estimate to approximately $1,197,300,[156] which reflects the outside counsel cost.

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153 For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number, and the estimated PRA cost burdens have been rounded to the nearest $100. At the proposing stage, we used an estimated hourly rate of $300.00 to determine the estimated cost to public companies of executive compensation and related disclosure prepared or reviewed by outside counsel. We recently have increased this hourly rate estimate to $400.00 per hour after consulting with several private law firms. The cost estimates in this release are based on the $400.00 hourly rate. We request comment on this estimated hourly rate.

154 7,301 notices for 14A filers + 681 notices for 14C filers = 7,982 total notices.

155 7,982 notices x 1.5 hours per notice x .75 = 8,980 hours.

156 7982 notices x $400/hour x 1.5 hours/notice x .25 = $1,197,300.

Although the notice and access model is an alternative to the existing model for the distribution of proxy materials to shareholders, and reliance upon it will be optional, we based our reporting burden and cost estimates on the assumption that all issuers or other soliciting persons in fiscal year 2005 would have relied on the notice and access model even though we realized that this would result in an overestimation of hour and cost burdens. The new alternative is voluntary, so the percentage of issuers and soliciting persons that will choose to rely on the new model is uncertain.

In response to commenters' remarks, we revised the proposal to require issuers to permit shareholders to make permanent elections to receive proxy materials in paper or by e-mail. An issuer must maintain records as to which of its shareholders have made such an election. Many issuers already maintain similar records to keep track of their shareholders who have affirmatively consented to electronic delivery consistent with past Commission guidance,[157] as well as their shareholders who have consented to householding of proxy materials pursuant to Rule 14a-3(e).[158] For purposes of the PRA, we estimate that a typical issuer will spend an additional five hours per year, or a total of 39,910 hours for all issuers subject to the proxy rules, to maintain these records.[159] Because this is an internal recordkeeping requirement, we do not expect a cost for hiring outside counsel.

The final rules also require an intermediary to prepare its own Notice. This Notice would be substantially the same as an issuer's Notice, but will be modified by the intermediaries to provide information that is relevant to beneficial owners rather than registered holders. According to ADP, it processes more than 95% of proxy materials that are sent to beneficial owners on behalf of intermediaries, reducing the need to create multiple intermediary Notices. In addition, the issuer or other soliciting person will provide the majority of information required in the intermediary's Notice. Therefore, we estimate that the burden to prepare an intermediary's Notice will be approximately one hour, or a total annual burden of 7,982 hours for all proxy solicitations.[160]

Intermediaries must also maintain records to keep track of which beneficial owners have made a permanent election to receive proxy materials in paper or by e-mail. Like issuers, intermediaries already maintain records of shareholders' affirmative consents to electronic delivery and householding of proxy materials. In addition, intermediaries maintain records as to whether their beneficial owner customers have objected, or not objected, to disclosure of their identities to the issuer. Like issuers, we believe this will result in an annual burden of 39,910 hours for intermediaries.

We did not receive any comments on the percentage of issuers and persons likely to rely on the notice and access model, nor did we receive any comments on our burden and cost estimates associated with preparing the Notice. However, several corporate commenters indicated that some issuers might be reluctant to rely on the notice and access model due to a concern that the costs of fulfillment of requests for paper copies under the model might offset some of the potential savings that they could realize from

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157 See the 1995 Interpretive Release.

158 17 CFR 240.14a-3(e).

159 7,982 filings with an estimated one filing per issuer or soliciting person x 5 hours = 39,910 hours.

160 7,982 notices x 1 hour per notice = 7,982 hours. We do not include a cost to intermediaries for hiring outside counsel because we expect that the substantive contents of an intermediary's Notice would be provided by the issuer or other soliciting person. The estimates assume that ADP will continue to process over 95% of the proxy solicitations on behalf of intermediaries, thereby eliminating the need for each intermediary to prepare a separate Notice.

the model. We have revised the proposed model to address some of these concerns about fulfillment of requests for paper copies, but it is still difficult to predict the number of issuers and soliciting persons that will rely on the model. Therefore, we are not revising the original estimates that assume that all issuers and soliciting persons will rely on the notice and access model. As a result, these burden estimates likely are overstated. We will adjust them after we have actual experience with the notice and access model. We request comment on all of our hourly and cost burden estimates.

Any member of the public may direct to us any comments concerning these burden and cost estimates and any suggestions for reducing the burdens and costs. Persons who desire to submit comments on the collections of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303, with reference to File No. S7-10-05. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7-10-05, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE, Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.



## VI. Cost-Benefit Analysis

### A. Background

The amendments to the proxy rules enable issuers to take advantage of technological advances that have occurred in recent years to more efficiently furnish proxy materials to shareholders. We expect that these amendments will lead to significant cost reduction for proxy solicitations. The costs of solicitations ultimately are borne by shareholders. We are sensitive to the costs and benefits that result from our rules. In this section, we examine those costs and benefits.

Issuers and other persons soliciting proxies must comply with the rule amendments only if they elect to furnish proxy materials pursuant to the notice and access model. No issuer or person conducting a proxy solicitation will be required to follow the notice and access model. We expect that an issuer or other soliciting person will follow the model only if it believes that it will experience cost savings as a result. We expect that having a choice among alternative models for furnishing proxy materials will limit the costs of the amendments by enabling issuers and other soliciting persons to choose one that is most efficient and cost effective under the issuer's or other soliciting person's particular circumstances.

### B. Summary of Amendments

The amendments provide an alternative notice and access model that permits an issuer to furnish its proxy materials to shareholders by posting them on a publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and providing shareholders with a notice informing them that the materials are available and

explaining how to access them. Under this alternative model, shareholders may request paper or e-mail copies of the proxy materials at no charge from the issuer.

Under the amendments, an issuer can require intermediaries to follow similar procedures when forwarding the issuer's proxy materials to beneficial owners. In addition, shareholders and other persons conducting their own proxy solicitations may follow the alternative model, under the same general requirements that apply to issuers. However, such persons will be able to limit their solicitations to shareholders who have not requested paper copies of the proxy materials from an issuer in connection with the issuer's solicitation.

**C. Benefits**

The benefits to investors of the amendments include the following: (1) more rapid dissemination of proxy information to shareholders using the Internet; and (2) reduced printing and mailing costs for issuers, as well as other soliciting persons engaging in proxy contests. We expect that the reductions in printing and mailing costs and the potential decrease in the costs of proxy contests to be the most significant sources of economic benefit to investors of the amendments.

In terms of paper processing alone, the benefits of the rule amendments are limited by the volume of paper processing that would occur otherwise. As we noted in the proposing release, Automatic Data Processing, Inc. (ADP) handles the vast majority of proxy mailings to beneficial owners.[161] ADP publishes statistics that provide useful background for evaluating the likely consequences of the rule amendments. ADP

[161] We expect savings per mailing to record holders to roughly correspond to savings per mailing to beneficial owners.



estimates that, during the 2006 proxy season,[162] over 69.7 million proxy material mailings were eliminated through a variety of means, including householding and existing electronic delivery methods. During that season, ADP mailed 85.3 million paper proxy items to beneficial owners. ADP estimates that the average cost of printing and mailing a paper copy of a set of proxy materials during the 2006 proxy season was $5.64. We estimate that issuers and other soliciting persons spent, in the aggregate, $481.2 million in postage and printing fees alone to distribute paper proxy materials to beneficial owners.[163] Approximately 50% of all proxy pieces mailed by ADP in 2005 were mailed during the proxy season.[164] Therefore, we estimate that issuers and other persons soliciting proxies from beneficial owners spent approximately $962.4 million in 2006 in printing and mailing costs.[165]

Based on the assumption that 19% of shareholders will choose to have paper copies sent to them when an issuer relies on the notice and access model, we estimate that the amendments could produce annual paper-related savings ranging from $48.3 million (if issuers who are responsible for 10% of all proxy mailings choose to rely on the notice and access model) to $241.4 million (if issuers who are responsible for 50% of all proxy mailings choose to rely on the notice and access model).[166] This estimate excludes the

[162] According to ADP data, the 2006 proxy season extended from February 15, 2006 to May 1, 2006.

[163] 85.3 million mailings x $5.64/mailing = $481.2 million.

[164] According to ADP, in 2005, 90,013,175 of 179,833,774, or 50%, of proxy pieces were mailed during the 2005 proxy season.

[165] $481.2 million / 50% = $962.4 million.

[166] This range of potential cost savings depends on data on proxy material production, home printing costs, and first-class postage rates provided by Lexecon and ADP, and supplemented with modest 2006 USPS postage rate discounts. The fixed costs of notice and proxy material production are estimated to be $2.36 per shareholder. The variable costs of fulfilling a paper requests, including handling, paper, printing and postage, are

effect of the provision of the amendments that will allow shareholders to make a permanent request for paper copies. That provision will enable issuers and other soliciting persons to take advantage of bulk printing and mailing rates for those requesting shareholders, and therefore should reduce the on-demand costs reflected in these calculations.[167]

We estimate that approximately 19% of shareholders will request paper copies. Commenters provided alternate estimates. For example, Computershare, a large transfer agent, estimated that less than 10% of shareholders would request paper copies.[168] According to a survey conducted by Forrester Research for ADP, 12% of shareholders report that they would always take extra steps to get their proxy materials, and as many as 68% of shareholders report that they would take extra steps to get their proxy materials in paper at least some of the time. The same survey also finds that 82% of shareholders report that they look at their proxy materials at least some of the time. These survey results suggest that shareholders may review proxy materials even if they do not vote.

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estimated to be $6.11 per copy requested. Assumptions about percentages of shareholders requesting paper copies are derived from Forrester survey data furnished by ADP and adjusted for the reported likelihood that an investor will take extra steps to get proxy materials. Our estimate of the total number of shareholders is based on data provided by ADP and SIA. According to SIA's comment letter, 78.49% of shareholders held their shares in street name. We estimate that the total number of proxy pieces mailed equals the number of pieces mailed to beneficial shareholders by ADP in 2005 divided by 78.49%, which equals 179,833,774 / 78.49%, or 229,116,797.

167 ADP commissioned a study by Lexecon to provide estimates for the total net cost/savings of the amendments to issuers. Lexecon's study relied on 2005 postage rates with no first-class mail discounts and a higher share of color printing at home than we assume above. It estimated that if all issuers adopt the notice and access model, if 9% of shareholders choose to print the materials at home, and 19% choose to have paper copies sent to them, then the amendments would produce a net savings of $205 million for issuers in the aggregate. However, if 20% of shareholders chose to print and 39% chose to request paper copies, the amendments would produce a net cost of $181 million. See Lexecon comment letter for more details.

168 See letter from Computershare.



During the 2005 proxy season, only 44% of accounts were voted by beneficial owners. Put differently, 56%, or 84.8 million accounts, did not return requests for voting instructions. Our estimate that 19% of shareholders will request paper copies reflects the diverse estimates suggested by the available data.

Although we expect the savings to be significant, the actual paper-related benefits will be influenced by several factors that we estimate will become less important over time. First, some issuers and other soliciting persons will likely not elect to follow the alternative model. We estimate that issuers who are responsible for between 10% and 50% of all current proxy mailings will adopt the notice and access model during the first year of implementation of the amendments. Several commenters noted that some issuers may not be willing to try the model the first year, but rather will opt to wait and monitor the experience of other issuers that do try the model. Second, to the extent that some shareholders request paper copies of the proxy materials, the benefits of the amendments in terms of savings in printing and mailing costs will be reduced. Issuers are concerned that the cost per paper copy would be significantly greater if they have to mail copies of paper proxy materials to shareholders on an on-demand basis, rather than mailing the paper copies in bulk. Thus, if a significant number of shareholders request paper, the savings will be substantially reduced. Third, after adopting the notice and access model, issuers may face a high degree of uncertainty about the number of requests that they may get for paper proxy materials and may maintain unnecessarily large inventories of paper copies as a precaution. As issuers gain familiarity with the continued use of paper materials and as shareholders become more comfortable with receiving disclosures via the Internet, the number of paper copies are likely to decline, as will issuers' tendency to

print many more copies than ultimately are requested. This will lead to growth in paper-related savings from the rule amendments over time.

Additional benefits will accrue from reductions in the costs of proxy solicitations by persons other than the issuer. Under the amendments, persons other than the issuer also can rely on the notice and access model, but will be able to limit the scope of their proxy solicitations to shareholders who have not requested paper copies of the proxy materials. We expect that the flexibility afforded to persons other than the issuer under the amendments will reduce the cost of engaging in proxy contests, thereby increasing the effectiveness and efficiency of proxy contests as a source of discipline in the corporate governance process.

The effect of the amendments of lessening the costs associated with a proxy contest will be limited by the persistence of other costs, even under the notice and access model. One commenter noted that a large percentage of the costs of effecting a proxy contest go to legal, document preparation, and solicitation fees, while a much smaller percentage of the costs is associated with printing and distribution of materials.[169] However, other commenters suggested that the paper-related cost savings that can be realized from the rule amendments are substantial enough to change the way many contests are conducted.[170]

Finally, some benefits from the amendments may arise from a reduction in what may be regarded as the environmental costs of the proxy solicitation process.[171] Specifically, proxy solicitation involves the use of a significant amount of paper and

[169] See letter from ADP.

[170] See letters from CALSTRS, Computershare, ISS, and Swingvote.

[171] See letter from American Forests.



printing ink. Paper production and distribution can adversely affect the environment, due to the use of trees, fossil fuels, chemicals such as bleaching agents, printing ink (which contains toxic metals), and cleanup washes. To the extent that paper producers internalize these costs and the costs are reflected in the price of paper and other materials consumed during the proxy solicitation process, our dollar estimates of the paper-related benefits reflect the elimination of these adverse environmental consequences under the amendments.

**D. Costs**

An issuer's decision to use the notice and access model will introduce several new costs into the process of proxy distribution, including the following: (1) the cost of preparing, producing, and sending the Notice to shareholders; (2) the cost of processing shareholders' requests for copies of the proxy materials and maintaining their permanent election preferences; and (3) the cost to shareholders of printing proxy materials at home that would otherwise be printed by issuers.

The paper-related savings to issuers and other soliciting persons discussed under the benefits section above are adjusted for the cost of printing and sending Notices. If Notices are sent by mail, then the mailing costs may vary widely among parties. Postage rates likely would vary from $0.14 to $0.39 per Notice mailed, depending on numerous factors. In our estimates of the paper-related benefits above, we assume that each Notice costs a total of $0.42 to print and mail. Based on data from ADP and SIA, we estimate that issuers and other soliciting persons process a total of 229,116,797 accounts per

year.[172] The alternative model also requires minimal added disclosures in the form of a Notice to shareholders, informing them that the proxy materials are available at a specified Internet Web site. For purposes of the PRA, we have presented the extremely conservative estimate that the preparation and filing costs of the amendments, assuming that all issuers and other soliciting persons elect to follow the procedures, will be approximately $2,020,475.[173] Under the alternate scenario presented above, these costs could range between $202,048 if 10% of issuers adopt the model and $1,010,238 if 50% of issuers adopt. The amendments also require issuers and intermediaries to maintain records of shareholders who have requested paper and e-mail copies for future proxy solicitations. We estimate that this cost to issuers and intermediaries will be approximately $9,977,500 if all issuers adopt the notice and access model,[174] $997,500 if 10% of issuers adopt the model, and $4,988,750 if 50% of issuers adopt the model.

Issuers who adopt the notice and access model and their intermediaries will incur additional processing costs. The amendments will require an intermediary such as a bank, broker-dealer, or other association to follow the notice and access model if an issuer so requests. An intermediary that follows the notice and access model will be

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172 See www.ics.adp.com/release11/public_site/about/stats.html stating that ADP handled 179,833,774 in fiscal year 2005 and letter from SIA stating that beneficial accounts represent 78.49% of total accounts.

173 For PRA purposes, we estimate that issuers would spend a total of $897,975 on outside professionals to prepare this disclosure. We also estimate that issuers would spend a total of 8,980 hours of issuer personnel time preparing this disclosure. We estimate the average hourly cost of issuer personnel time to be $125, resulting in a total cost of $1,122,500 for issuer personnel time. This results in a total cost of $2,020,475 for all issuers. We expect that costs for posting the materials on a Web site will be minimal and are included in this calculation.

174 For PRA purposes, we estimate that issuers and intermediaries would spend a total of 79,820 hours of issuer and intermediary personnel time maintaining these records. We estimate the average hourly cost of issuer and intermediary personnel time to be $125, resulting in a total cost of $9,977,500 for issuer and intermediary personnel time.



required to prepare its own Notice to beneficial owners, along with instructions on when and how to request paper copies and the website where the beneficial owner can access his or her request for voting instructions. Since issuers reimburse intermediaries for their reasonable expenses of forwarding proxy materials and intermediaries and their agents already have systems to prepare and deliver requests for voting instructions, we do not expect the intermediaries' role in sending their Notices to beneficial owners to significantly affect the costs associated with the rule.

Under the notice and access model, a beneficial owner must request a copy of proxy materials from its intermediary rather than from the issuer. The costs of collecting and processing requests from beneficial owners may be significant, particularly if the intermediary receives the requests of beneficial owners associated with many different issuers that specify different methods of furnishing the proxy. We expect that these processing costs will be highest in the first year after adoption but will subsequently decline as intermediaries develop the necessary systems and procedures and as beneficial owners increasingly become comfortable with accessing proxy materials online. In addition, the final rules permit a beneficial owner to specify its preference on an account-wide basis, which should reduce the cost of processing requests for copies. These costs are ultimately paid by the issuer and therefore would be included in an issuer's assessment of whether to adopt the alternative model.

Shareholders obtaining proxy materials online would incur any necessary costs associated with gaining access to the Internet. In addition, some shareholders may choose to print out the posted materials, which will entail paper and printing costs. We estimate that approximately 10% of all shareholders will print out the posted materials at

home at an estimated cost of $7.05 per proxy package. Based on these assumptions, the amendments are estimated to produce annual home printing costs ranging from $16 million (if issuers who are responsible for 10% of all current proxy mailings choose to rely on the notice and access model) to $80 million (if issuers who are responsible for 50% of all current proxy mailings choose to rely on the notice and access model).[175] Investors have the option to incur no additional cost by either accessing the proxy materials online or requesting paper copies of the materials from the issuer.

## VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[176] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[177] and Section 2(c) of the Investment Company Act of 1940[178] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. We have also discussed other impacts of the amendments in our Cost-Benefit, Paperwork Reduction Act and Final Regulatory Flexibility Act Analyses.

The amendments to the proxy rules are intended to improve efficiency by providing an alternative for issuers and other soliciting persons that could reduce the cost of soliciting proxies and sending information statements regarding shareholder meetings. Currently, many issuers must devote a significant amount of time and resources to proxy mailings. Similarly, undertaking a proxy contest is often a very costly endeavor. We expect that the amendments will reduce the time and resources related to such distributions. These costs include reimbursing intermediaries for their part in the process.

As noted elsewhere in this release, commenters expressed concern that the amendments might reduce shareholder participation in the proxy voting process, making issuers more dependent on broker discretionary voting. Such a result would affect the efficiency of the current proxy voting process. We have made revisions to the amendments to minimize such effect, by making it easier for shareholders to continue to receive paper copies of the proxy materials. Similarly, there was concern that the amendments would increase the risk of shareholders conducting frivolous proxy contests. We have also revised the final rules to minimize this possibility, by eliminating the proposed conditional solicitation.[179]

Some commenters were concerned that the added procedures would complicate the proxy distribution process, reducing the efficiency of the process. The final rules are voluntary. No issuer or other soliciting person is required to rely on the notice and access model. Those that choose to rely on the model presumably have determined that the

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[175] This range of potential home printing costs depends on data provided by Lexecon and ADP. See letter from ADP. The Lexecon data was included in the ADP comment letter. To calculate home printing cost, we assume that 50% of annual report pages are printed in color and 100% of proxy statement pages are printed in black and white. The estimated percentage of shareholders printing at home is derived from Forrester survey data furnished by ADP and adjusted for the reported likelihood that an investor will take extra steps to get proxy materials. Total number of shareholders estimated as above based on data provided by ADP and SIA. See letters from ADP and SIA.

[176] 15 U.S.C. 78w(a)(2).

[177] 15 U.S.C. 78c(f).

[178] 15 U.S.C. 80a-2(c).

additional procedures that they must follow would reduce their cost of soliciting proxies, thereby increasing the efficiency of the process.

We considered the effects that the amendments would have on capital formation. The final rules do not directly affect the ability of issuers to raise capital. However, they are intended to reduce the cost of soliciting proxies. In addition, they facilitate proxy disclosure via the Internet, which may improve the manner in which investors receive those disclosures, thereby improving shareholder relations.

We considered the possible effects of the amendments on competition. As noted elsewhere in this release, companies in, and related to, the financial printing industry were concerned about the negative effects that the rules may have on that industry. Conversely, these rules may create alternative industries that promote more user-friendly, computer-based systems for interaction with shareholders, thus creating new jobs and industries in this field.

