509 - SEC Update

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Paula Dubberly
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Faculty Biographies

Mike D. Cahn

Michael D. Cahn recently retired as senior associate general counsel – securities at Textron Inc. in Providence, Rhode Island. During his tenure at Textron, he advised Textron on a wide range of securities and corporate governance issues as well as corporate development and other legal matters.

Prior to joining Textron, Mr. Cahn was an associate at Cahill Gordon