**VIII. Final Regulatory Flexibility Analysis**

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to amendments to the proxy rules under the Exchange Act that will provide an alternative model for issuers and other persons soliciting proxies to satisfy certain of their obligations under the Commission's proxy rules. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act in conjunction with the proposing release. The proposing release included, and solicited comment on, the IRFA.

[179] See Section III.C.1 of Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597].



**A. Need for the Amendments**

On December 8, 2005, we proposed amendments to the rules regarding provision of proxy materials to shareholders.[180] We are adopting those amendments, substantially as proposed, but with a few modifications in response to public comment. Specifically, the amendments create an alternative notice and access model by which issuers and other soliciting persons can electronically furnish their proxy materials to shareholders. The amendments are intended to put into place processes that will provide shareholders with notice of, and access to, proxy materials while taking advantage of technological developments and the growth of the Internet and electronic communications. Issuers that rely on the amendments may be able to significantly lower the costs of their proxy solicitations that ultimately are borne by shareholders. The fact that the amendments also apply to a soliciting person other than the issuer might help to reduce the costs of engaging in a proxy contest.

The amendments also have the potential to improve the ability of shareholders to participate meaningfully in the proxy process by reducing the cost of undertaking a proxy contest and may increase management's accountability and responsiveness to shareholders due to heightened concern about the possibility of a proxy contest. This, in turn, may enhance the value of shareholders' investments.

**B. Significant Issues Raised by Public Comment**

In the proposing release, we requested comment on any aspect of the Initial Regulatory Flexibility Act Analysis, including the number of small entities that would be affected by the proposals, and both the qualitative and quantitative nature of the impact.

[180] Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597].

We did not receive comment on the number of small entities that would be affected by the proposals. Also, no commenters noted any difference in the potential effect of the amendments on small entities as opposed to other entities.

One commenter remarked that smaller companies depend more heavily on broker discretionary voting than larger companies in order to meet state law quorum requirements.[181] Although the new rules do not affect the NYSE's broker discretionary voting rule, that commenter noted that if the final rules reduce shareholder voting, such smaller companies would become even more dependent on broker discretionary voting. As noted elsewhere in this release, we have made revisions to the amendments to minimize such effect, by making it easier for shareholders to continue to receive paper copies of the proxy materials.

**C. Small Entities Subject to the Amendments**

Exchange Act Rule 0-10(a)[182] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 2,500 public companies, other than investment companies, that may be considered small entities.

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[183] Approximately 157 registered investment companies meet this

[181] See letter from ABC.

[182] 17 CFR 240.0-10(a).

[183] See Rule 0-10 under the Investment Company Act of 1940 [17 CFR 270.0-10].



definition. Moreover, approximately 53 business development companies may be considered small entities.

Paragraph (c)(1) of Rule 0-10 under the Exchange Act[184] states that the term "small business" or "small organization," when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to §240.17a-5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2005, the Commission estimates that there were approximately 910 broker-dealers that qualified as small entities as defined above.[185] Small Business Administration regulations define "small entities" to include banks and savings associations with total assets of $165 million or less.[186] The Commission estimates that the rules will apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of $165 million or less.

No issuer is required to follow the notice and access model. However, we expect that many issuers will choose to follow the alternative model because of the substantial cost savings that they may realize. These issuers likely will include many small entities. Broker-dealer and bank intermediaries are required to comply with the notice and access model if an issuer or other soliciting person requests such intermediaries to follow the alternative model.

[184] 17 CFR 240.0-10(c)(1).

[185] These numbers are based on a review by the Commission's Office of Economic Analysis of 2005 Financial and Operational Combined Uniform Single (FOCUS) Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent in their FOCUS Report filings.

**D. Reporting, Recordkeeping and Other Compliance Requirements**

If an issuer chooses to follow the model, it will be required to prepare, file, and furnish a Notice to shareholders. Similarly, upon request from an issuer or other soliciting person, a broker-dealer or bank intermediary will be required to prepare and furnish its own Notice to beneficial owners. These Notices must include factual information that is readily available to the issuer and intermediary. An issuer relying on the notice and access model also will be required to provide copies of the proxy materials to requesting shareholders and to maintain a Web site on which to post the proxy materials. Intermediaries will be required to forward copies of the proxy materials to requesting beneficial owners and to maintain a Web site on which to post its request for voting instructions. Those Web sites must be maintained in a manner to ensure that the anonymity of persons accessing the Web sites is preserved. Finally, issuers and intermediaries must maintain records regarding which shareholders have indicated a preference to receive paper or e-mail copies of the proxy materials in the future.

**E. Agency Action to Minimize Effect on Small Entities**

Compliance with the alternative notice and access model is voluntary for issuers. An issuer that is a small entity, like other types of entities subject to the proxy rules, need not elect to follow the alternative model. This flexibility to comply with traditional methods of distributing proxy materials to shareholders or to comply with the notice and access model will allow a small entity to choose the compliance means that will be most cost effective for its particular situation. It is likely that only the issuers that believe they will realize cost savings or other benefits as a result of following the notice and access model will choose to do so.

Broker-dealer and bank intermediaries that are small entities must comply with the requirements of the voluntary model upon request from an issuer or other soliciting person. However, an intermediary is not required to forward proxy materials to beneficial owners unless the issuer or other soliciting person provides assurance of reimbursement of the intermediary's reasonable expenses incurred in connection with forwarding those materials. Therefore, any costs imposed on intermediaries by the rules will be borne by the issuer or other soliciting person, and ultimately shareholders. Exempting broker-dealers and banks that are small entities would lead to inconsistent means by which beneficial owners receive their proxy materials, which we believe would not be appropriate.

We considered alternatives, such as permitting an intermediary to merely forward an issuer's Notice rather than preparing its own Notice and permitting beneficial owners to request copies directly from the issuer. However, we believe that those alternatives create a high likelihood of confusion with respect to whether a beneficial owner would be entitled to execute a proxy card rather than provide voting instructions to his or her intermediary. To prevent such confusion, we have decided that such alternatives would not be appropriate.

**IX. Statutory Basis and Text of Amendments**

We are adopting the amendments pursuant to Sections 3(b), 10, 13, 14, 15, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and Sections 20(a), 30, and 38 of the Investment Company Act of 1940, as amended.

[186] 13 CFR 121.201.

**List of Subjects**

**17 CFR Parts 240 and 249**

Reporting and recordkeeping requirements, Securities.

**17 CFR Part 274**

Investment companies, Reporting and recordkeeping requirements, Securities.

**PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

1. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend §240.14a-2 by:

a. Removing the period and adding a semicolon at the end of paragraph (b)(3)(ii); and

b. Revising paragraph (b)(3)(iv).

The revision reads as follows:

**§240.14a-2 Solicitations to which §240.14a-3 to §240.14a-15 apply.**

* * * * *

(b) * * *

(3) * * *

(iv) The proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of §240.14a-12(c); and

* * * * *

3. Amend §240.14a-3 by:

a. Revising paragraphs (a), (e)(1)(i), the introductory text of paragraphs (e)(1)(ii)(A) and (e)(1)(ii)(B)(2), paragraphs (e)(1)(ii)(B)(2)(ii), (e)(1)(ii)(B)(2)(iii), (e)(1)(ii)(B)(3), (e)(1)(iii), and (e)(2); and

b. Revising the term “annual report” to read “annual report to security holders” in paragraph (b)(13).

The revisions read as follows:

**§240.14a-3 Information to be furnished to security holders.**

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with:

(1) A publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A (§240.14a-101);

(2) A publicly-filed preliminary or definitive proxy statement, in the form and manner described in §240.14a-16, containing the information specified in Schedule 14A (§240.14a-101); or

(3) A preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 (§239.25 or §239.34 of this chapter) or Form N-14 (§239.23 of this chapter) and containing the information specified in such Form.

* * * * *

(e)(1)(i) A registrant will be considered to have delivered an annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as described in §240.14a-16, to all security holders of record who share an address if:

(A) The registrant delivers one annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, to the shared address;

(B) The registrant addresses the annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, to the security holders as a group (for example, "ABC Fund [or Corporation] Security Holders," "Jane Doe and Household," "The Smith Family"), to each of the security holders individually (for example, "John Doe and Richard Jones") or to the security holders in a form to which each of the security holders has consented in writing;

Note to paragraph (e)(1)(i)(B): Unless the registrant addresses the annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials to the security holders as a group or to each of the security holders individually, it must obtain, from each security holder to be included in the householded group, a separate affirmative written consent to the specific form of address the registrant will use.

(C) The security holders consent, in accordance with paragraph (e)(1)(ii) of this section, to delivery of one annual report to security holders or proxy statement, as applicable;

(D) With respect to delivery of the proxy statement or Notice of Internet Availability of Proxy Materials, the registrant delivers, together with or subsequent to



delivery of the proxy statement, a separate proxy card for each security holder at the shared address; and

(E) The registrant includes an undertaking in the proxy statement to deliver promptly upon written or oral request a separate copy of the annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, to a security holder at a shared address to which a single copy of the document was delivered.

(ii) Consent. (A) Affirmative written consent. Each security holder must affirmatively consent, in writing, to delivery of one annual report to security holders or proxy statement, as applicable. A security holder's affirmative written consent will be considered valid only if the security holder has been informed of:

* * * * *

(B) * * *

(2) The registrant has sent the security holder a notice at least 60 days before the registrant begins to rely on this section concerning delivery of annual reports to security holders, proxy statements or Notices of Internet Availability of Proxy Materials to that security holder. The notice must:

* * * * *

(ii) State that only one annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, will be delivered to the shared address unless the registrant receives contrary instructions;

(iii) Include a toll-free telephone number, or be accompanied by a reply form that is pre-addressed with postage provided, that the security holder can use to notify the

registrant that the security holder wishes to receive a separate annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials;

* * * * *

(3) The registrant has not received the reply form or other notification indicating that the security holder wishes to continue to receive an individual copy of the annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials, as applicable, within 60 days after the registrant sent the notice required by paragraph (e)(1)(ii)(B)(2) of this section; and

* * * * *

(iii) Revocation of consent. If a security holder, orally or in writing, revokes consent to delivery of one annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials to a shared address, the registrant must begin sending individual copies to that security holder within 30 days after the registrant receives revocation of the security holder's consent.

* * * * *

(2) Notwithstanding paragraphs (a) and (b) of this section, unless state law requires otherwise, a registrant is not required to send an annual report to security holders, proxy statement or Notice of Internet Availability of Proxy Materials to a security holder if:

(i) An annual report to security holders and a proxy statement, or a Notice of Internet of Availability of Proxy Materials, for two consecutive annual meetings; or

(ii) All, and at least two, payments (if sent by first class mail) of dividends or interest on securities, or dividend reinvestment confirmations, during a twelve month



period, have been mailed to such security holder's address and have been returned as undeliverable. If any such security holder delivers or causes to be delivered to the registrant written notice setting forth his then current address for security holder communications purposes, the registrant's obligation to deliver an annual report to security holders, a proxy statement or a Notice of Internet Availability of Proxy Materials under this section is reinstated.

* * * * *

4. Amend §240.14a-4 by:

a. Removing the authority citation following the section;

b. Revising the word "mailed" to read "sent" in the first sentence of paragraph (c)(1); and

c. Revising the word "mails" to read "sends" in the last sentence of paragraph (c)(1).

5. Amend §240.14a-7 by:

a. Revising paragraphs (a)(2)(i) and (a)(2)(ii);

b. Adding paragraph (a)(2)(iii); and

c. In the "Notes to §240.14a-7", revising the numerical designation "1." to read "Note 1 to §240.14a-8", revising the numerical designation "2." to read "Note 2 to §240.14a-7" and adding "Note 3 to §240.14a-7".

The revisions and additions read as follows:

**§240.14a-7 Obligations of registrants to provide a list of, or mail soliciting material to, security holders.**

* * * * *

(a) * * *

(2) * * *

(i) Send copies of any proxy statement, form of proxy, or other soliciting material, including a Notice of Internet Availability of Proxy Materials (as described in §240.14a-16), furnished by the security holder to the record holders, including banks, brokers, and similar entities, designated by the security holder. A sufficient number of copies must be sent to the banks, brokers, and similar entities for distribution to all beneficial owners designated by the security holder. The security holder may designate only record holders and/or beneficial owners who have not requested paper and/or e-mail copies of the proxy statement. If the registrant has received affirmative written or implied consent to deliver a single proxy statement to security holders at a shared address in accordance with the procedures in §240.14a-3(e)(1), a single copy of the proxy statement or Notice of Internet Availability of Proxy Materials furnished by the security holder shall be sent to that address, provided that if multiple copies of the Notice of Internet Availability of Proxy Materials are furnished by the security holder for that address, the registrant shall deliver those copies in a single envelope to that address. The registrant shall send the security holder material with reasonable promptness after tender of the material to be sent, envelopes or other containers therefore, postage or payment for postage and other reasonable expenses of effecting such distribution. The registrant shall not be responsible for the content of the material; or

(ii) Deliver the following information to the requesting security holder within five business days of receipt of the request:

(A) A reasonably current list of the names, addresses and security positions of the record holders, including banks, brokers and similar entities holding securities in the



same class or classes as holders which have been or are to be solicited on management's behalf, or any more limited group of such holders designated by the security holder if available or retrievable under the registrant's or its transfer agent's security holder data systems;

(B) The most recent list of names, addresses and security positions of beneficial owners as specified in §240.14a-13(b), in the possession, or which subsequently comes into the possession, of the registrant;

(C) The names of security holders at a shared address that have consented to delivery of a single copy of proxy materials to a shared address, if the registrant has received written or implied consent in accordance with §240.14a-3(e)(1); and

(D) If the registrant has relied on §240.14a-16, the names of security holders who have requested paper copies of the proxy materials for all meetings and the names of security holders who, as of the date that the registrant receives the request, have requested paper copies of the proxy materials only for the meeting to which the solicitation relates.

(iii) All security holder list information shall be in the form requested by the security holder to the extent that such form is available to the registrant without undue burden or expense. The registrant shall furnish the security holder with updated record holder information on a daily basis or, if not available on a daily basis, at the shortest reasonable intervals; provided, however, the registrant need not provide beneficial or record holder information more current than the record date for the meeting or action.

* * * * *

Notes to §240.14a-7.

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Note 3 to §240.14a-7. If the registrant is sending the requesting security holder's materials under §240.14a-7 and receives a request from the security holder to furnish the materials in the form and manner described in §240.14a-16, the registrant must accommodate that request.

6. Amend §240.14a-8 by revising the word "mail" to read "send" in the last sentence of paragraph (e)(2) and in paragraph (e)(3) and the word "mails" to read "sends" in the introductory text of paragraph (m)(3).

7. Amend §240.14a-12 by revising the term "annual report" to read "annual report to security holders" in the heading of paragraph (c)(1) and the first sentence of paragraph (c)(1).

8. Amend §240.14a-13 by revising the word "mailing" to read "sending" in paragraph (a)(5) and the word "mail" to read "send" in Note 2 following paragraph (a) and in paragraph (c), each time it appears.

9. Add §240.14a-16 to read as follows:

**§240.14a-16 Internet availability of proxy materials.**

(a)(1) A registrant may furnish a proxy statement pursuant to §240.14a-3(a), or an annual report to security holders pursuant to §240.14a-3(b), to a security holder by sending the security holder a Notice of Internet Availability of Proxy Materials, as described in this section, 40 calendar days or more prior to the security holder meeting date, or if no meeting is to be held, 40 calendar days or more prior to the date the votes, consents or authorizations may be used to effect the corporate action, and complying with all other requirements of this section.



(2) If the registrant chooses to provide the proxy statement or annual report to security holders to beneficial owners pursuant to this section, it must provide the record holder or respondent bank with all information listed in paragraph (d) of this section in sufficient time for the record holder or respondent bank to prepare, print and send a Notice of Internet Availability of Proxy Materials to beneficial owners at least 40 calendar days before the meeting date.

(b)(1) All materials identified in the Notice of Internet Availability of Proxy Materials must be publicly accessible, free of charge, at the Web site address specified in the notice on or before the time that the notice is sent to the security holder and such materials must remain available on that Web site through the conclusion of the meeting of security holders.

(2) All additional soliciting materials sent to security holders or made public after the Notice of Internet Availability of Proxy Materials has been sent must be made publicly accessible at the specified Web site address no later than the day on which such materials are first sent to security holders or made public.

(3) The Web site address relied upon for compliance under this section may not be the address of the Commission's electronic filing system.

(4) The registrant must provide security holders with a means to execute a proxy as of the time the Notice of Internet Availability of Proxy Materials is first sent to security holders.

(c) The materials must be presented on the Web site in a format, or formats, convenient for both reading online and printing on paper.

(d) The Notice of Internet Availability of Proxy Materials must contain the following:

(1) A prominent legend in bold-face type that states:

**"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**

**1. This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.**

**2. The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

**3. If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."**;

(2) The date, time, and location of the meeting, or if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;

(3) A clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendations regarding those matters, but no supporting statements;

(4) A list of the materials being made available at the specified Web site;

(5) A toll-free telephone number, an e-mail address, and an Internet Web site where the security holder can request a copy of the proxy statement, annual report to security holders, and form of proxy, relating to all of the registrant's future security holder meetings and for the particular meeting to which the proxy materials being furnished relate;

(6) Any control/identification numbers that the security holder needs to access his or her form of proxy;

(7) Instructions on how to access the form of proxy, provided that such instructions do not enable a security holder to execute a proxy without having access to the proxy statement and, if required by §240.14a-3(b), the annual report to security holders; and

(8) Information on how to obtain directions to be able to attend the meeting and vote in person.

(e)(1) The Notice of Internet Availability of Proxy Materials may not be incorporated into, or combined with, another document, except that it may be incorporated into, or combined with, a notice of security holder meeting required under state law, unless state law prohibits such incorporation or combination.

(2) The Notice of Internet Availability of Proxy Materials may contain only the information required by paragraph (d) of this section and any additional information required to be included in a notice of security holders meeting under state law; provided that:

(i) The registrant must revise the information on the Notice of Internet Availability of Proxy Materials, including any title to the document, to reflect the fact that:

(A) The registrant is conducting a consent solicitation rather than a proxy solicitation; or

(B) The registrant is not soliciting proxy or consent authority, but is furnishing an information statement pursuant to §240.14c-2; and

(ii) The registrant may include a statement on the Notice to educate security holders that no personal information other than the identification or control number is necessary to execute a proxy.

(f)(1) Except as provided in paragraph (h) of this section, the Notice of Internet Availability of Proxy Materials must be sent separately from other types of security holder communications and may not accompany any other document or materials, including the form of proxy.

(2) Notwithstanding paragraph (f)(1) of this section, the registrant may accompany the Notice of Internet Availability of Proxy Materials with:

(i) A pre-addressed, postage-paid reply card for requesting a copy of the proxy materials; and

(ii) A copy of any notice of security holder meeting required under state law if that notice is not combined with the Notice of Internet Availability of Proxy Materials.

(g) Plain English.

(1) To enhance the readability of the Notice of Internet Availability of Proxy Materials, the registrant must use plain English principles in the organization, language, and design of the notice.





(2) The registrant must draft the language in the Notice of Internet Availability of Proxy Materials so that, at a minimum, it substantially complies with each of the following plain English writing principles:

(i) Short sentences;

(ii) Definite, concrete, everyday words;

(iii) Active voice;

(iv) Tabular presentation or bullet lists for complex material, whenever possible;

(v) No legal jargon or highly technical business terms; and

(vi) No multiple negatives.

(3) In designing the Notice of Internet Availability of Proxy Materials, the registrant may include pictures, logos, or similar design elements so long as the design is not misleading and the required information is clear.

(h) The registrant may, at its discretion, choose to furnish some proxy materials pursuant to §240.14a-3(a)(1) and other proxy materials pursuant to this section, provided that the registrant may not send a form of proxy to security holders until 10 calendar days or more after the date it sent the Notice of Internet Availability of Proxy Materials to security holders, unless the form of proxy is accompanied or has been preceded by a copy of the proxy statement and any annual report to security holders that is required by §240.14a-3(b) through the same delivery medium. If the registrant sends a form of proxy after the expiration of such 10-day period and the form of proxy is not accompanied or preceded by a copy, via the same medium, of the proxy statement and any annual report to security holders that is required by §240.14a-3(b), then the registrant

shall accompany the form of proxy with a Notice of Internet Availability of Proxy Materials.

(i) The registrant must file a form of the Notice of Internet Availability of Proxy Materials with the Commission pursuant to §240.14a-6(b) no later than the date that the registrant first sends the notice to security holders.

(j) Obligation to provide copies.

(1) The registrant must send, at no cost to the record holder or respondent bank and by U.S. first class mail or other reasonably prompt means, a paper copy of the proxy statement, information statement, annual report to security holders, and form of proxy (to the extent each of those documents is applicable) to any record holder or respondent bank requesting such a copy within three business days after receiving a request for a paper copy.

(2) The registrant must send, at no cost to the record holder or respondent bank and via e-mail, an electronic copy of the proxy statement, information statement, annual report to security holders, and form of proxy (to the extent each of those documents is applicable) to any record holder or respondent bank requesting such a copy within three business days after receiving a request for an electronic copy via e-mail.

(3) The registrant is required to provide copies of the proxy materials pursuant to paragraphs (j)(1) and (j)(2) for one year after the conclusion of the meeting or corporate action to which the proxy materials relate.

(4) The registrant must maintain records of security holder requests to receive materials in paper or via e-mail for future solicitations and must continue to provide





copies of the materials to a security holder who has made such a request until the security holder revokes such request.

(k) Security holder information.

(1) A registrant or its agent shall maintain the Internet Web site on which it posts its proxy materials in a manner that does not infringe on the anonymity of a person accessing such Web site.

(2) The registrant and its agents shall not use any e-mail address obtained from a security holder solely for the purpose of requesting a copy of proxy materials pursuant to paragraph (j) for any purpose other than to send a copy of those materials to that security holder. The registrant shall not disclose such information to any person other than an employee or agent to the extent necessary to send a copy of the proxy materials pursuant to paragraph (j).

(l) A person other than the registrant may solicit proxies pursuant to the conditions imposed on registrants by this section, provided that:

(1) A soliciting person other than the registrant is required to provide copies of its proxy materials only to security holders to whom it has sent a Notice of Internet Availability of Proxy Materials; and

(2) A soliciting person other than the registrant must send its Notice of Internet Availability of Proxy Materials by the later of:

(i) 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or

(ii) 10 calendar days after the date that the registrant first send its proxy statement or Notice of Internet Availability of Proxy Materials to security holders.

(3) Content of the soliciting person's Notice of Internet Availability of Proxy Materials.

(i) If, at the time a soliciting person other than the registrant sends its Notice of Internet Availability of Proxy Materials, the soliciting person is not aware of all matters on the registrant's agenda for the meeting of security holders, the soliciting person's Notice on Internet Availability of Proxy Materials must provide a clear and impartial identification of each separate matter on the agenda to the extent known by the soliciting person at that time. The soliciting person's notice also must include a clear statement indicating that there may be additional agenda items of which the soliciting person is not aware and that the security holder cannot direct a vote for those items on the soliciting person's proxy card provided at that time.

(ii) If a soliciting person other than the registrant sends a form of proxy not containing all matters intended to be acted upon, the Notice of Internet Availability of Proxy Materials must clearly state whether execution of the form of proxy will invalidate a security holder's prior vote on matters not presented on the form of proxy.

(m) This section shall not apply to a proxy solicitation in connection with a business combination transaction, as defined in §230.165 of this chapter.

(n) This section provides a non-exclusive alternative by which an issuer or other person may furnish a proxy statement pursuant to §240.14a-3(a) or an annual report to security holders pursuant to §240.14a-3(b) to a security holder. This section does not affect the availability of any other means by which an issuer or other person may furnish





a proxy statement pursuant to §240.14a-3(a), or an annual report to security holders pursuant to §240.14a-3(b), to a security holder.

10. Amend §240.14a-101 by:

a. Revising the term "annual report" to read "annual report on Form 10-K or Form 10-KSB" in Instruction 1 to paragraph (d)(2)(ii)(L) of Item 7;

b. Revising the word "mail" to read "send" in Instruction 2 to paragraph (d)(2)(ii)(L) of Item 7; and

c. Revising Item 23.

The revision reads as follows.

**§240.14a-101 Schedule 14A. Information required in proxy statement.**

* * * * *

Item 23. Delivery of documents to security holders sharing an address. If one annual report to security holders, proxy statement, or Notice of Internet Availability of Proxy Materials is being delivered to two or more security holders who share an address in accordance with §240.14a-3(e)(1), furnish the following information:

(a) State that only one annual report to security holders, proxy statement, or Notice of Internet Availability of Proxy Materials, as applicable, is being delivered to multiple security holders sharing an address unless the registrant has received contrary instructions from one or more of the security holders;

(b) Undertake to deliver promptly upon written or oral request a separate copy of the annual report to security holders, proxy statement, or Notice of Internet Availability of Proxy Materials, as applicable, to a security holder at a shared address to which a single copy of the documents was delivered and provide instructions as to how a

security holder can notify the registrant that the security holder wishes to receive a separate copy of an annual report to security holders, proxy statement, or Notice of Internet Availability of Proxy Materials, as applicable;

(c) Provide the phone number and mailing address to which a security holder can direct a notification to the registrant that the security holder wishes to receive a separate annual report to security holders, proxy statement, or Notice of Internet Availability of Proxy Materials, as applicable, in the future; and

(d) Provide instructions how security holders sharing an address can request delivery of a single copy of annual reports to security holders, proxy statements, or Notices of Internet Availability of Proxy Materials if they are receiving multiple copies of annual reports to security holders, proxy statements, or Notices of Internet Availability of Proxy Materials.

11. Amend §240.14b-1 by:

a. Revising paragraphs (b)(2) including the Note and (c)(2)(i);

b. Revising the term "annual reports" to read "annual reports to security holders" in paragraphs (c)(2)(ii) and (c)(3);

c. Revising the term "annual report" to read "annual report to security holders" in paragraph (c)(2)(ii);

d. Revising the word "mail" to read "send" in paragraph (c)(2)(ii); and

e. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

**§240.14b-1 Obligation of registered brokers and dealers in connection with the prompt forwarding of certain communications to beneficial owners.**

(b) * * *



(2) The broker or dealer shall, upon receipt of the proxy, other proxy soliciting material, information statement, and/or annual report to security holders from the registrant or other soliciting person, forward such materials to its customers who are beneficial owners of the registrant's securities no later than five business days after receipt of the proxy material, information statement or annual report to security holders.

Note to Paragraph (b)(2): At the request of a registrant, or on its own initiative so long as the registrant does not object, a broker or dealer may, but is not required to, deliver one annual report to security holders, proxy statement, information statement, or Notice of Internet Availability of Proxy Materials to more than one beneficial owner sharing an address if the requirements set forth in §240.14a-3(e)(1) (with respect to annual reports to security holders, proxy statements, and Notices of Internet Availability of Proxy Materials) and §240.14c-3(c) (with respect to annual reports to security holders, information statements, and Notices of Internet Availability of Proxy Materials) applicable to registrants, with the exception of §240.14a-3(e)(1)(i)(E), are satisfied instead by the broker or dealer.

(c) * * *

(2) * * *

(i) Its obligations under paragraphs (b)(2), (b)(3) and (d) of this section if the registrant or other soliciting person, as applicable, does not provide assurance of reimbursement of the broker's or dealer's reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2), (b)(3) and (d) of this section; or

* * * * *

(d) Compliance with §240.14a-16. If a registrant or other soliciting person informs the broker or dealer that it intends to rely on §240.14a-16 to furnish proxy materials to beneficial owners and provides all of the relevant information listed in §240.14a-16(d) to the broker or dealer, the broker or dealer shall:

(1) Prepare and send a Notice of Internet Availability of Proxy Materials containing the information required in paragraph (e) of this section to beneficial owners no later than:

(i) With respect to a registrant, 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; and

(ii) With respect to a soliciting person other than the registrant, the later of:

(A) 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or

(B) 10 calendar days after the date that the registrant first sends its proxy statement or Notice of Internet Availability of Proxy Materials to security holders.

(2) Establish a Web site at which beneficial owners are able to access the broker or dealer's request for voting instructions and, at the broker or dealer's option, establish a Web site at which beneficial owners are able to access the proxy statement and other soliciting materials, provided that such Web sites are maintained in a manner consistent with paragraphs (b), (c), and (k) of §240.14a-16;

(3) Upon receipt of a request from the registrant or other soliciting person, send to security holders specified by the registrant or other soliciting person a copy of the





request for voting instructions accompanied by a copy of the intermediary's Notice of Internet Availability of Proxy Materials 10 calendar days or more after the broker or dealer sends its Notice of Internet Availability of Proxy Materials pursuant to paragraph (d)(1); and

(4) Upon receipt of a request for a copy of the materials from a beneficial owner:

(i) Request a copy of the soliciting materials from the registrant or other soliciting person, in the form requested by the beneficial owner, within three business days after receiving the beneficial owner's request;

(ii) Forward a copy of the soliciting materials to the beneficial owner, in the form requested by the beneficial owner, within three business days after receiving the materials from the registrant or other soliciting person; and

(iii) Maintain records of security holder requests to receive a paper or e-mail copy of the proxy materials in connection with future proxy solicitations and provide copies of the proxy materials to a security holder who has made such a request for all securities held in the account of that security holder until the security holder revokes such request.

(e) Content of Notice of Internet Availability of Proxy Materials. The broker or dealer's Notice of Internet Availability of Proxy Materials shall:

(1) Include all information, as it relates to beneficial owners, required in a registrant's Notice of Internet Availability of Proxy Materials under §240.14a-16(d), provided that the broker or dealer shall provide its own, or its agent's, toll-free telephone

number, an e-mail address, and an Internet Web site to service requests for copies from beneficial owners;

(2) Include a brief description, if applicable, of the rules that permit the broker or dealer to vote the securities if the beneficial owner does not return his or her voting instructions; and

(3) Otherwise be prepared and sent in a manner consistent with paragraphs (e), (f), and (g) of §240.14a-16.

12. Amend §240.14b-2 by:

a. Revising the introductory text of paragraph (b)(3), the Note to paragraph (b)(3), and paragraph (c)(2)(i);

b. Revising the term "annual reports" to read "annual reports to security holders" in paragraph (c)(2)(ii) and (c)(4);

c. Revising the term "annual report" to read "annual report to security holders" in paragraph (c)(2)(ii);

d. Revising the word "mail" to read "send" in paragraph (c)(2)(ii); and

e. Adding paragraphs (d) and (e).

The additions and revisions read as follows:

**§240.14b-2 Obligation of banks, associations and other entities that exercise fiduciary powers in connection with the prompt forwarding of certain communications to beneficial owners.**

* * * * *

(b) * * *

(3) Upon receipt of the proxy, other proxy soliciting material, information statement, and/or annual report to security holders from the registrant or other soliciting





person, the bank shall forward such materials to each beneficial owner on whose behalf it holds securities, no later than five business days after the date it receives such material and, where a proxy is solicited, the bank shall forward, with the other proxy soliciting material and/or the annual report to security holders, either:

* * * * *

Note to Paragraph (b)(3): At the request of a registrant, or on its own initiative so long as the registrant does not object, a bank may, but is not required to, deliver one annual report to security holders, proxy statement, information statement, or Notice of Internet Availability of Proxy Materials to more than one beneficial owner sharing an address if the requirements set forth in §240.14a-3(e)(1) (with respect to annual reports to security holders, proxy statements, and Notices of Internet Availability of Proxy Materials) and §240.14c-3(c) (with respect to annual reports to security holders, information statements, and Notices of Internet Availability of Proxy Materials) applicable to registrants, with the exception of §240.14a-3(e)(1)(i)(E), are satisfied instead by the bank.

* * * * *

(c) * * *

(2) * * *

(i) Its obligations under paragraphs (b)(2), (b)(3), (b)(4) and (d) of this section if the registrant or other soliciting person, as applicable, does not provide assurance of reimbursement of its reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2), (b)(3), (b)(4) and (d) of this section; or

* * * * *

(d) Compliance with §240.14a-16. If a registrant or other soliciting person informs the bank that it intends to rely on §240.14a-16 to furnish proxy materials to beneficial owners and provides all of the relevant information listed in §240.14a-16(d) to the bank, the bank shall:

(1) Prepare and send a Notice of Internet Availability of Proxy Materials containing the information required in paragraph (e) of this section to beneficial owners no later than:

(i) With respect to a registrant, 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; and

(ii) With respect to a soliciting person other than the registrant, the later of:

(A) 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or

(B) 10 calendar days after the date that the registrant first sends its proxy statement or Notice of Internet Availability of Proxy Materials to security holders.

(2) Establish a Web site at which beneficial owners are able to access the bank's request for voting instructions and, at the bank's option, establish a Web site at which beneficial owners are able to access the proxy statement and other soliciting materials, provided that such Web sites are maintained in a manner consistent with paragraphs (b), (c), and (k) of §240.14a-16;



(3) Upon receipt of a request from the registrant or other soliciting person, send to security holders specified by the registrant or other soliciting person a copy of the request for voting instructions accompanied by a copy of the intermediary's Notice of Internet Availability of Proxy Materials 10 days or more after the bank sends its Notice of Internet Availability of Proxy Materials pursuant to paragraph (d)(1); and

(4) Upon receipt of a request for a copy of the materials from a beneficial owner:

(i) Request a copy of the soliciting materials from the registrant or other soliciting person, in the form requested by the beneficial owner, within three business days after receiving the beneficial owner's request;

(ii) Forward a copy of the soliciting materials to the beneficial owner, in the form requested by the beneficial owner, within three business days after receiving the materials from the registrant or other soliciting person; and

(iii) Maintain records of security holder requests to receive a paper or e-mail copy of the proxy materials in connection with future proxy solicitations and provide copies of the proxy materials to a security holder who has made such a request for all securities held in the account of that security holder until the security holder revokes such request.

(e) Content of Notice of Internet Availability of Proxy Materials. The bank's Notice of Internet Availability of Proxy Materials shall:

(1) Include all information, as it relates to beneficial owners, required in a registrant's Notice of Internet Availability of Proxy Materials under §240.14a-16(d), provided that the bank shall provide its own, or its agent's, toll-free telephone number,

e-mail address, and Internet Web site to service requests for copies from beneficial owners; and

(2) Otherwise be prepared and sent in a manner consistent with paragraphs (e), (f), and (g) of §240.14a-16.

13. Amend §240.14c-2 by:

a. Revising paragraph (a); and

b. Adding paragraph (d).

The revision and addition read as follows:

**§240.14c-2 Distribution of information statement.**

(a)(1) In connection with every annual or other meeting of the holders of the class of securities registered pursuant to section 12 of the Act or of a class of securities issued by an investment company registered under the Investment Company Act of 1940 that has made a public offering of securities, including the taking of corporate action by the written authorization or consent of security holders, the registrant shall transmit to every security holder of the class that is entitled to vote or give an authorization or consent in regard to any matter to be acted upon and from whom proxy authorization or consent is not solicited on behalf of the registrant pursuant to section 14(a) of the Act:

(i) A written information statement containing the information specified in Schedule 14C (§240.14c-101);

(ii) A publicly-filed information statement, in the form and manner described in §240.14c-3(d), containing the information specified in Schedule 14C (§240.14c-101); or





(iii) A written information statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 (§239.25 or §239.34 of this chapter) or Form N-14 (§239.23 of this chapter) and containing the information specified in such Form.

(2) Notwithstanding paragraph (a)(1) of this section:

(i) In the case of a class of securities in unregistered or bearer form, such statements need to be transmitted only to those security holders whose names are known to the registrant; and

(ii) No such statements need to be transmitted to a security holder if a registrant would be excused from delivery of an annual report to security holders or a proxy statement under §240.14a-3(e)(2) if such section were applicable.

* * * * *

(d) A registrant may transmit an information statement to security holders pursuant to paragraph (a) of this section by satisfying the requirements set forth in §240.14a-16; provided, however, that the registrant may revise the information required in the Notice of Internet Availability of Proxy Materials to reflect the fact that the registrant is not soliciting proxies for the meeting. This paragraph (d) provides a non-exclusive alternative by which a registrant may transmit an information statement pursuant to paragraph (a) of this section to a security holder. This paragraph (d) does not affect the availability of any other means by which a registrant may transmit an information statement pursuant to paragraph (a) of this section to a security holder.

14. Amend §240.14c-3 by:

a. Removing the authority citation following this section;

b. Revising paragraphs (a)(1) and (c); and

c. Adding paragraph (d).

The revisions and addition read as follows:

**§240.14c-3 Annual report to be furnished security holders.**

(a) * * *

(1) The annual report to security holders shall contain the information specified in paragraphs (b)(1) through (b)(11) of §240.14a-3.

* * * * *

(c) A registrant will be considered to have delivered a Notice of Internet Availability of Proxy Materials, annual report to security holders or information statement to security holders of record who share an address if the requirements set forth in §240.14a-3(e)(1) are satisfied with respect to the Notice of Internet Availability of Proxy Materials, annual report to security holders or information statement, as applicable.

(d) A registrant may furnish an annual report to security holders pursuant to paragraph (a) of this section by satisfying the requirements set forth in §240.14a-16. This paragraph (d) provides a non-exclusive alternative by which a registrant may furnish an annual report pursuant to paragraph (a) of this section to a security holder. This paragraph (d) does not affect the availability of any other means by which a registrant may furnish an annual report pursuant to paragraph (a) of this section to a security holder.

15. Amend §240.14c-5 by revising the word "mailed" to read "sent" in the second sentence of the introductory text of paragraph (a).

16. Amend §240.14c-7 by revising paragraph (a)(5) before the Note and the word "mail" to read "send" in Note 2 following paragraph (a).





The revision reads as follows:

**§240.14c-7 Providing copies of material for certain beneficial owners.**

(a) * * *

(5) Upon the request of any record holder or respondent bank that is supplied with Notices of Internet Availability of Proxy Materials, information statements and/or annual reports to security holders pursuant to paragraph (a)(3) of this section, pay its reasonable expenses for completing the sending of such material to beneficial owners.

* * * * *

17. Amend §240.14c-101 by:

a. Revising the word "mailing" to read "sending" in Item 4, Instruction 1; and

b. Revising Item 5.

The revision reads as follows.

**§240.14c-101 Schedule 14C. Information required in information statement.**

* * * * *

Item 5. Delivery of documents to security holders sharing an address. If one annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials is being delivered to two or more security holders who share an address, furnish the following information in accordance with §240.14a-3(e)(1):

(a) State that only one annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials, as applicable, is being delivered to multiple security holders sharing an address unless the registrant has received contrary instructions from one or more of the security holders;

(b) Undertake to deliver promptly upon written or oral request a separate copy of the annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials, as applicable, to a security holder at a shared address to which a single copy of the documents was delivered and provide instructions as to how a security holder can notify the registrant that the security holder wishes to receive a separate copy of an annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials, as applicable;

(c) Provide the phone number and mailing address to which a security holder can direct a notification to the registrant that the security holder wishes to receive a separate annual report to security holders, information statement, or Notice of Internet Availability of Proxy Materials, as applicable, in the future; and

(d) Provide instructions how security holders sharing an address can request delivery of a single copy of annual reports to security holders, information statements, or Notices of Internet Availability of Proxy Materials if they are receiving multiple copies of annual reports to security holders, information statements, or Notices of Internet Availability of Proxy Materials.

**PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934**

18. The general authority citation for Part 249 is revised to read as follows:

Authority: 15 U.S.C. 78a et seq., 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

19. Amend Item 4 to "Part II - Other Information" of Form 10-Q (referenced in §249.308a) by revising paragraph (d) to read as follows:





**Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.**

**Form 10-Q**

* * * * *

**Part II - Other Information**

* * * * *

**Item 4. Submission of Matters to a Vote of Security Holders.**

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

20. Amend Item 4 to "Part II - Other Information" of Form 10-QSB (referenced in §249.308b) by revising paragraph (d) to read as follows:

**Note: The text of Form 10-QSB does not, and this amendment will not, appear in the Code of Federal Regulations.**

**Form 10-QSB**

* * * * *

**Part II - Other Information**

* * * * *

**Item 4. Submission of Matters to a Vote of Security Holders.**

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

21. Amend Item 4 to Part I of Form 10-K (referenced in §249.310) by revising paragraph (d) to read as follows:

**Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.**

**Form 10-K**

* * * * *

**Part I**

* * * * *

**Item 4. Submission of Matters to a Vote of Security Holders.**

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

22. Amend Item 4 to Part I of Form 10-KSB (referenced in §249.310b) by revise paragraph (d) to read as follows:

**Note: The text of Form 10-KSB does not, and this amendment will not, appear in the Code of Federal Regulations.**





**Form 10-KSB**

* * * * *

**Part I**

* * * * *

**Item 4. Submission of Matters to a Vote of Security Holders.**

* * * * *

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

**PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940**

23. The authority citation for Part 274 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

* * * * *

24. Amend Sub-Item 77C to “Instructions to Specific Items” of Form N-SAR (referenced in §§ 249.330 and 274.101) by revising paragraph (d) to read as follows:

**Note: The text of Form N-SAR does not, and this amendment will not, appear in the Code of Federal Regulations.**

**Form N-SAR**

* * * * *

**Instructions to Specific Items**

* * * * *

**SUB-ITEM 77C: Submission of matters to a vote of security holders**

* * * * *

(d) Describe the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (§240.14a-101)) terminating any solicitation subject to §240.14a-12(c), including the cost or anticipated cost to the registrant.

* * * * *

By the Commission.

Nancy M. Morris
Secretary

January 22, 2007



**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR PART 240**

**[RELEASE NOS. 34-56135; IC-27911; File No. S7-03-07]**

**RIN 3235-AJ79**

**SHAREHOLDER CHOICE REGARDING PROXY MATERIALS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting amendments to the proxy rules under the Securities Exchange Act of 1934 to provide shareholders with the ability to choose the means by which they access proxy materials. Under the amendments, issuers and other soliciting persons will be required to post their proxy materials on an Internet Web site and provide shareholders with a notice of the Internet availability of the materials. The issuer or other soliciting person may choose to furnish paper copies of the proxy materials along with the notice. If the issuer or other soliciting person chooses not to furnish a paper copy of the proxy materials along with the notice, a shareholder may request delivery of a copy at no charge to the shareholder.

**DATES:** Effective Date: January 1, 2008, except §240.14a-16(d)(3) and §240.14a-16(j)(3) are effective October 1, 2007.

Compliance Dates: "Large accelerated filers," as that term is defined in Rule 12b-2 under the Securities Exchange Act of 1934, not including registered investment companies, must comply with the amendments regarding proxy solicitations commencing on or after January 1, 2008. Registered investment companies, persons other than issuers, and issuers that are not large accelerated filers conducting proxy solicitations

(1) may comply with the amendments regarding proxy solicitations commencing on or after January 1, 2008 and (2) must comply with the amendments regarding proxy solicitations commencing on or after January 1, 2009.

**FOR FURTHER INFORMATION CONTACT:** Raymond A. Be, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** The Commission is adopting amendments to Rules 14a-3,[1] 14a-7,[2] 14a-16,[3] 14a-101,[4] 14b-1,[5] 14b-2,[6] 14c-2,[7] and 14c-3[8] under the Securities Exchange Act of 1934.[9]

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[1] 17 CFR 240.14a-3.

[2] 17 CFR 240.14a-7.

[3] 17 CFR 240.14a-16.

[4] 17 CFR 240.14a-101.

[5] 17 CFR 240.14b-1.

[6] 17 CFR 240.14b-2.

[7] 17 CFR 240.14c-2.

[8] 17 CFR 240.14c-3.

[9] 15 U.S.C. 78a et seq.

## I. Introduction

On January 22, 2007, we proposed amendments to the proxy rules that would require all issuers and other soliciting persons to furnish proxy materials to shareholders by posting them on an Internet Web site and providing shareholders with notice of the electronic availability of the proxy materials.[10] Under the proposal, issuers and other soliciting persons would be permitted to deliver paper or e-mail copies of their proxy materials to shareholders along with the notice. The proposal was intended to provide all shareholders with the ability to choose the means by which they access proxy materials, including via paper, e-mail or the Internet, while still affording issuers and other soliciting persons flexibility in determining how to furnish their proxy materials to shareholders.[11] In a companion release issued on the same date, we adopted the "notice and access" model that issuers and other soliciting persons may comply with on a voluntary basis for proxy solicitations commencing on or after July 1, 2007.[12]

We received 23 comment letters on the proposal. The vast majority of commenters generally supported our goal of increasing reliance on technology to improve proxy distribution.[13] However, many of the commenters thought that the

[10] See Release No. 34-55147 (Jan. 22, 2007) [72 FR 4176].

[11] For purposes of this release, the term "proxy materials" includes proxy statements on Schedule 14A [17 CFR 240.14a-101], proxy cards, information statements on Schedule 14C [17 CFR 240.14c-101], annual reports to security holders required by Rules 14a-3 [17 CFR 240.14a-3] and 14c-3 [17 CFR 240.14c-3] of the Exchange Act, notices of shareholder meetings, additional soliciting materials, and any amendments to such materials. For purposes of this release, the term does not include materials filed under Rule 14a-12 [17 CFR 240.14a-12].

[12] Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148].

[13] See letters from AARP, American Business Conference (ABC), Automatic Data Processing Brokerage Services Group, now known as Broadridge Financial Solutions, Inc. (ADP), Bank of New York (BONY), U.S. Chamber of Commerce (Chamber of Commerce), Council of Institutional Investors (CII), Commerce Finance Printers Corp. (Commerce Finance Printers), Computershare, Dechert LLP (Dechert), Kathryn Elmore and Michael Allen (Elmore & Allen),





Commission's timetable for adopting the proposed amendments was too aggressive.[14] They suggested that we postpone adoption of the proposal until we gain experience from operation of the voluntary rule.

Although we acknowledge the timing concerns raised by the commenters, we think that it is appropriate to adopt the proposal at this time because the model that we are adopting will provide shareholders with enhanced choices without changing significantly the obligations of an issuer or other soliciting person. The only new obligations that the revised notice and access model will impose on issuers and other soliciting persons compared to the voluntary rule is that an issuer or other person soliciting proxies who wishes to initially furnish a full set of proxy materials in paper to shareholders will be required to: (1) post those proxy materials on an Internet Web site; and (2) include a Notice of Internet Availability of Proxy Materials (Notice) with the full set or incorporate the Notice information into its proxy statement and proxy card.[15]

Furthermore, under the phase-in schedule that we are establishing for expanding the notice and access model to all issuers and other soliciting persons, the largest public companies will become subject to the model a year before any other companies become subject to the model. Most of these companies already appear to post their proxy

Investment Company Institute (ICI), Infosys Technologies Limited (Infosys), MailExpress, Reed Smith LLP (Reed Smith), Registrar and Transfer Company (Registrar and Transfer), Karl W. Reimers (Reimers), Ayal Rosenthal (Rosenthal), Society of Corporate Secretaries and Governance Professionals (SCSGP), Securities Industry and Financial Markets Association (SIFMA), Mark Snyder (Snyder), Shareholder Services Association (SSA), and Securities Transfer Association, Inc. (STA).

[14] See letters from AARP, ABC, ADP, BONY, Chamber of Commerce, CII, Computershare, ICI, Reed Smith, Registrar and Transfer, SCSGP, SIFMA, SSA, and STA.

[15] The effective result of the rules is that an intermediary must prepare Notices (or incorporate Notice information in its request for voting instructions) and create Web sites for all issuers for which securities are held by the intermediary's customers, rather than only for issuers who elect to follow the notice and access model under the voluntary system.

materials and Exchange Act reports on an Internet Web site.[16] A large accelerated filer (not including registered investment companies) will have to comply with the notice and access model for solicitations beginning on or after January 1, 2008.[17] All other issuers (including registered investment companies) and soliciting persons other than issuers will have to comply with the model for solicitations beginning on or after January 1, 2009. This tiered system of implementation addresses the commenters' timing concerns by providing the Commission with a significant test group of large accelerated filers from which to obtain operating data and more than a full year to study the effects of the notice and access model and make any necessary revisions to the rules before they apply to other entities.

In addition, several commenters were concerned that the proposals would have required all issuers to establish Internet voting platforms[18] or to prepare their proxy materials at least 40 days prior to the shareholder meeting,[19] and therefore would impose significant costs on issuers. As discussed in detail below, the final rules do not require, and the proposals would not have required, an issuer or other soliciting person to establish an Internet voting platform. Similarly, the rules do not require an issuer or other soliciting person that sends a full set of proxy materials to shareholders to prepare its proxy materials at least 40 days prior to the meeting.

**II. Description of the Amendments**

Under the amendments, an issuer that is required to furnish proxy materials to shareholders under the Commission's proxy rules must post its proxy materials on a specified, publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and provide record holders with a notice informing them that the materials are available and explaining how to access those materials.[20] Intermediaries also must follow the notice and access model to furnish an issuer's proxy materials to beneficial owners. Persons other than the issuer conducting their own proxy solicitations must comply with the notice and access model as well. By requiring Internet availability of proxy materials, the amendments are designed to enhance the ability of investors to make informed voting decisions and to expand use of the Internet to ultimately lower the costs of proxy solicitations.

**A. Notice and Access Model for Issuers: Two Options for Making Proxy Materials Available to Shareholders**

The notice and access model allows an issuer to select either of the following two options to provide proxy materials to shareholders: (1) the "notice only option" and (2) the "full set delivery option." Under the notice only option, an issuer will comply with the same requirements that we adopted in connection with the voluntary notice and

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16 Based on a random sampling of 150 large accelerated filers, approximately 80% of such filers already post their proxy materials on a non-EDGAR Web site, while almost all of the rest provide a link on their Web site to the Commission's EDGAR system. Only a small handful of such filers do not post their proxy materials on their Web site at all. We note, however, that currently there is no requirement that such Web sites preserve the anonymity of persons accessing the Web site. See Section II.A.1.f of this release for a description of this requirement.

17 A large accelerated filer, as defined in Exchange Act Rule 12b-2 [17 CFR 240.12b-2], is an issuer that, as of the end of its fiscal year, has an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $700 million or more, as measured on the last business day of the issuer's most recently completed second fiscal quarter; has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and is not eligible to use Forms 10-KSB and 10-QSB for its annual and quarterly reports.

18 See letters from ABC, BONY, and Registrar and Transfer.

19 See, for example, letters from Chamber of Commerce, CII, Commerce Financial Printers, Elmore & Allen, ICI, and STA.

20 See revised Rule 14a-3(a). The notice and access model does not apply to a proxy solicitation related to a business combination transaction. See Rule 14a-16(m) [17 CFR 240.14a-16(m)]. Also, as with the voluntary model, the notice and access model does not apply if the law of the issuer's state of incorporation would prohibit them from furnishing proxy materials in that manner. See Rule 14a-3(a)(3)(ii).

access model. Under these requirements, the issuer must post its proxy materials on an Internet Web site and send a Notice to shareholders to inform them of the electronic availability of the proxy materials at least 40 days before the shareholders meeting. If an issuer follows this option, it must respond to shareholder requests for copies, including a shareholder's permanent request for paper or e-mail copies of proxy materials for all shareholder meetings.

Under the full set delivery option, an issuer can deliver a full set of proxy materials to shareholders, along with the Notice. An issuer need not prepare and deliver a separate Notice if it incorporates all of the information required to appear in the Notice into its proxy statement and proxy card,[21] and it need not respond to requests for copies as required under the notice only option.

An issuer does not have to choose one option or the other as the exclusive means for providing proxy materials to shareholders. Rather, an issuer may use the notice only option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders. We describe both options in greater detail below.

**1. The Notice Only Option: Sending a Notice Without a Full Set of Proxy Materials**

We are adopting the notice only option substantially as proposed. Under the notice only option, an issuer will follow the same procedures that we have established under the existing notice and access model that issuers may choose to comply with on a voluntary basis for proxy solicitations commencing on or after July 1, 2007.[22] Under

[21] If not soliciting proxies, an issuer may incorporate the Notice information into its information statement.

[22] See Rule 14a-16 [17 CFR 240.14a-16].





these procedures, the issuer must send a Notice to shareholders at least 40 calendar days before the shareholder meeting date, or if no meeting is to be held, at least 40 calendar days before the date that votes, consents, or authorizations may be used to effect a corporate action, indicating that the issuer's proxy materials are available on a specified Internet Web site and explaining how to access those proxy materials.[23] Issuers may household the Notice pursuant to Rule 14a-3(e).[24]

**a. Contents of the Notice of Internet Availability of Proxy Materials**

The Notice must contain the following information:[25]

- A prominent legend in bold-face type that states:

  **"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**

  - **This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.**

  - **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

  - **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."**

[23] Rule 14a-16(a)(1) [17 CFR 240.14a-16(a)(1)].

[24] 17 CFR 240.14a-3(e).

[25] Rule 14a-16(d) [17 CFR 240.14a-16(d)]. Appropriate changes must be made if the issuer is providing an information statement pursuant to Regulation 14C, seeking to effect a corporate action by written consent, or is a legal entity other than a corporation.

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on, and the issuer's recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- (1) A toll-free telephone number; (2) an e-mail address; and (3) an Internet Web site address where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;
- Any control/identification numbers that the shareholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement; and
- Information about attending the shareholder meeting and voting in person.

The Notice must be written in plain English.[26] The Notice may contain only the information specified by the rules and any other information required by state law, if the issuer chooses to combine the Notice with any shareholder meeting notice that state law may require.[27] However, the Notice may contain a protective warning to shareholders, advising them that no personal information other than the identification or control number is necessary to execute a proxy.[28] In addition, a registered investment company may send its prospectus and/or report to shareholders together with the Notice.[29] The issuer must file its Notice with the Commission pursuant to Rule 14a-6(b)[30] no later than the date that it first sends the Notice to shareholders.[31]

**b. Design of the specified publicly-accessible Web site**

An issuer must make all proxy materials identified in the Notice publicly accessible, free of charge, at the Web site address specified in the Notice on or before the date that the Notice is sent to the shareholder.[32] The specified Web site may not be the Commission's EDGAR system.[33] The issuer also must post any subsequent additional soliciting materials on the Web site no later than the date on which such materials are first sent to shareholders or made public.[34] The materials must be presented on the Web site in a format, or formats, convenient for both reading online and printing on paper.[35]

26 Rule 14a-16(g) [17 CFR 240.14a-16(g)].

27 Rule 14a-16(e) [17 CFR 240.14a-16(e)].

28 Rule 14a-16(e)(2)(ii) [17 CFR 240.14a-16(e)(2)(ii)].

29 See new Rule 14a-16(f)(2)(iii).

30 17 CFR 240.14a-6(b).

31 Rule 14a-16(i) [17 CFR 240.14a-16(i)].

32 Rule 14a-16(b)(1) [17 CFR 240.14a-16(b)(1)].

33 Rule 14a-16(b)(3) [17 CFR 240.14a-16(b)(3)].

34 Rule 14a-16(b)(2) [17 CFR 240.14a-16(b)(2)].

35 Rule 14a-16(c) [17 CFR 240.14a-16(c)]. See Section II.A.3 of Release 34-55146 (Jan. 22, 2007) [72 FR 4148]. One commenter asked the Commission to consider the costs of requiring such formats. See letter from ICI. We believe that requiring readable and printable formats is important so that shareholders have meaningful access to the proxy materials. When determining the readability and printability of formats, issuers should consider the size of the files because many shareholders do not have broadband connections. Although some types of files may be suitable for persons with high-speed Internet access, the readability and printability of a document may be affected significantly by the time that it takes to download the document.

The proxy materials must remain available on that Web site through the conclusion of the shareholder meeting.[36]

**c. Means to vote**

An issuer also must provide shareholders with a method to execute proxies as of the time the Notice is first sent to shareholders.[37] Several commenters on the proposal questioned whether this provision would require all issuers to establish Internet voting platforms.[38] The final rules do not require, and the proposals would not have required, an issuer to establish an Internet voting platform. Rather, an issuer can satisfy this requirement through a variety of methods, including providing an electronic voting platform, a toll-free telephone number for voting, or a printable or downloadable proxy card on the Web site. As noted above, if a telephone number for executing a proxy is provided, such a telephone number may appear on the Web site, but not on the Notice because it would enable a shareholder to execute a proxy without having access to the proxy statement.

**d. Request for paper or e-mail copies**

An issuer must provide paper or e-mail copies at no charge to shareholders requesting such copies.[39] It also must allow shareholders to make a permanent election to receive paper or e-mail copies of proxy materials distributed in connection with future proxy solicitations, and maintain records of those elections.[40] Further, the issuer must provide a toll-free telephone number, e-mail address, and Internet Web site address as a

36 Rule 14a-16(b)(1) [17 CFR 240.14a-16(b)(1)].

37 Rule 14a-16(b)(4) [17 CFR 240.14a-16(b)(4)].

38 See letters from ABC, BONY, and Registrar and Transfer.

39 Rule 14a-16(j) [17 CFR 240.14a-16(j)].

40 See Rule 14a-16(d)(5) and (j)(4) [17 CFR 240.14a-16(d)(5) and (j)(4)].



means by which a shareholder can request a copy of the proxy materials for the particular shareholder meeting referenced in the Notice or make a permanent election to receive copies of the proxy materials on a continuing basis with respect to all meetings.[41] The issuer also may include a pre-addressed, postage-paid reply card with the Notice that shareholders can use to request a copy of the proxy materials.[42]

**e. Delivery of a proxy card**

An issuer may not send a paper or e-mail proxy card to a shareholder until 10 calendar days or more after the date it sent the Notice to the shareholder, unless the proxy card is accompanied or preceded by a copy of the proxy statement and any annual report, if required, to security holders sent via the same medium.[43] This provision is intended to assist an issuer's efforts to solicit proxies if its initial efforts have not produced adequate response. This is similar to many issuers' current practice of sending reminder notices and duplicate proxy cards to shareholders who have not responded to the issuer's original request for proxy voting instructions.

One commenter remarking on this aspect of the proposals expressed concern that shareholders receiving proxy cards separately from the proxy statement and annual report may make their voting decisions without the benefit of access to those disclosure documents.[44] We appreciate this concern. However, at the point that a shareholder receives such a proxy card, the shareholder already would have received a Notice that provides information on how the shareholder can access the proxy materials and request

41 Rule 14a-16(d)(5) [17 CFR 240.14a-16(d)(5)].

42 Rule 14a-16(f)(2)(i) [17 CFR 240.14a-16(f)(2)(i)].

43 Rule 14a-16(h) [17 CFR 240.14a-16(h)].

44 See letter from CII.

copies of the materials, if desired. Moreover, the shareholder also would receive another copy of the Notice with the proxy card. We believe that, at this point, the shareholder will have had ample opportunity to either access the proxy materials on the Internet Web site or request a copy of those materials.

**f. Web site confidentiality**

An issuer must maintain the Internet Web site on which it posts its proxy materials in a manner that does not infringe on the anonymity of a person accessing that Web site.[45] An issuer also may not use any e-mail address provided by a shareholder solely to request a copy of proxy materials for any purpose other than to send a copy of those materials to that shareholder.[46] The issuer also may not disclose a shareholder's e-mail address to any person, except to its agent or an employee of the issuer. This disclosure may be made only for the purpose of facilitating delivery of a copy of the issuer's proxy materials by the agent or employee to a shareholder requesting a copy of the materials.

Three commenters were concerned about the provisions of the model that require a company to maintain the designated Web site in a manner that does not infringe on the anonymity of persons accessing the Web site.[47] One commenter was concerned that the prohibition on "cookies" will raise the costs of maintaining Internet Web sites.[48] Conversely, one commenter was concerned that there could be potential abuses of shareholder privacy through information tracking and collection of information on

[45] Rule 14a-16(k)(1) [17 CFR 240.14a-16(k)(1)]. See Section II.A.1.b.iii of Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148].

[46] Rule 14a-16(k)(2) [17 CFR 240.14a-16(k)(2)].

[47] See letters from CII, ICI, and Reed Smith.

[48] See letter from ICI.



Internet Web sites.[49] Similar concerns regarding potential abuses of shareholder privacy also were raised with regard to the adoption of the voluntary notice and access model.

Although we recognize that the confidentiality requirements may increase the cost of maintaining an Internet Web site, we believe that the protection of shareholder information is important. A rule that permits issuers to discover the identity of a person accessing the Web site could effectively negate a beneficial owner's ability under the proxy rules to object to an intermediary's disclosure of that beneficial owner's identity to the issuer.[50] In addition, a rule without this prohibition on the issuer may make some shareholders hesitant to access the proxy disclosures, which would not promote the purposes of this rule. Therefore we have retained this provision of the rule to help prevent potential abuses of shareholder information.

We do not believe that this requirement will impose any undue burden on companies. Under the rule, a company must refrain from installing cookies and other tracking features on the Web site on which the proxy materials are posted. This may require segregating those pages from the rest of the company's regular Web site or creating a new Web site. However, the rule does not require the company to turn off the Web site's connection log, which automatically tracks numerical IP addresses that connect to that Web site. Although in most cases, this IP address does not provide companies with sufficient information to identify the accessing shareholder, companies may not use these numbers to attempt to find out more information about persons accessing the Web site. In addition, shareholders still concerned about their anonymity can request copies from their intermediaries.

[49] See letter from CII.

**2. The Full Set Delivery Option: Sending a Notice with a Full Set of Proxy Materials**

Under the "full set delivery option," an issuer will follow procedures that are substantially similar to the traditional means of providing proxy materials in paper.[51] Under this option, in addition to sending proxy materials to shareholders as under the traditional method, an issuer must:

- Send a Notice accompanied by a full set of proxy materials,[52] or incorporate all of the information required to appear in the Notice into the proxy statement and proxy card;[53] and
- Post the proxy materials on a publicly accessible Web site no later than the date the Notice was first sent to shareholders.[54]

Issuers may household the Notice and other proxy materials pursuant to Rule 14a-3(e).[55]

**a. Contents of the Notice or incorporation of Notice information**

Under the final rules that we are adopting, a separate Notice is not required if the issuer presents all of the information required in the Notice in its proxy statement and proxy card.[56] In the proposing release, we solicited comment on whether we should permit the issuer that is sending a full set to incorporate the information required in the Notice into the proxy statement and proxy card, rather than require that issuer to prepare a separate Notice. Although we did not receive any comment on this issue, we do not see a compelling reason to require an issuer to include a separate Notice when it already is sending a shareholder a full set of proxy materials. We believe that providing the Notice information in the proxy materials will provide shareholders with sufficient information to access the materials on the Internet, while reducing costs to issuers. However, an issuer may prepare a separate Notice if it desires.

The information required in the Notice, or proxy materials if no separate Notice is prepared, includes much, but not all, of the information that is required under the notice only option, including the following:[57]

- A prominent legend in bold-face type that states:

  **"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].**

  - **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

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50 See Rules 14b-1(b) and 14b-2(b) [17 CFR 240.14b-1(b) and 240.14b-2(b)].

51 Under the traditional proxy delivery scheme, issuers could send proxy materials to shareholders via e-mail provided they followed Commission guidance regarding such delivery, which typically required obtaining affirmative consent from individual shareholders. See Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458]. Issuers may continue to rely on such guidance to send materials electronically to shareholders. See Section II.A. of this release.

52 A "full set" of proxy materials would contain (1) a proxy statement or information statement, (2) an annual report if one is required by Rule 14a-3(b) or Rule 14c-3(a), and (3) a proxy card or, in the case of a beneficial owner, a request for voting instructions, if proxies are being solicited.

53 See new Rule 14a-16(n)(2).

54 As discussed below, this date does not have to be at least 40 days prior to the shareholder meeting date.

55 17 CFR 240.14a-3(e).

56 Because issuers are obligated to provide proxy materials to beneficial owners, we recommend that issuers place only information required by the Notice that is relevant to all shareholders (record and beneficial owners) in the proxy statement, and present information that is relevant only to record holders on the proxy card so that beneficial owners are not confused by information in the proxy statement that would only be applicable to record holders. Required information disclosed on the proxy statement need not be repeated on the proxy card.

57 See new Rule 14a-16(n)(4). Appropriate changes must be made if the issuer is providing an information statement pursuant to Regulation 14C, seeking to effect a corporate action by written consent, or is a legal entity other than a corporation.

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer's recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- Any control/identification numbers that the shareholder needs to access his or her proxy card; and
- Information about attending the shareholder meeting and voting in person.

The issuer is not required to provide paper or e-mail copies upon request to shareholders to whom it has furnished proxy materials under this option because it would already have provided those shareholders with a copy of the proxy materials as part of its initial distribution.[58] Therefore, the issuer need not provide instructions in the Notice as to how shareholders can request paper or e-mail copies of the proxy materials.[59]

If the issuer prepares a separate Notice, it must be written in plain English.[60] The Notice may contain only the information specified by the rules and any other information required by state law, if the issuer chooses to combine the Notice with any shareholder meeting notice that state law may require.[61] However, the Notice may contain a protective warning to shareholders, advising them that no personal information other than

58 See new Rule 14a-16(n)(3)(ii).

59 See new Rule 14a-16(n)(4)(ii).

60 Rule 14a-16(g) [17 CFR 240.14a-16(g)].

61 Rule 14a-16(e) [17 CFR 240.14a-16(e)].



the identification or control number is necessary to execute a proxy.[62] The issuer must file any such separate Notice with the Commission pursuant to Rule 14a-6(b) no later than the date that it first sends the Notice to shareholders.[63]

**b. Design of the specified publicly-accessible Web site**

An issuer must post all proxy materials identified in the Notice, or proxy statement and proxy card if no separate Notice is prepared, on the publicly accessible Web site address specified in the Notice on or before the date that it sends the proxy materials to shareholders.[64] The specified Web site may not be the Commission's EDGAR system.[65] The issuer also must post any subsequent additional soliciting materials on the Web site no later than the date on which such materials are first sent to shareholders or made public.[66] The materials must be presented on the Web site in a format, or formats, convenient for both reading online and printing on paper.[67] The proxy materials must remain available on that Web site through the conclusion of the shareholder meeting.[68]

**c. Means to vote**

The notice and access model requires an issuer to provide shareholders with a method to execute proxies as of the time the Notice is first sent to shareholders.[69] If an

62 Rule 14a-16(e)(2)(ii) [17 CFR 240.14a-16(e)(2)(ii)].

63 Rule 14a-16(i) [17 CFR 240.14a-16(i)]. If the issuer incorporates the contents of the Notice into the proxy materials, a separate filing is not required.

64 Rule 14a-16(b)(1) [17 CFR 240.14a-16(b)(1)].

65 Rule 14a-16(b)(3) [17 CFR 240.14a-16(b)(3)].

66 Rule 14a-16(b)(2) [17 CFR 240.14a-16(b)(2)].

67 Rule 14a-16(c) [17 CFR 240.14a-16(c)]. See Section II.A.3 of Release 34-55146 (Jan. 22, 2007) [72 FR 4148].

68 Rule 14a-16(b)(1) [17 CFR 240.14a-16(b)(1)].

69 Rule 14a-16(b)(4) [17 CFR 240.14a-16(b)(4)].

issuer follows the full set delivery option, the proxy card or request for voting instructions included in the full set of proxy materials satisfies this requirement. Therefore, the issuer does not need to provide another means for shareholders to execute proxies or submit voting instructions for accounts receiving proxy materials through the full set delivery option.

**d. Repeat Delivery of a Proxy Card**

Even though a proxy card already will be included in the full set of proxy materials, an issuer relying on the full set delivery option subsequently may choose to deliver another copy of the proxy card to shareholders who have not returned the card. This is permissible under the current rules, and issuers commonly do so as a reminder for shareholders to vote. The reminder proxy card does not have to be accompanied by the Notice because the reminder card would have been preceded by the proxy statement via the same medium and may be sent at any time after the full set of proxy materials has been sent.[70]

**e. Web site confidentiality**

As under the notice only option, an issuer must maintain the Internet Web site on which it posts its proxy materials in a manner that does not infringe on the anonymity of a person accessing that Web site.[71] An issuer also may not use any e-mail address provided by a shareholder solely to request a copy of proxy materials for any purpose other than to send a copy of those materials to that shareholder.[72] The issuer also may not disclose a shareholder's e-mail address to any person other than the issuer's employee

[70] See new Rule 14a-16(h)(2).

[71] Rule 14a-16(k)(1) [17 CFR 240.14a-16(k)(1)]. See Section II.A.1.b.iii of Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148].





or agent to the extent necessary to send a copy of the proxy materials to a requesting shareholder.

**3. Differences Between the Full Set Delivery Option and the Notice Only Option**

The full set delivery option varies from the notice only option in the following ways:

- An issuer may accompany the Notice with a copy of the proxy statement, annual report to security holders, if required by Rule 14a-3(b),[73] and a proxy card;[74]
- An issuer need not prepare a separate Notice if the issuer incorporates all of the Notice information into the proxy statement and proxy card;[75]
- Because the issuer already has provided shareholders with a full set of proxy materials, the issuer need not provide the shareholder with copies of the proxy materials upon request;[76]
- Because shareholders will not need extra time to request paper or e-mail copies, the issuer need not send the Notice and full set of proxy materials at least 40 days before the meeting date;[77]

[72] Rule 14a-16(k)(2) [17 CFR 240.14a-16(k)(2)].

[73] The requirement in Exchange Act Rules 14a-3(b) and 14c-3(a) to furnish annual reports to security holders does not apply to registered investment companies [17 CFR 240.14a-3(b) and 240.14c-3(a)]. A soliciting person other than the issuer also is not subject to this requirement. Finally, an issuer is required to provide such a report for shareholder meetings at which directors are to be elected.

[74] See new Rule 14a-16(n)(1).

[75] See new Rule 14a-16(n)(2)(ii). See also footnote 58, above.

[76] See new Rule 14a-16(n)(3)(ii).

[77] See new Rule 14a-16(n)(3)(i).

- Because the full set of proxy materials includes a proxy card or request for voting instructions, the issuer need not provide another means for voting at the time the Notice is provided unless it chooses to do so; and
- The issuer need not include the part of the prescribed legend relating to security holder requests for copies of the documents and instructions on how to request a copy of the proxy materials.[78]

**a. Inclusion of a Full Set of Proxy Materials**

The notice only option does not permit an issuer to accompany the Notice with any other documents.[79] In contrast, an issuer relying on the full set delivery option will deliver a full set of proxy materials, including a proxy statement, annual report to shareholders if required by Rule 14a-3(b), and a proxy card, along with the Notice. Under this option, when the Notice is initially sent, it must be accompanied by all of these documents, not just some of them. For example, an issuer may not send only the Notice and a proxy card to a shareholder as part of its initial distribution of proxy materials.[80]

**b. Request for Copies of the Proxy Materials**

As noted above, because an issuer relying on the full set delivery option will send shareholders copies of all of the proxy materials along with the Notice, there is no need for the issuer to provide these shareholders with a means to request a copy of the proxy materials. The issuer therefore may exclude information from the Notice on how a shareholder may request such copies.[81]

**c. 40-Day Deadline**

Under the full set delivery option, if an issuer or other soliciting person sends a full set of the proxy materials with the Notice, it need not comply with the 40-day deadline in Rule 14a-16 for sending the Notice. Thus, if an issuer is unable or unwilling to meet the 40-day deadline, it still may begin its solicitation after that deadline provided that it complies with the full set delivery option. Six commenters on the proposal questioned whether the proposal would have required all issuers to prepare their proxy materials at least 40 days prior to the meeting.[82] We have clarified that an issuer must comply with the 40-day period only if it intends to comply with the notice only option.[83]

**B. Implications of the Notice and Access Model for Intermediaries**

An issuer or other soliciting person must provide each intermediary with the information necessary to prepare the intermediary's Notice in sufficient time for the intermediary to prepare and send its Notice to beneficial owners within the timeframes of the model. An issuer that complies with the notice only option must provide the intermediary with the relevant information in sufficient time for the intermediary to prepare and send the Notice and post the proxy materials on the Web site at least 40 calendar days before the shareholder meeting date.[84]

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78 See new Rule 14a-16(n)(4).

79 Rule 14a-16(f)(1) [17 CFR 240.14a-16(f)(1)]. We note however, that under the notice only option, an issuer may send the Notice and proxy card together 10 days or more after it initially sends the Notice. See new Rule 14a-16(h)(1).

80 However, it may send a reminder proxy card at any time after it initially sends the Notice accompanied by the full set of proxy materials. See new Rule 14a-16(h)(2).

81 See Rule 14a-16(n)(4).

82 See, for example, letters from Chamber of Commerce, CII, Commerce Financial Printers, Elmore & Allen, ICI, and STA.

83 See Rule 14a-16(n)(3)(i).

84 If a soliciting person other than the issuer elects to follow the notice only option, the Notice must be sent to shareholders by the later of: (1) 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or (2) 10 calendar days after the date

An issuer that complies with the full set delivery option need not comply with the 40-day deadline. The issuer need only provide the Notice information to the intermediary in sufficient time for the intermediary to prepare and send the Notice along with the full set of materials provided by the issuer. Under this option, as with the traditional method of delivering proxy materials, the intermediary must forward the issuer's full set of proxy materials to beneficial owners within five business days of receipt from the issuer or the issuer's agent.[85]

The intermediary's Notice generally must contain the same types of information as an issuer's Notice, but must be tailored specifically for beneficial owners.[86] With respect to beneficial owners who receive a Notice under the notice only option, the intermediary also must forward paper or e-mail copies of the proxy materials upon request, permit the beneficial owners to make a permanent election to receive paper or e-mail copies of the proxy materials, keep records of beneficial owner preferences, provide proxy materials in accordance with those preferences, and provide a means to access a request for voting instructions for its beneficial owner customers no later than the date the Notice is first sent.

When the issuer is delivering full sets of proxy materials to beneficial owners, the intermediary must either prepare a separate Notice and forward it with the full set of proxy materials, or incorporate any information required in the Notice, but not appearing in the issuer's proxy statement, in its request for voting instructions.

that the registrant first sends its proxy statement or Notice of Internet Availability of Proxy Materials to security holders. See Rule 14a-16(l)(2) [17 CFR 240.14a-16(l)(2)].

85 See Rule 14b-1(b)(2) [17 CFR 240.14b-1(b)(2)].

86 For a more complete discussion of the content of the intermediary's Notice, see Section II.B.2 of Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148].



### C. Reliance on the Notice and Access Model by Soliciting Persons Other Than the Issuer

Under the amendments, a soliciting person other than the issuer also must comply with the notice and access model. Such a person may solicit proxies pursuant to the notice only option, the full set delivery option, or a combination of the two.[87] Consistent with the existing proxy rules and the voluntary model, the amendments treat such soliciting persons differently from the issuer in certain respects.

First, a soliciting person is not required to solicit every shareholder or to furnish an information statement to shareholders not being solicited. It may select the specific shareholders from whom it wishes to solicit proxies. For example, under the notice and access model, a soliciting person other than the issuer can choose to send Notices only to those shareholders who have not previously requested paper copies.[88]

Second, if a soliciting person other than the issuer elects to follow the notice only option, it must send a Notice to shareholders by the later of:

- 40 calendar days prior to the shareholder meeting date or, if no meeting is to be held, 40 calendar days prior to the date that votes, consents, or authorizations may be used to effect the corporate action; or

87 That is, as in the case of an issuer, a soliciting person other than the issuer may solicit some shareholders using the notice only option, while soliciting other shareholders using the full set delivery option.

88 Under Rule 14a-7(a)(2) [17 CFR 240.14a-7(a)(2)], an issuer is required to either mail the Notice on behalf of the soliciting person, in which case the soliciting person can request that the issuer send Notices only to shareholders who have not requested paper copies, or provide the soliciting person with a shareholder list, indicating which shareholders have requested paper copies. For a more complete discussion of the interaction of the model with Rule 14a-7, see Section II.C.4 of Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148].

- 10 calendar days after the date that the issuer first sends its proxy materials to shareholders.[89]

This timing requirement does not apply to a solicitation pursuant to the full set delivery model.

If, at the time the Notice is sent, a soliciting person other than the issuer is not aware of all matters on the shareholder meeting agenda, the Notice must provide a clear and impartial identification of each separate matter to be acted upon at the meeting, to the extent known by the soliciting person.[90] The soliciting person's Notice also must include a clear statement that there may be additional agenda items that the soliciting person is unaware of, and that the shareholder cannot direct a vote for those items on the soliciting person's proxy card provided at that time.[91] If a soliciting person other than the issuer sends a proxy card that does not reference all matters that shareholders will act upon at the meeting, the Notice must clearly state whether execution of the proxy card would invalidate a shareholder's prior vote using the issuer's card on matters not presented on the soliciting person's proxy card.[92]

**III. Clarifying Amendments**

Since adopting the notice and access model as a voluntary model, we have received several questions regarding implementation of that model. Some of these questions were received as comments on the proposing release to these amendments. To the extent such comments relate to the previously adopted voluntary model, the

89 Rule 14a-16(l)(2) [17 CFR 240.14a-16(l)(2)].

90 Rule 14a-16(l)(3)(i) [17 CFR 240.14a-16(l)(3)(i)].

91 Id.

92 Rule 14a-16(l)(3)(ii) [17 CFR 240.14a-16(l)(3)(ii)].



Commission's staff is working with those commenters to provide guidance regarding implementation of those rules. However, several comments indicated aspects of the adopted rules that we believe would benefit from clarification in the regulatory text. To help clarify our intent, we are adopting the following technical amendments.

**A. No Requirement to Provide Recommendations**

Rule 14a-16(d)(3),[93] as it was initially adopted under the voluntary notice and access model, required the Notice to contain "[a] clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendation regarding those matters." Our intent with this provision was not to require an issuer or other soliciting person to have a recommendation for every matter. Therefore, we are revising this provision to clarify that an issuer or other a soliciting person must present its recommendation only if it chooses to make a recommendation on a particular matter to be acted upon by shareholders.

**B. Deadline for Responding to Requests for Copies After the Meeting**

We are also amending the requirements about the fulfillment of requests for paper or e-mail copies received after the conclusion of the meeting. The rules that we initially adopted as part of the voluntary notice and access model made no distinction in the fulfillment requirements based on whether the issuer received a request for a paper or e-mail copy before or after the meeting date. We did state in the adopting release for the voluntary notice and access model that the post-meeting fulfillment provision is intended to require issuers to provide a copy of the proxy statement for one year "[j]ust as the proxy rules require issuers to undertake in their proxy statements or annual reports to

93 17 CFR 240.14a-16(d)(3).

shareholders to provide copies of annual reports on Form 10-K for the most recent fiscal year to requesting shareholders."[94] The rule relating to providing copies of the annual report on Form 10-K does not require the use of First Class mail or that the issuer respond within three business days.[95] After the meeting is concluded, we do not believe there is such an urgent need to provide copies of the proxy materials in a timely manner to impose such requirements. Therefore, we are revising Rule 14a-16(j)(3)[96] to clarify that, with respect to requests for copies received after the conclusion of the meeting, an issuer is not required to use First Class mail and is not required to respond within three business days.

**C. Item 4 of Schedule 14A**

Item 4 of Schedule 14A[97] requires that an issuer or other soliciting person describe the methods used for soliciting proxies if not using the mails. Because the amendments require issuers and other soliciting persons to comply with Rule 14a-16 with respect to all proxy solicitations not related to business combination transactions, we are revising this item to clarify that issuers and other soliciting persons need not describe the notice and access model when they are using it to solicit proxies.

**IV. Compliance Dates**

Large accelerated filers, not including registered investment companies, must comply with the amendments with respect to solicitations commencing on or after January 1, 2008. Registered investment companies, soliciting persons other than the

94 See Release No. 33-55146 (Jan. 22, 2007) [72 FR 4148].

95 See Rule 14a-3(b) [17 CFR 240.14a-3(b)].

96 17 CFR 240.14a-16(j)(3).

97 17 CFR 240.14a-101.



issuer, and issuers that are not large accelerated filers conducting proxy solicitations (1) may comply with the amendments for solicitations commencing on or after January 1, 2008 and (2) must comply with the notice and access model for solicitations commencing on or after January 1, 2009. For example, a soliciting person other than the issuer that is soliciting proxies with respect to a shareholder meeting of a large accelerated filer is not required to follow the notice and access model until January 1, 2009, even though the large accelerated filer would be required to follow the model. However, such a soliciting person may voluntarily follow the model.

As stated above, the primary concern of most commenters on the proposal was the Commission's aggressive timetable for adopting the proposed rules. All 14 commenters on this topic requested that the Commission delay adoption of the proposed rules.[98] This group of commenters included trade associations representing issuers, transfer agents, intermediaries, proxy distribution service providers, institutional investors, and other shareholders.

Eight of these commenters were concerned that the short period between effectiveness of the voluntary model and adoption of the amendments in this release would not permit the Commission and the industry to properly evaluate the results of the voluntary model and prepare an adequate cost-benefit analysis.[99] Data that the commenters felt would be important to capture regarding the voluntary model included: (1) the effect on voter participation; (2) the costs of implementing the model; and (3) the extent to which predicted savings are actually realized by companies and other soliciting

98 See letters from AARP, ABC, ADP, BONY, Chamber of Commerce, CII, Computershare, ICI, Reed Smith, Registrar and Transfer, SCSGP, SIFMA, SSA, and STA.

99 See letters from Chamber of Commerce, BONY, ICI, Reed Smith, Registrar and Transfer, SCSGP, SIMFA, and STA.

persons. These commenters recommended that the Commission not adopt the proposed amendments until it has had the opportunity to assess the data received regarding companies' experiences with the voluntary model.

With respect to costs, three of these commenters were concerned regarding the cost of adopting rules that would require issuers to develop, or hire outside services to develop, an Internet voting platform.[100] The rules that we are adopting do not require, and the proposals would not have required, such an Internet voting platform. Similarly, five commenters raised concerns regarding the ability of issuers to prepare their proxy materials at least 40 days before the date of the shareholder meeting, and costs associated with these efforts.[101] The rules that we are adopting do not require, and the proposal would not have required, all issuers to comply with the 40-day deadline if they are unable, or choose not, to do so.

As we have explained above, an issuer or other soliciting person may elect to comply with either: (1) the notice only option which is identical to the voluntary notice and access model; or (2) the full set delivery option. The latter option is substantially the same as the traditional system of providing proxy materials in paper, except that an issuer or other soliciting person complying with the full set delivery option also will have to:

- prepare and send a Notice, or incorporate the Notice information into its proxy statement and proxy card; and
- post its proxy materials on a publicly accessible Web site.

[100] See letters from ABC, BONY and Registrar and Transfer.

[101] See letters from Chamber of Commerce, CII, Commerce Financial Printers, Elmore & Allen, ICI, and STA.



As we discuss more fully in our cost-benefit analysis, we believe that the cost to issuers and other soliciting persons to comply with these two requirements will not be significant, and therefore are expanding Internet availability of proxy materials to all shareholders. Many of the commenters' concerns regarding costs were based on beliefs that the proposal would require an electronic voting platform, preparation of proxy materials at least 40 days before the shareholder meeting, and anonymity controls on the Web site that exceed what the proposal would actually require. As noted above, the proposals would not have required, and the final rules do not require, such provisions. Rather, an issuer or other soliciting person can substantially continue to follow the traditional method of proxy delivery with minimal changes. Because the amendments will not have a significant impact on the requirements placed on issuers and other soliciting persons, we believe it is appropriate to adopt them now.

We also note that commenters have expressed concern, particularly in relation to the voluntary model, that if the model has a negative effect on shareholder participation, issuers may use the model to disenfranchise certain shareholders. We recognize these concerns and intend to monitor shareholder participation and take any steps necessary to prevent such abuse.

Furthermore, the tiered compliance dates address commenters' concerns because they will allow the Commission to better analyze the impact of the rules on a subset of issuers constituting large accelerated filers.[102] As noted above, a review of existing Web sites of such issuers indicated that approximately 80% of them already post their filings,

[102] One commenter specifically noted that the timeframe would not allow the Commission to analyze the effects of one-full year of compliance for large accelerated filers who chose to accept the voluntary model. See letter from the Chamber of Commerce. The tiered system will allow the

including proxy materials, on their Web site. Thus, most of the issuers that will be subject to the rules in the first year will be large issuers that appear to already post their proxy materials on their Web site. Therefore, we believe that this group is in the best position with respect to implementation costs in the first year while we evaluate the performance of the model. Adopting the amendments before the 2008 proxy season effectively creates a test group of issuers, enabling the Commission to study the performance of the model with a significant number of larger issuers and providing the Commission with an opportunity to make any necessary revisions to the rules before they apply to all issuers and other soliciting persons.

**V. Paperwork Reduction Act**

Certain provisions of the amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA"), including preparation of Notices, maintaining Web sites, maintaining records of shareholder preferences, and responding to requests for copies. The titles for the collections of information are:

Regulation 14A (OMB Control No. 3235-0059)

Regulation 14C (OMB Control No. 3235-0057)

We requested public comment on these collections of information in the release proposing the notice and access model as a voluntary model for disseminating proxy materials,[103] and submitted them to the Office of Management and Budget ("OMB") for review in accordance with the PRA. We received approval for the collections of

Commission to analyze a full year of experience under the notice and access model for all large accelerated filers.

[103] Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597].



information. We submitted a revised PRA analysis to OMB in conjunction with the release adopting the notice and access model as a voluntary model.[104] In those releases, we assumed conservatively that all issuers and other persons soliciting proxies would follow the voluntary model because the proportion of issuers and other soliciting persons that would elect to follow the model was uncertain.

The rules that we are adopting require all issuers and other soliciting persons to follow the notice and access model, including the preparation of the Notice, as we assumed for our prior PRA analysis. Therefore, we estimate that the rule amendments will not impose any new recordkeeping or information collection requirements beyond those described in the release adopting the voluntary model, or necessitate revising the burden estimates for any existing collections of information requiring OMB's approval.

**VI. Cost-Benefit Analysis**

**A. Background**

We are adopting amendments to the proxy rules under the Exchange Act substantially as proposed that require issuers and other soliciting persons (jointly referred to as "soliciting parties") to follow the notice and access model for furnishing proxy materials. The amendments are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet to ultimately lower the costs of proxy solicitations, and to improve shareholder communications.

[104] Release No. 34-55146 (Jan. 22, 2007) [72 FR 4147].

### B. Summary of the Amendments

The notice and access model that we are adopting requires soliciting parties to furnish proxy materials by posting them on a specified, publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and providing shareholders with a notice informing them that the materials are available and explaining how to access them. Under the model, soliciting parties may choose between two options with respect to how they will provide proxy materials to shareholders. Under the first option, the notice only option, a soliciting party may follow the procedures in Exchange Act Rule 14a-16 that we adopted on January 22, 2007 in connection with the voluntary model.[105] Under this option, a soliciting party would send only a Notice indicating the Internet availability of the proxy materials to a solicited shareholder at least 40 days prior to the shareholders meeting and provide that shareholder with a paper or e-mail copy of the proxy materials upon request.

Under the second option, the full set delivery option, soliciting parties may follow procedures substantially similar to the traditional method of sending paper copies of the proxy materials to a shareholder by accompanying the Notice with a full set of proxy materials. Under the full set delivery option, the soliciting party is not required to send the Notice and the full set of proxy materials at least 40 days prior to the shareholders meeting and need not provide a means for shareholders to request another set of the proxy materials. Moreover, a soliciting party need not prepare a separate Notice if it includes all of the information otherwise required in a Notice in the proxy statement or proxy card.

[105] Release No. 34-55146 (Jan. 22, 2007) [72 FR 4147].





A soliciting party may use the notice only option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders. The amendments also require intermediaries to follow similar procedures to provide beneficial owners with access to the proxy materials. Soliciting parties may not use the model with respect to a business combination transaction.

### C. Benefits

#### 1. Versatility of the Internet

Historically, soliciting parties decided whether to provide shareholders with the choice to receive proxy materials by electronic means. The amendments, which build on and incorporate the voluntary model that we adopted in January, are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet potentially to lower the costs of proxy solicitations, and to improve the efficiency of the proxy process and shareholder communications. The amendments provide all shareholders with the ability to choose whether to access proxy materials in paper, by e-mail or via the Internet. As technology continues to progress, accessing the proxy materials on the Internet should increase the utility of our disclosure requirements to shareholders. Information in electronic documents is often more easily searchable than information in paper documents. Shareholders will be better able to go directly to any section of the document that they are particularly interested in. The amendments also will permit shareholders to more easily evaluate data and transfer data using analytical tools such as spreadsheet programs. Such tools enable users to compare relevant data about several companies more easily.

In addition, encouraging shareholders to use the Internet in the context of proxy solicitations may encourage improved shareholder communications in other ways. Current and future Internet communications innovations may enhance shareholders' ability to interact not only with management, but with each other. Such access may improve shareholder relations to the extent that shareholders feel that they have enhanced access to management. Centralizing an issuer's disclosure on a Web site may facilitate shareholder access to other important information, such as research reports and news concerning the issuer. We believe that increased reliance on the Internet for making proxy materials available to shareholders could ultimately lower the cost of soliciting proxies for all soliciting parties.

**2. Paper Processing Costs**

One of the purposes of the voluntary model was to reduce paper processing costs related to proxy solicitations. We previously estimated savings assuming that soliciting parties responsible for 10% to 50% of all proxy mailings would follow that model. We do not assume that the amendments will cause a soliciting party to change its decision under the voluntary model whether to send only a Notice or to send a full set of proxy materials to shareholders. Therefore, we do not assume for this analysis any savings in paper processing costs as a result of these particular amendments. However, because the voluntary model just recently became effective for proxy solicitations commencing on or after July 1, 2007, and therefore has not been used by many soliciting parties and because these amendments create a single notice and access model that includes aspects of the voluntary model, we are presenting a cost-benefit analysis that addresses the notice and access model as a whole, including our assessment of the benefits and costs created by the amendments.

As we discussed in the adopting release for the voluntary model, the paper-related benefits of the notice and access model are limited by the volume of paper processing that would occur otherwise. As we noted in that release, Automatic Data Processing, Inc.[106] (ADP) handles the vast majority of proxy mailings to beneficial owners.[107] ADP publishes statistics that provide useful background for evaluating the likely consequences of the rule amendments. ADP estimates that, during the 2006 proxy season,[108] over 69.7 million proxy material mailings were eliminated through a variety of means, including householding and existing electronic delivery methods. During that season, ADP mailed 85.3 million paper proxy items to beneficial owners. ADP estimates that the average cost of printing and mailing a paper copy of a set of proxy materials during the 2006 proxy season was $5.64. We estimate that soliciting parties spent, in the aggregate, $481.2 million in postage and printing fees alone to distribute paper proxy materials to beneficial owners during the 2006 proxy season.[109] Approximately 50% of all proxy pieces mailed by ADP in 2005 were mailed during the proxy season.[110] Therefore, extrapolating this

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106 ADP recently spun off its brokerage services group, which is now called Broadridge Financial Solutions, Inc. However, because its comment letter was submitted when the group was part of ADP and carries the ADP letterhead, we continue to refer to the company as ADP for purposes of this release.

107 We expect savings per mailing to record holders to roughly correspond to savings per mailing to beneficial owners.

108 According to ADP data, the 2006 proxy season extended from February 15, 2006 to May 1, 2006.

109 85.3 million mailings x $5.64/mailing = $481.2 million.

110 According to ADP, in 2005, 90,013,175 proxy pieces out of a total 179,833,774 proxy pieces were mailed during the 2005 proxy season. Thus, we estimate that 50% of proxy pieces are mailed during the proxy season (90,013,175 proxy pieces during the season / 179,833,774 total proxy pieces = 0.5 or 50%).

percentage to 2006, we estimate that soliciting parties from beneficial owners spent approximately $962.4 million in 2006 in printing and mailing costs.[111]

As was the case with the voluntary model, for soliciting parties following the notice only option, paper-related savings may be reduced by the cost of fulfilling requests for paper copies.[112] We estimate that approximately 19% of shareholders would request paper copies from such soliciting parties. Commenters on the voluntary model provided alternate estimates. For example, Computershare, a large transfer agent, estimated that less than 10% of shareholders would request paper copies.[113] According to a survey conducted by Forrester Research for ADP, 12% of shareholders report that they would always take extra steps to get their proxy materials, and as many as 68% of shareholders report that they would take extra steps to get their proxy materials in paper at least some of the time. The same survey also finds that 82% of shareholders report that they look at their proxy materials at least some of the time. These survey results suggest that shareholders may review proxy materials even if they do not vote. During the 2005 proxy season, only 44% of accounts were voted by beneficial owners. Put differently, 56%, or 84.8 million accounts, did not return requests for voting instructions. Our estimate that 19% of shareholders would request paper copies reflects the diverse estimates suggested by the available data.

Based on the assumption that 19% of shareholders would choose to have paper copies sent to them when a soliciting party initially sends them only a Notice, we

111 $481.2 million / 50% = $962.4 million.

112 Soliciting parties that choose to follow the full set delivery option will not incur fulfillment costs. Such soliciting parties are not required to provide paper copies to shareholders upon request because they would have provided such copies at the outset.

113 See letter commenting on Release No. 34-52926 (Dec. 8, 2005) [70 FR 74598] from Computershare.



estimated that the voluntary model could produce annual paper-related savings ranging from $48.3 million (if soliciting parties responsible for 10% of all proxy mailings choose to follow the notice only option) to $241.4 million (if soliciting parties responsible for 50% of all proxy mailings choose to follow the notice only option).[114] This estimate excludes the effect of the provision of the amendments that would allow shareholders to make a permanent request for paper copies. That provision enables soliciting parties to take advantage of bulk printing and mailing rates for those requesting shareholders, and therefore should reduce the on-demand costs reflected in these calculations.

Although we expect the savings to be significant from the notice and access model as a whole, the actual paper-related benefits will be influenced by several factors that we estimate should become less important over time. First, to the extent that shareholders request paper copies of the proxy materials, the benefits of the notice and access model in terms of savings in printing and mailing costs will be reduced. Soliciting parties have expressed concern that the cost per paper copy would be significantly greater if they have to mail copies of paper proxy materials to shareholders on an on-demand basis, rather than mailing the paper copies in bulk. Thus, if a significant number of

114 This range of potential cost savings depends on data on proxy material production, home printing costs, and first-class postage rates provided by Lexecon and ADP, and supplemented with modest 2006 USPS postage rate discounts. The fixed costs of notice and proxy material production are estimated to be $2.36 per shareholder, including $0.42 to print and mail the Notice. The variable costs of fulfilling a paper request, including handling, paper, printing and postage, are estimated to be $6.11 per copy requested. Our estimate of the total number of shareholders is based on data provided by ADP and SIFMA (at the time it submitted these comments, the SIFMA was known as the Securities Industry Association or SIA). According to SIFMA's comment letter on Release No. 34-52926 (Dec. 8, 2005) [70 FR 74598], 78.49% of shareholders held their shares in street name. We estimate that the total number of proxy pieces mailed to both registered holders and beneficial owners is approximately 229,116,797 (179,833,774 proxy pieces to beneficial owners / 78.49% = 229,116,799 total proxy pieces). To calculate the potential cost savings, for the percentage of proxy piece mailings replaced by the Notice (10% or 50% times 229,116,799 proxy pieces), we estimate the total savings of not printing and sending full sets ($5.64) and subtract the estimated costs of printing and sending Notices and fulfilling paper requests ($2.36 + (19.2% x

shareholders request paper, the savings will be substantially reduced. Second, soliciting parties may face a high degree of uncertainty about the number of requests that they may get for paper proxy materials and may maintain unnecessarily large inventories of paper copies as a precaution. As soliciting parties gain experience with the number of sets of paper materials that they need to supply to requesting shareholders, and as shareholders become more comfortable with receiving disclosures via the Internet, the number of paper copies are likely to decline, as would soliciting parties' tendency to print many more copies than ultimately are requested. This should lead to growth in paper-related savings from the notice and access model over time.

**3. Reduction in the Cost of Proxy Contests**

Benefits would accrue under the notice and access model from additional reductions in the costs of proxy solicitations by persons other than the issuer. Soliciting persons other than the issuer also must comply with the notice and access model, but can limit the scope of their proxy solicitations to shareholders who have not requested paper copies of the proxy materials. The flexibility afforded to persons other than the issuer under the model ultimately may reduce the cost of engaging in proxy contests, thereby increasing the effectiveness and efficiency of proxy contests as a source of discipline in the corporate governance process. However, because the amendments do not significantly change the options available to such soliciting person from the existing rules, we do not anticipate that the amendments will change significantly the number of soliciting persons other than issuers who select the notice only option as opposed to the number who would have chosen to follow the voluntary model.

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$6.11)). 10% x 229,116,799 proxy pieces x ($5.64 - ($2.36 + (19.2% x $6.11)) = $48.3 million. 50% x 229,116,799 proxy pieces x ($5.64 - ($2.36 + (19.2% x $6.11)) = $241.4 million.



The effect of the notice and access model of lessening the costs associated with a proxy contest will be limited by the persistence of other costs. One commenter on the proposal to create the voluntary model noted that a large percentage of the costs of effecting a proxy contest go to legal, document preparation, and solicitation fees, while a much smaller percentage of the costs is associated with printing and distribution of materials.[115] However, other commenters suggested that the paper-related cost savings that can be realized from the rule amendments are substantial enough to change the way many contests are conducted.[116]

**4. Environmental Benefits**

Finally, some benefits from the notice and access model, as revised, may arise from a reduction in what may be regarded as the environmental costs of the proxy solicitation process.[117] Specifically, proxy solicitation involves the use of a significant amount of paper and printing ink. Paper production and distribution can adversely affect the environment, due to the use of trees, fossil fuels, chemicals such as bleaching agents, printing ink (which contains toxic metals), and cleanup washes. Although not all of these costs may be internalized by paper producers, to the extent that such producers do internalize these costs and the costs are reflected in the price of paper and other materials consumed during the proxy solicitation process, our dollar estimates of the paper-related benefits reflect the elimination of these adverse environmental consequences under the model.

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115 See letter commenting on Release No. 34-52926 (Dec. 8, 2005) [70 FR 74598] from ADP.

116 See letters commenting on Release No. 34-52926 (Dec. 8, 2005) [70 FR 74598] from CALSTRS, Computershare, ISS, and Swingvote.

117 See letter commenting on Release No. 34-52926 (Dec. 8, 2005) [70 FR 74598] from American Forests.

**D. Costs**

The amendments require all soliciting parties, including those who follow the full set delivery option, to (1) prepare and print a Notice (or incorporate Notice information into its proxy statement and proxy card) and (2) post the proxy materials on an Internet Web site. Because the notice only option is identical to the voluntary model, soliciting parties that choose that option will incur the same costs and savings as they would have under the voluntary model.

**1. Costs Under the Notice Only Option**

A soliciting party that chooses to follow the notice only option would incur the same costs as a soliciting party that chose to follow the voluntary model. These costs include the following: (1) the cost of preparing, producing, and sending the Notice to shareholders; (2) the cost of posting proxy materials on an Internet Web site; (3) providing a means to execute a proxy as of the date that the Notice is sent; and (4) the cost of processing shareholders' requests for copies of the proxy materials and maintaining their permanent election preferences if a soliciting party elects to follow the notice only option.

Under the amendments, soliciting parties must prepare and print the Notice to shareholders and post their proxy materials on an Internet Web site. As noted above, these costs would apply to soliciting parties irrespective of which option they choose. A soliciting party following the notice only option also must separately send the Notice to shareholders. As we stated in the release adopting the voluntary model, the paper-related savings to soliciting parties discussed under the benefits section above are adjusted for the cost of preparing, printing and sending Notices.



In the release adopting the voluntary model, we assumed, for purposes of the PRA, that all soliciting parties would elect to follow the procedures, resulting in a total estimated cost to prepare the Notice of approximately $2,020,475.[118] We are adjusting this amount to $2,469,475 to reflect a change in the basis of our cost estimate for personnel time.[119] Based on the percentage range of soliciting parties that we estimated would adopt the voluntary model, we estimated that these costs for soliciting parties who follow the notice only option could range between $246,948 (if soliciting parties responsible for 10% of all proxy mailings followed the notice only option) and $1,234,736 (if soliciting parties responsible for 50% of all proxy mailings followed the notice only option).[120]

If Notices are sent by mail, then the mailing costs may vary widely among parties. Postage rates likely would vary from $0.14 to $0.41 per Notice mailed, depending on numerous factors. In our estimates of the paper-related benefits above, we assume that each Notice costs a total of $0.13 to print and $0.29 to mail. Based on data from ADP and SIA, we estimate that soliciting parties send a total of 229,116,797 proxy pieces per year.[121] In the release adopting the voluntary model, we assumed that only those

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118 In the voluntary model adopting release, we estimated that soliciting parties would spend a total of $897,975 on outside professionals to prepare this disclosure. We also estimated that soliciting parties would spend a total of 8,980 hours of personnel time preparing this disclosure. We estimated the average hourly cost of personnel time to be $125, resulting in a total cost of $1,122,500 for personnel time and a total cost of $2,020,475 ($1,122,500 + $897,975 = $2,020,475).

119 We are adjusting this estimate of personnel time to be $175 to be consistent with our other releases. This results in an in-house cost of $1,571,500 (8,980 hours x $175/hour = $1,571,500) and a total cost of $2,469,475 ($1,571,500 + $897,975 = $2,469,475) for soliciting parties following the notice only option. For purposes of the PRA analysis, we are not adjusting the hourly burden imposed on soliciting parties and, therefore, are not revising our PRA submission.

120 $2,469,475 * 10% = $246,948. $2,469,475 * 50% = $1,234,736.

121 See www.ics.adp.com/release11/public_site/about/stats.html stating that ADP handled 179,833,774 in fiscal year 2005 and letter commenting on Release No. 34-52926 (Dec. 8, 2005) [70 FR 74598] from SIFMA stating that beneficial accounts represent 78.49% of total accounts.

soliciting parties that choose to follow the voluntary model would incur these printing and mailing costs. We estimated that the costs to print the Notices would range from $9.6 million (if soliciting parties responsible for 10% of all current proxy mailings choose to follow the notice only option) and $48.1 million (if soliciting parties responsible for 50% of current proxy mailings choose to follow the notice only option).[122] These same costs would be incurred by soliciting parties following the notice only option under the revised model.

Soliciting parties that follow the notice only option must post their proxy materials on an Internet Web site. Although costs for establishing a Web site and posting materials on it can vary greatly, the rules do not require elaborate Web site design. The rules only require that a soliciting party obtain a Web site and post several documents on that Web site. Several companies currently provide Web hosting services for free, including significant memory to post the required documents and bandwidth to handle several thousand "hits" per month.[123] We also noted that several Web hosting services provided Web sites which would handle up to five million hits per month are available for approximately $5 to $8 per month, or $60 to $96 per year.[124] Based on a review of several Internet Web page design firms, we estimate that the cost of designing a Web site

[122] 10% x 229,116,797 x ($0.13 + $0.29) = $9.6 million. 50% x 229,116,797 x ($0.13 + $0.29) = $48.1 million. As stated above, these costs would be significantly offset by savings as a result of not being required to print and mail full sets of proxy materials, resulting in a net savings of $48.3 million (if issuers responsible for 10% of all proxy mailings choose to follow the notice only option) to $241.4 million (if issuers responsible for 50% of all proxy mailings choose to follow the notice only option) for issuers choosing to follow the notice only option.

[123] A review found free Web hosting services that permit the posting of up to 100M of data, with a bandwidth capacity of 10,000MB. A document's size can vary dramatically depending on its design. Typical proxy statement and annual report sizes vary from 200KB for documents with few graphics such as an annual report on Form 10-K to 5MB for elaborate "glossy" annual reports. Based on this range of sizes, we estimate that a free Web hosting service would enable between 1,000 and 25,000 "hits" per month.





that meets the basic requirements of the notice and access model would be approximately $300. Thus, we estimate that the approximate total cost to establish a new Web site would be approximately $360 per year for a soliciting party, or a range of $0.3 million (if soliciting parties responsible for 10% of all proxy mailings would not have followed the voluntary model) to $1.4 million (if soliciting parties responsible for 50% of all proxy mailings would not have followed the voluntary model).[125] This estimate assumes that the soliciting party obtains a new Web site to post the proxy materials. We believe that the cost to soliciting parties that already maintain Web sites would be less.

The Web site on which the proxy materials are posted must maintain the anonymity of shareholders accessing the site. As discussed elsewhere in the release, this requirement requires a soliciting party to refrain from installing software on the Web site that tracks the identity of persons accessing the Web site. Thus, this requirement does not impose any added burden on soliciting party establishing new Web sites. A soliciting party that already has a Web site must segregate a portion of that Web site so that any tracking software on its general Web site does not track persons accessing the portion containing the proxy materials. Such segregation of the Web site requires minimal effort and should not impose a significant burden on such parties.

The rules also require that the proxy materials be posted in a format or formats convenient for printing on paper or viewing online. One commenter was concerned that this would impose an unnecessary burden on soliciting parties. Currently, Internet Web sites regularly present the same document in multiple formats for the convenience of

[124] We found several services which permit the posting of up to 300GB of data, with a bandwidth capacity of 3000GB, and include web design programs at prices between $5 and $8 per month.

[125] Based on filings in our last fiscal year, we estimate 7,982 proxy solicitations per year. 10% x 7,982 x $360 = $0.3 million. 50% x 7,982 x $360 = $1.4 million.

readers. In particular, Internet Web sites regularly post large files for Internet users with broadband connections and smaller files for users who do not have broadband connections. In light of this common practice on the Internet, we do not believe that this requirement will impose a significant burden on soliciting parties.

Soliciting parties must provide a means to vote as of the date on which the Notice is first sent. Those following the notice only option can do so by creating an electronic voting platform, providing a telephone number or posting a printable proxy card on the Web site. Some commenters questioned whether the model would require the creation of an electronic voting platform, which they estimated would cost approximately $3,000.[126] The amendments do not require such a voting platform. A soliciting party may simply post a printable proxy card or a telephone number for executing a proxy on its Web site, which should impose little burden.

The cost of processing shareholders' requests for copies of the proxy materials if a soliciting party elects to follow the notice only option is addressed as an offset to the savings discussed in the Benefits section of this analysis.

The amendments also require issuers and intermediaries to maintain records of shareholders who have requested paper and e-mail copies for future proxy solicitations. We estimate that this total cost if all issuers followed the notice only option would be approximately $13,098,500.[127] Thus, we estimated the cost due to the voluntary model would be approximately $1.3 million (if issuers responsible for 10% of all proxy mailings followed the notice only option) and $6.5 million (if issuers responsible for 50% of all proxy mailings followed the notice only option).[128]

**2. Costs Under the Full Set Delivery Option**

A soliciting party following the full set delivery option must either prepare a Notice or incorporate the Notice information into its proxy statement or proxy card. We base our estimates on preparing a separate Notice because we believe this would involve a greater cost. However, we anticipate that a significant number of soliciting parties would choose to incorporate the information into their materials. Based on the range that we estimated for soliciting parties following the notice only option, we estimate that soliciting parties responsible for 50% to 90% of all proxy mailings would choose to follow the full set delivery option. Soliciting parties who follow this option would not incur mailing costs in addition to costs incurred under the traditional system because the Notice would be included in the much larger package of the full set of proxy materials.

When the Commission adopted the voluntary model, we estimated that soliciting parties responsible for 10% to 50% of all proxy mailings would rely on the voluntary model. Under the amendments, we assume that soliciting parties that we estimated would not have followed the voluntary model (i.e., soliciting parties responsible for 50% to 90% of all proxy mailings) would incur the cost of preparing and printing a Notice (or incorporating Notice information into their proxy materials)[129] and posting the proxy materials on an Internet Web site.

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126 See letters from BONY and Registrar and Transfer.

127 In the voluntary model adopting release, we estimated, for PRA purposes, that issuers and intermediaries would spend a total of 79,820 hours of issuer and intermediary personnel time maintaining these records. We estimate the average hourly cost of issuer and intermediary personnel time to be $175, resulting in a total cost of $13,068,500 for issuer and intermediary personnel time.

128 $13,098,500 x 10% = $1,309,850. $13,098,500 * 50% = $6,549,250.

129 We do not expect an incremental increase in mailing cost for the Notice for soliciting parties that choose the full set delivery option because the Notice is substantially smaller than the full set of proxy materials currently sent under the traditional system and must accompany that full set (or be incorporated into those materials).

We estimate that the cost for soliciting parties that would not have followed the voluntary model to prepare a Notice will range between $1.2 million (if soliciting parties responsible for 50% of all proxy mailings would not have followed the voluntary model) and $2.2 million (if soliciting parties responsible for 90% of all proxy mailings would not have followed the voluntary model).[130]

Similarly, we estimate that the cost for such parties of printing the Notice will range between $14.9 million[131] (if soliciting parties responsible for 50% of all proxy mailings would not have followed the voluntary model) and $26.8 million[132] (if soliciting parties responsible for 90% of all proxy mailings would not have followed the voluntary model). Soliciting parties can significantly reduce this cost to print the Notice by incorporating the Notice information into the proxy materials instead of printing a separate Notice. Printing costs for the full set of proxy materials would be identical to such costs under the traditional method of providing proxy materials by mail and therefore do not represent an incremental cost increase as a result of these rules.

We do not expect an incremental increase in mailing cost for the Notice for soliciting parties that choose the full set delivery option because the Notice is substantially smaller than the full set of proxy materials currently sent under the traditional system and must accompany that full set (or be incorporated into the proxy statement and proxy card).

130 As noted above, we calculated a total cost of $2,469,475 for preparing the Notice for purposes of the PRA. $2,469,475 * 50% = $1,234,736. $2,469,475 * 90% = $2,222,528.

131 50% x 229,116,797 x $0.13 = $14.9 million.

132 90% x 229,116,797 x $0.13 = $26.8 million. We assume that the additional cost of mailing the Notice together with the full set of proxy materials is negligible.



In addition, under the amendments, soliciting parties that would not have followed the voluntary model must post their proxy materials on an Internet Web site. As we noted above, although costs for establishing a Web site and posting materials on it can vary greatly, the rules do not require elaborate Web site design. The rules only require that a soliciting party obtain a Web site and post several documents on that Web site. As with the notice only option, we estimate that the approximate total cost to establish a new Web site would be approximately $360 per year for a soliciting party, or a range of $1.4 million (if soliciting parties responsible for 50% of all proxy mailings would not have followed the voluntary model) to $2.6 million (if soliciting parties responsible for 90% of all proxy mailings would not have followed the voluntary model).[133]

**3. Costs to Intermediaries**

Soliciting parties and intermediaries will incur additional processing costs under the notice and access model. The amendments require an intermediary such as a bank, broker-dealer, or other association to follow the notice and access model with respect to all issuers. An intermediary must prepare its own Notice to beneficial owners, along with instructions on when and how to request paper copies and the Web site where the beneficial owner can access his or her request for voting instructions. Since soliciting parties reimburse intermediaries for their reasonable expenses of forwarding proxy materials and intermediaries and their agents already have systems to prepare and deliver requests for voting instructions, we do not expect the involvement of intermediaries in sending their Notices to significantly affect the costs associated with the rules.

133 50% x 7,982 x $360 = $1.4 million. 90% x 7,982 x $360 = $2.6 million.

Under the notice and access model, a beneficial owner desiring a copy of the proxy materials from a soliciting party following the notice only option must request such a copy from its intermediary. The costs of collecting and processing requests from beneficial owners may be significant, particularly if the intermediary receives the requests of beneficial owners associated with many different soliciting parties that specify different methods of furnishing the proxy. We expect that these processing costs will be highest in the first year after adoption but will subsequently decline as intermediaries develop the necessary systems and procedures and as beneficial owners increasingly become comfortable with accessing proxy materials online. In addition, the amendments permit a beneficial owner to specify its preference on an account-wide basis, which should reduce the cost of processing requests for copies. These costs ultimately are paid by the soliciting party.

**4. Costs to Shareholders**

Under the amendments, a shareholder can avoid any additional cost by accessing the proxy materials on the Internet if they already have Internet access or by requesting copies of the proxy materials from the soliciting parties if the shareholder is a record holder or the intermediary if the shareholder is a beneficial owner. Shareholders who do not already have Internet access and wish to access the proxy materials online would incur any necessary costs associated with gaining access to the Internet. In addition, some shareholders may choose to print out the posted materials, which would entail paper and printing costs. We estimate that approximately 10% of all shareholders receiving a Notice under the notice only option would print out the posted materials at home at an estimated cost of $7.05 per proxy package. Based on these assumptions, we estimated



that the voluntary model could produce incremental annual home printing costs ranging from $16 million (if soliciting parties responsible for 10% of all current proxy mailings follow the notice only option) to $80 million (if soliciting parties responsible for 50% of all current proxy mailings follow the notice only option).[134] Shareholders of issuers that follow the full set delivery option would not incur such costs.

**5. Comments Regarding Unanticipated Costs**

Several commenters expressed concern with the adoption of these amendments before the Commission has collected operating data from the voluntary model. The recommended delaying adoption until the market has had more experience with the voluntary model before requiring companies to follow the notice and access model. As we note elsewhere in the release, the amendments adopted in this release do not require soliciting parties to follow procedures substantially different from the procedures available under the voluntary model. Soliciting parties who wish to furnish their proxy materials via traditional paper delivery may continue to do so, with the only added requirements being that they must post their proxy materials on an Internet Web site and prepare a Notice (or incorporate the Notice information into their proxy statement and proxy card).

In addition, only large accelerated filers that are subject to the proxy rules will be subject to the requirements in 2008. All other filers need not, but may, follow the notice

[134] This range of potential home printing costs depends on data provided by Lexecon and ADP. See letter from ADP. The Lexecon data was included in the ADP comment letter. To calculate home printing cost, we assume that 50% of annual report pages are printed in color and 100% of proxy statement pages are printed in black and white. The estimated percentage of shareholders printing at home is derived from Forrester survey data furnished by ADP and adjusted for the reported likelihood that an investor will take extra steps to get proxy materials. Total number of shareholders estimated as above based on data provided by ADP and SIFMA. See letters commenting on Release No. 34-52926 (Dec. 8, 2005) [70 FR 74598] from ADP and SIFMA.

and access model before January 1, 2009. Most large accelerated filers already appear to post their proxy materials on the Internet. As noted above, a review of existing Web sites of such issuers indicated that approximately 80% of them already post their filings, including proxy materials, on their Web site. Thus, most of the issuers that will be subject to the rules in the first year will be large issuers that already post their proxy materials on their Web site. Therefore, we believe that no company will incur significant cost as a result of these amendments in the first year, while we evaluate the performance of the model. Although they may need to implement some procedures to ensure the anonymity of persons accessing those materials, we do not believe this requirement will impose a significant burden on these companies.

Furthermore, the tiered compliance dates address commenters' concerns because they will allow the Commission to better analyze the impact of the rules on a subset of issuers constituting large accelerated filers.[135] Adopting the amendments for large accelerated filers before the 2008 proxy season effectively creates a test group of issuers, enabling the Commission to study the performance of the model with a significant number of larger issuers and to make any necessary revisions to the rules before they apply to all issuers and other soliciting persons.

**6. Comment on the Complexity of the Notice and Access Model**

One commenter expressed concern that the proposed rule would make the proxy delivery system too complex for beneficial owners holding in street name through their brokers or other intermediaries.[136] We acknowledge that the amendments provide shareholders with more options with respect to the manner in which they are able to access their proxy materials, and thereby add complexity to the proxy distribution system. However, we believe that shareholder choice as to the means by which they access proxy materials and the expanded use of the Internet to provide such information to shareholders ultimately will provide shareholders with better access to information, which we believe can make the proxy process more efficient. In adopting the voluntary model, we created a provision that allows a shareholder to make a one-time election of the means by which they access proxy materials to simplify the model for those shareholders. In addition, by choosing to follow the full set delivery option, issuers and other soliciting persons wishing to do so can continue to furnish their proxy materials through procedures substantially similar to traditional methods of furnishing proxy materials. These provisions should significantly simplify the process for all shareholders.

## VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[137] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[138] and Section 2(c) of the Investment

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135 One commenter specifically noted that the timeframe would not allow the Commission to analyze the effects of one-full year of compliance for large accelerated filers who chose to accept the voluntary model. See letter from the Chamber of Commerce. The tiered system will allow the Commission to analyze a full year of experience under the notice and access model for all large accelerated filers.

136 See letter from Reed Smith. We received similar comments on our proposals to adopt the notice and access model as a voluntary means of furnishing proxy materials.

137 15 U.S.C. 78w(a)(2).

138 15 U.S.C. 78c(f).

Company Act of 1940[139] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The amendments require all issuers and other soliciting persons to follow the notice and access model for all proxy solicitations, other than those associated with business combination transactions. The amendments are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet to lower the costs of proxy solicitations, and to improve shareholder communications. Historically, issuers decided whether to provide shareholders with the choice to receive proxy materials by electronic means. The amendments provide all shareholders with the ability to choose whether to access proxy materials in paper, by e-mail or via the Internet. We believe that expanded use of electronic communications to replace current modes of disclosures on paper and physical mailings will increase the efficiency of the shareholder communications process. Use of the Internet permits technology developers to enhance a shareholder's experience with respect to such communications. It permits interactive communications at real-time speeds. Improved shareholder communications may improve relationships between shareholders and management. Retail investors may have easier access to management. In turn, this may lead to increased confidence and trust in well-managed, responsive issuers.

[139] 15 U.S.C. 80a-2(c).





The amendment may have the effect of initially raising costs on issuers and other soliciting persons by requiring persons who choose to follow the full set delivery option to post the proxy materials on a Web site and prepare a Notice (or incorporate Notice information into their proxy statement and proxy card). Commenters were concerned that the amendments may create other inefficiencies such as reducing shareholder voting participation and increased reliance on broker discretionary voting. The amendments do not significantly differ from the voluntary model. Issuers who are concerned about a reduction in voting participation still have the option to send a full set of proxy materials to all shareholders. Therefore, we do not believe that the amendments will have a significant impact compared to the previously-adopted voluntary model on shareholder voting participation, and hence reliance on broker discretionary voting.

We also considered the effect of the amendments on competition and capital formation, including the effect that the amendments may have on industries servicing the proxy soliciting process. We do not anticipate any significant effects on capital formation. We also anticipate that some companies whose business model is based on the dissemination of paper-based proxy materials may experience some adverse competition effects from the amendments. However, the full set delivery option permits companies to continue to send paper copies to shareholders. Thus, we do not anticipate that the amendments will have an incremental impact on this industry different from the voluntary model. The amendments may also promote competition among Internet-based information services.

## VIII. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to amendments to the rules and forms under the Exchange Act that require issuers, other persons soliciting proxies, and intermediaries to follow the notice and access model for all proxy solicitations except for those associated with a business combination transaction. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act in conjunction with the proposing release. The proposing release included, and solicited comment on, the IRFA.

### A. Need for the Amendments

On January 22, 2007, we proposed amendments to the rules regarding provision of proxy materials to shareholders. We are adopting those amendments, substantially as proposed. Specifically, the amendments require issuers and other persons soliciting proxies to provide shareholders with Internet access to proxy materials. The amendments are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet to ultimately lower the costs of proxy solicitations, and to improve shareholder communications. We anticipate that the model will enhance the ability of investors to make informed decisions and ultimately to lower the costs of proxy solicitations.

The amendments also will provide all shareholders with the ability to choose whether to access proxy materials in paper, by e-mail or via the Internet. Developing technologies on the Internet should expand the ways in which required disclosures can be used by shareholders. Electronic documents are more easily searchable than paper documents. Users are better able to go directly to any section of the document that they



believe to be the most important. They also permit users to more easily evaluate data. It enables users to more easily download data into spreadsheet or other analytical programs so that they can perform their own analyses more efficiently. A centralized Web site containing proxy-related disclosure may facilitate shareholder access to other relevant information such as research reports and news about the issuer.

In addition, encouraging shareholders to use the Internet in the context of proxy solicitations may have the side-effect of improving shareholder communications in other ways. Internet tools may enhance shareholders' ability to communicate not only with management, but with each other. Such direct access may improve shareholder relations to the extent shareholders have improved access to management.

### B. Significant Issues Raised by Public Comment

Five commenters were concerned that smaller firms may not realize the savings contemplated by the mandatory model and may even incur increased costs.[140] One commenter suggested that the Commission develop "ways to 'scale' the notice and access model for smaller public companies so as to reduce the cost of compliance," but did not provide any recommendations on how to do so.[141]

Several commenters were concerned about the increased set-up costs for issuers, including small entities. One commenter estimated that, based on its "back-of-envelope" estimate, the cost of outsourcing the requirements to a third party provider could cost companies over $5,000 and may exceed $10,000, including the establishment of an Internet voting platform.[142] Three other commenters estimated that the proposal would

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140 See letters from ABC, BONY, Reed Smith, Registrar and Transfer, and STA.

141 See letter from ABC.

142 See letter from ABC.

cost companies approximately $3,000 to establish such an Internet voting platform.[143] However, as noted previously, the amendments do not require companies to establish such a platform.[144] One of these commenters noted that although posting the proxy materials on the Internet is not necessarily expensive or difficult, outsourcing this function to an outside firm could cost hundreds, if not thousands, of dollars to do so.[145]

One commenter was concerned that the prohibition on "cookies" raises the costs for maintaining the Web sites.[146] Although this prohibition does raise the cost to maintain the Web sites, we believe that eliminating this prohibition may have a negative effect on shareholders' willingness to access the proxy materials via an Internet Web site. We do not believe this requirement will create undue burden on companies. Soliciting parties must refrain from installing cookies and other tracking features on the Web site or portion of the Web site where the proxy materials are posted. This may require segregating those pages from the rest of the soliciting party's regular Web site or creating a new Web site. However, the rules do not require the company to turn off the Web site's connection log, which automatically tracks numerical IP addresses that connect to that Web site. Although in most cases, this IP address does not provide a soliciting party with sufficient information to identify the accessing shareholder, soliciting parties may not use these numbers to attempt to find out more information about persons accessing the Web site.

143 See letters from BONY, Registrar and Transfer, and STA.

144 See letters from BONY and Registrar and Transfer.

145 See letter from Registrar and Transfer.

146 See letter from ICI.



**C. Small Entities Subject to the Amendments**

The amendments affect issuers that are small entities. Exchange Act Rule 0-10(a)[147] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 public companies, other than investment companies, that may be considered small entities.[148]

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[149] Approximately 164 registered investment companies meet this definition. Moreover, approximately 51 business development companies may be considered small entities.

Paragraph (c)(1) of Rule 0-10 under the Exchange Act[150] states that the term "small business" or "small organization," when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to §240.17a-5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2005, the

147 17 CFR 240.0-10(a).

148 The estimated number of reporting small entities is based on 2007 data including the Commission's EDGAR database and Thomson Financial's Worldscope database. This represents an update from the number of reporting small entities estimated in prior rulemakings. See, for example, Executive Compensation and Related Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158] (in which the Commission estimated a total of 2,500 small entities, other than investment companies).

149 17 CFR 270.0-10.

150 17 CFR 240.0-10(c)(1).

Commission estimates that there were approximately 910 broker-dealers that qualified as small entities as defined above.[151] Small Business Administration regulations define "small entities" to include banks and savings associations with total assets of $165 million or less.[152] The Commission estimates that the rules might apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of $165 million or less.

**D. Reporting, Recordkeeping and Other Compliance Requirements**

The amendments require all issuers, including small entities, to follow the notice and access model. This model does not significantly change an issuer's obligations under current rules. An issuer choosing to follow the notice only option would incur costs identical to costs that it would have incurred under the voluntary model. An issuer following the full set delivery option would incur two costs in addition to the current cost of sending proxy materials under the traditional method: (1) the cost of preparing a Notice of Internet Availability of Proxy Materials and (2) the cost of posting the proxy materials on a Web site with anonymity controls.

For purposes of the Paperwork Reduction Act, we have estimated that the Notice would take approximately 1.5 hours to prepare because the information is readily available to the issuer. We estimated that 75% of that burden would be incurred by in-house, while 25% of the burden would reflect costs of outside counsel, at a cost of $400 per hour, or approximately $150 per Notice. With respect to printing the Notice, for purposes of the Cost-Benefit Analysis we estimated a cost of $0.13 per copy to print the

[151] These numbers are based on a review by the Commission's Office of Economic Analysis of 2005 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[152] 13 CFR 121.201.



Notice. However, an issuer may reduce this cost by incorporating the Notice information into its proxy materials.

As we noted in our Cost-Benefit Analysis, we anticipate the cost of posting the proxy materials on a publicly accessible Web site to be relatively low. Although an issuer may choose to pay more for an elaborate Web site, the rules do not require such a Web site. An issuer with a small shareholder base may be able to post its materials on a free Web hosting service. As we note in more detail in the Cost-Benefit Analysis, based on our estimate of the typical size of a proxy statement and annual report, we estimate such services provide sufficient bandwidth for approximately 1,000 to 25,000 hits per month.[153] We also noted that several Web hosting services provided Web sites which would handle up to five million hits per month are available for approximately $5 to $8 per month, or $60 to $96 per year. Based on a review of several Internet Web page design firms, we estimate that the design of a Web site meeting the base requirements of the rules would be approximately $300.

Intermediaries must follow substantially similar requirements with respect to beneficial owners of the issuer's securities. Issuers, including small entities, are required to reimburse intermediaries for the cost of complying with these requirements. These costs are incorporated in our estimate of costs to issuers.

**E. Agency Action to Minimize Effect on Small Entities**

The amendments require all issuers and intermediaries, including small entities, to follow the notice and access model. The purpose of the amendments is to provide all

[153] These calculations are based on typical file sizes of proxy statements and annual reports. The lower capacity (1,000) corresponds to files that are elaborate "glossy" annual statements. We believe the higher capacity (25,000) is a more reasonable estimate for small entities because small

shareholders with the ability to choose the means by which they can access proxy materials, to expand use of the Internet to ultimately lower the costs of proxy solicitations, and to improve shareholder communications. Exempting small entities would not be consistent with this goal and we do not believe that the additional compliance requirements that we are imposing are significant.

We believe that in the long run, use of the Internet for shareholder communications not only may decrease costs for all issuers, but also may improve the quality of shareholder communications by enhancing a shareholder's ability to search and manipulate proxy disclosures. However, in the short term, we are adopting a tiered system of compliance dates to minimize the burdens on smaller issuers, including small entities. Under this tiered system, issuers that are not large accelerated filers need not comply with the requirements until January 1, 2009. This would provide smaller issuers more time to adjust to the amendments and learn from the experiences of larger filers. Furthermore, adopting the amendments for large accelerated filers before the 2008 proxy season effectively creates a test group of issuers, enabling the Commission to study the performance of the model with a significant number of larger issuers and to make any necessary revisions to the rules before they apply to all issuers, including small entities.

Intermediaries that are small entities also are subject to the amendments. We understand that the task of forwarding proxy materials to over 95% of beneficial ownership accounts currently is handled by a single entity. Because a third-party outsourcing alternative is readily available and issuers are required to reimburse such costs to the intermediary, we believe that imposing the amendments on small entities will

entities tend to send annual reports on Form 10-K to meet their Rule 14a-3(b) requirements rather than spend the significant cost of producing a "glossy" annual report.



not create a substantial burden on small entities. Thus, we have decided not to exempt intermediaries that are small entities from the amendments. Such an exemption may create disparity in the way shareholders receive proxy materials. Shareholders owning securities through such intermediaries would not have the ability to choose the means by which they receive proxy disclosures.

We considered the use of performance standards rather than design standards in the amendments. The amendments contain both performance standards and design standards. We are adopting design standards to the extent that we believe compliance with particular requirements is necessary. For example, we are using a design standard with respect to the contents of the Notice so that investors get uniform information regarding access to important information. However, to the extent possible, we are adopting rules that impose performance standards to provide issuers, other soliciting persons and intermediaries with the flexibility to devise the means through which they can comply with such standards. For example, we are adopting a performance standard for providing for anonymity on the Web site so that issuers and other soliciting persons can determine for themselves the least costly option to meet the requirement.

## IX. Statutory Basis and Text of Amendments

We are adopting the amendments pursuant to Sections 3(b), 10, 13, 14, 15, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and Sections 20(a), 30, and 38 of the Investment Company Act of 1940, as amended.

**List of Subjects**

**17 CFR Part 240**

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows.

**PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend §240.14a-3 by revising paragraph (a) to read as follows:

**240.14a-3 Information to be furnished to security holders.**

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with:

(1) A publicly-filed preliminary or definitive proxy statement, in the form and manner described in §240.14a-16, containing the information specified in Schedule 14A (§240.14a–101);

(2) A preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 (§239.25 or §239.34 of this chapter) or Form N–14 (§239.23 of this chapter) and containing the information specified in such Form; or

(3) A publicly-filed preliminary or definitive proxy statement, not in the form and manner described in §240.14a-16, containing the information specified in Schedule 14A (§240.14a–101), if:





(i) The solicitation relates to a business combination transaction as that term is defined in §230.165 of this chapter; or

(ii) The solicitation may not follow the form and manner described in §240.14a-16 pursuant to the laws of the state of incorporation of the registrant;

* * * * *

3. Amend §240.14a-7 by removing Note 3 to §240.14a-7.

4. Amend §240.14a-16 by:

a. Revising paragraphs (a), (d)(3), (f)(2)(i), (f)(2)(ii), (h), (j)(3), and (n); and

b. Adding paragraph (f)(2)(iii).

The revisions and additions to read as follows:

**240.14a-16 Internet availability of proxy materials.**

(a)(1) A registrant shall furnish a proxy statement pursuant to §240.14a–3(a), or an annual report to security holders pursuant to §240.14a–3(b), to a security holder by sending the security holder a Notice of Internet Availability of Proxy Materials, as described in this section, 40 calendar days or more prior to the security holder meeting date, or if no meeting is to be held, 40 calendar days or more prior to the date the votes, consents or authorizations may be used to effect the corporate action, and complying with all other requirements of this section.

(2) Unless the registrant chooses to follow the full set delivery option set forth in paragraph (n) of this section, it must provide the record holder or respondent bank with all information listed in paragraph (d) of this section in sufficient time for the record holder or respondent bank to prepare, print and send a Notice of Internet Availability of Proxy Materials to beneficial owners at least 40 calendar days before the meeting date.

* * * * *

(d) * * *

(3) A clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendations, if any, regarding those matters, but no supporting statements;

* * * * *

(f) * * *

(2) * * *

(i) A pre-addressed, postage-paid reply card for requesting a copy of the proxy materials;

(ii) A copy of any notice of security holder meeting required under state law if that notice is not combined with the Notice of Internet Availability of Proxy Materials; and

(iii) In the case of an investment company registered under the Investment Company Act of 1940, the company's prospectus or a report that is required to be transmitted to stockholders by section 30(e) of the Investment Company Act (15 U.S.C. 80a-29(e)) and the rules thereunder.

* * * * *

(h) The registrant may send a form of proxy to security holders if:

(1) At least 10 calendar days or more have passed since the date it first sent the Notice of Internet Availability of Proxy Materials to security holders and the form of proxy is accompanied by a copy of the Notice of Internet Availability of Proxy Materials; or



(2) The form of proxy is accompanied or preceded by a copy, via the same medium, of the proxy statement and any annual report to security holders that is required by §240.14a-3(b).

* * * * *

(j) * * *

(3) The registrant must provide copies of the proxy materials for one year after the conclusion of the meeting or corporate action to which the proxy materials relate, provided that, if the registrant receives the request after the conclusion of the meeting or corporate action to which the proxy materials relate, the registrant need not send copies via First Class mail and need not respond to such request within three business days.

* * * * *

(n) Full Set Delivery Option.

(1) For purposes of this paragraph (n), the term full set of proxy materials shall include all of the following documents:

(i) A copy of the proxy statement;

(ii) A copy of the annual report to security holders if required by §240.14a-3(b); and

(iii) A form of proxy.

(2) Notwithstanding paragraphs (e) and (f)(2) of this section, a registrant or other soliciting person may:

(i) Accompany the Notice of Internet Availability of Proxy Materials with a full set of proxy materials; or

(ii) Send a full set of proxy materials without a Notice of Internet Availability of Proxy Materials if all of the information required in a Notice of Internet Availability of Proxy Materials pursuant to paragraphs (d) and (n)(4) is incorporated in the proxy statement and the form of proxy.

(3) A registrant or other soliciting person that sends a full set of proxy materials to a security holder pursuant to this paragraph (n) need not comply with

(i) The timing provisions of paragraphs (a) and (l)(2); and

(ii) The obligation to provide copies pursuant to paragraph (j).

(4) A registrant or other soliciting person that sends a full set of proxy materials to a security holder pursuant to this paragraph (n) need not include in its Notice of Internet Availability of Proxy Materials, proxy statement, or form of proxy the following disclosures:

(i) Paragraphs 1 and 3 of the legend required by paragraph (d)(1);

(ii) Instructions on how to request a copy of the proxy materials; and

(iii) Instructions on how to access the form of proxy pursuant to paragraph (d)(7).

5. Amend §240.14a-101 by revising the first sentence of Item 4(a)(c) to read as follows:

**§240.14a-101 Schedule 14A. Information required in proxy statement.**

* * * * *

Item 4. Persons Making the Solicitation—(a) * * *

(3) If the solicitation is to be made otherwise than by the use of the mails or pursuant to §240.14a-16, describe the methods to be employed. * * *



* * * * *

6. Amend §240.14b-1 by:

a. Revising the introductory text of paragraph (d); and

b. Adding paragraph (d)(5).

The revision and addition read as follows.

**§240.14b-1 Obligation of registered brokers and dealers in connection with the prompt forwarding of certain communications to beneficial owners.**

* * * * *

(d) Upon receipt from the soliciting person of all of the information listed in §240.14a-16(d), the broker or dealer shall:

* * * * *

(5) Notwithstanding any other provisions in this paragraph (d), if the broker or dealer receives copies of the proxy statement and annual report to security holders (if applicable) from the soliciting person with instructions to forward such materials to beneficial owners, the broker or dealer:

(i) Shall either:

(A) Prepare a Notice of Internet Availability of Proxy Materials and forward it with the proxy statement and annual report to security holders (if applicable); or

(B) Incorporate any information required in the Notice of Internet Availability of Proxy Materials that does not appear in the proxy statement into the broker or dealer's request for voting instructions to be sent with the proxy statement and annual report (if applicable);

(ii) Need not comply with the following provisions:

(A) The timing provisions of paragraph (d)(1)(ii); and

(B) Paragraph (d)(4); and

(iii) Need not include in its Notice of Internet Availability of Proxy Materials or request for voting instructions the following disclosures:

(A) Legends 1 and 2 in §14a-16(d)(1) of this chapter; and

(B) Instructions on how to request a copy of the proxy materials.

* * * * *

7. Amend §240.14b-2 by:

a. Revising the introductory text of paragraph (d); and

b. Adding paragraph (d)(5).

The revision and addition read as follows.

**§240.14b-2 Obligation of banks, associations and other entities that exercise fiduciary powers in connection with the prompt forwarding of certain communications to beneficial owners.**

* * * * *

(d) Upon receipt from the soliciting person of all of the information listed in §240.14a-16(d), the bank shall:

* * * * *

(5) Notwithstanding any other provisions in this paragraph (d), if the bank receives copies of the proxy statement and annual report to security holders (if applicable) from the soliciting person with instructions to forward such materials to beneficial owners, the bank:

(i) Shall either:

(A) Prepare a Notice of Internet Availability of Proxy Materials and forward it with the proxy statement and annual report to security holders (if applicable); or





(B) Incorporate any information required in the Notice of Internet Availability of Proxy Materials that does not appear in the proxy statement into the bank's request for voting instructions to be sent with the proxy statement and annual report (if applicable);

(ii) Need not comply with the following provisions:

(A) The timing provisions of paragraph (d)(1)(ii); and

(B) Paragraph (d)(4); and

(iii) Need not include in its Notice of Internet Availability of Proxy Materials or request for voting instructions the following disclosures:

(A) Legends 1 and 2 in §14a-16(d)(1) of this chapter; and

(B) Instructions on how to request a copy of the proxy materials.

* * * * *

8. Amend §240.14c-2 by revising paragraph (d) to read as follows:

**§240.14c-2 Distribution of information statement.**

* * * * *

(d) A registrant shall transmit an information statement to security holders pursuant to paragraph (a) of this section by satisfying the requirements set forth in §240.14a-16; provided, however, that the registrant shall revise the information required in the Notice of Internet Availability of Proxy Materials, including changing the title of that notice, to reflect the fact that the registrant is not soliciting proxies for the meeting.

9. Amend §240.14c-3 by revising paragraph (d) to read as follows:

**§240.14c-3 Annual report to be furnished security holders.**

* * * * *

(d) A registrant shall furnish an annual report to security holders pursuant to paragraph (a) of this section by satisfying the requirements set forth in §240.14a-16.

By the Commission.

Florence E. Harmon
Deputy Secretary

July 26, 2007





**E-PROXY**

I. "Shareholder Choice" Rules

A. Under recent amendments to the proxy rules, issuers will be required to make their proxy materials accessible via the Internet, using a "notice and access" model described below, other than in the case of proxy materials related to a business combination. Large accelerated filers will become subject to this rule beginning January 1, 2008. Other filers will become subject to this rule January 1, 2009 but may comply voluntarily beginning January 1, 2008.

B. Issuers will have two options for delivering proxy materials, the "notice only" option, under which the issuer uses the notice and access model as the primary means of delivery, and the "full set delivery" option, under which the issuer delivers its proxy materials in printed form, as is done under the current rules, but also makes them available via the Internet. Issuers are not required to choose one option or the other as the exclusive means for delivering proxy materials, but may use the notice only option for some shareholders and the full set delivery option for other shareholders.

C. Brokers and other intermediaries will be required to adopt a similar notice and access model with respect to all issuers for which securities are held on behalf of the intermediary's customers. The notice and access requirements will also apply to persons other than the issuer conducting their own proxy solicitations.

D. Notice Only Option

1. An issuer relying on the notice only option must send shareholders a Notice, described below (see "Notice Requirements"), at least 40 days before the meeting date. The purpose of the 40-day notice period is to give shareholders time to request copies of proxy materials in hard copy or via email if desired.

2. Proxy materials identified in the Notice must be made publicly accessible free of charge on the website specified in the Notice. The rules governing this website are described below (see "Website Requirements").

3. The issuer must provide shareholders with a method for executing proxies as of the time the Notice is first sent to shareholders. The issuer can satisfy this requirement by, for example, providing a means of voting online, a toll-free telephone number, or a printable or downloadable proxy card.

4. Upon request by any shareholder, the issuer must provide copies of the proxy materials in hard copy or via email at no charge. The issuer must also enable shareholders to make a permanent election to receive paper or email copies and must maintain records of those elections.

5. California corporations and other companies headquartered in California may be prevented from making full use of the notice only option due to an apparent conflict with California law, as discussed below.

E. Full Set Delivery Option

1. An issuer may rely on the full set delivery option by delivering a full set of proxy materials, including an annual report if required, along with the Notice. The issuer must also post the proxy materials on a website, in a manner similar to the notice only option, no later than the date the Notice is first sent to shareholders.

2. As an alternative to sending a separate Notice, the issuer may incorporate the required information into the proxy statement and proxy card.

3. The full set delivery option differs from the notice only option in a few other ways:

a. The issuer need not provide shareholders with a means of requesting copies of proxy materials.

b. The 40-day notice requirement does not apply, since shareholders will not need extra time to request paper or email copies.

c. Because the proxy materials will include a proxy card or request for voting instructions, the issuer need not provide another means for voting at the time the Notice is provide (although it may do so if it chooses).

II. Notice Requirements

A. Issuers must send shareholders a "Notice of Internet Availability of Proxy Materials" indicating that the issuer's proxy materials are available on a specified website and explaining how to access them.

B. For issuers relying on the notice only option, the Notice must be sent to shareholders at least 40 calendar days prior to the meeting.

C. Contents of the Notice

1. The Notice must include, among other things:

a. the date, time, and location of the meeting;

b. a clear and impartial description of each matter to be voted on;

c. a list of materials available at the website;



d. any control or identification numbers a shareholder needs to access the proxy card; and

e. procedures shareholders can use to vote by proxy and in person.

2. Issuers relying on the notice only option must also provide:

a. instructions on how to access the proxy card, provided that such instructions do not enable the shareholder to execute a proxy without having access to the proxy statement; and

b. a toll-free telephone number, email address and website where the shareholder can request a copy of the proxy materials for all meetings or for the meeting to which the Notice relates.

3. The Notice must be written in plain English.

4. The Notice may only contain the information specified by the rules and, if the issuer chooses to combine it with the shareholder meeting required under state corporate law, such information as may be required by state law. To protect shareholders' anonymity, the Notice may also include a warning advising shareholders that no personal information other than the specified identification or control number is necessary to execute a proxy.

D. The Notice must be filed with the SEC no later than the date when it is first sent to shareholders.

E. Issuers may send a proxy card 10 days or more after sending the Notice (e.g., as a reminder to shareholders who have not yet voted), or earlier if they also send hard copies of the proxy statement and annual report. If paper copies of the proxy statement and annual report do not accompany or precede the proxy card, a copy of the Notice must be sent along with the card.

III. Website Requirements

A. Proxy materials must be made publicly accessible, free of charge, on the website specified in the Notice on or before the date the Notice is sent to shareholders. The website may not be the SEC's EDGAR system. The issuer must also post any subsequent additional soliciting materials no later than the date such materials are first sent to shareholders or made public. All materials posted on the website must be presented in a format that is convenient for both reading online and printing out. The materials must be maintained on the website through the conclusion of the shareholders' meeting.

B. The issuer must maintain the website in a manner that does not infringe on shareholders' anonymity. The issuer must refrain from installing "cookies" and other tracking features on the website. The issuer may not use shareholders' IP

addresses (which may be tracked by the website's connection log) to attempt to collect more information about persons accessing the website.

C. When a shareholder has provided an email address solely to request a copy of proxy materials, the issuer may not use that email address for any other purpose.

IV. Implications for Brokers and Other Intermediaries

A. An issuer or other soliciting person must provide each broker or other intermediary with the information necessary to prepare the intermediary's Notice in sufficient time for the intermediary to send its Notice to beneficial owners within the required timeframe.

B. An issuer that complies with the notice only option must provide the intermediary with the relevant information in sufficient time for the intermediary to prepare and send the Notice and post the proxy materials on the website at least 40 days before the shareholder meeting date.

C. An issuer that complies with the full set delivery option need not comply with the 40-day deadline. The issuer need only provide the Notice information to the intermediary in sufficient time for the intermediary to prepare and send the Notice along with the full set of materials provided by the issuer. Under this option, as with the traditional method of delivering proxy materials, the intermediary must forward the issuer's full set of proxy materials to beneficial owners within five business days of receipt from the issuer or the issuer's agent.

D. With respect to beneficial owners who receive a Notice under the notice only option, the intermediary must also make paper or email copies of the proxy materials available upon request, permit the beneficial owners to make a permanent election to receive paper or email copies, keep records of beneficial owner preferences, and provide a means to access a request for voting instructions for its beneficial owner customers no later than the date the Notice is first sent.

E. With respect to beneficial owners who are receiving materials under the full set delivery option, the intermediary must either prepare a separate Notice and forward it with the full set of proxy materials, or incorporate any information required in the Notice, but not appearing in the issuer's proxy statement, in its request for voting instructions.

V. Reliance on the Notice and Access Model by Soliciting Persons Other Than the Issuer

A. A soliciting person other than the issuer also must comply with the notice and access model, using either the notice only option, the full set delivery option or a combination of the two.

B. Such persons are treated differently from the issuer in the following respects:





1. They are not required to solicit every shareholder or furnish a proxy statement to every shareholder.

2. If they follow the notice only option, they must send a Notice by the later of 40 days prior to the meeting date or 10 days after the date when the issuer first sends its proxy materials to shareholders.

VI. Voluntary E-Proxy

A. New SEC rules that took effect on July 1, 2007 give issuers the option of delivering proxy materials electronically (other than in business combinations) subject to conditions that are substantially the same as those that apply to the notice only option described above.

B. With respect to any issuer that has voluntarily adopted E-Proxy, the notice and access requirements will apply to (a) intermediaries holding that issuer's shares on behalf of beneficial owners and (b) soliciting persons other than the issuer, as described above.

VII. Potential Conflict for California Corporations and Foreign Corporations Headquartered in California

A. Section 1501 of the California Corporations Code requires a corporation to deliver an annual report. Delivery may be accomplished by website posting as contemplated by the notice only option, but only if the shareholder has consented to such means of delivery (i.e., Section 1501 has an opt-in feature, in contrast to the more issuer-friendly opt-out feature embodied in the notice only option).

B. Section 1501 purports to apply not only to California corporations but also to any foreign corporation whose principal executive office is in California or whose board customarily holds meetings in this state. There is an argument that such extra-territorial application is unconstitutional, as the Delaware Supreme Court ruled in 2005 in *Vantagepoint v. Examen*, but this theory has not been tested in the California or Federal courts.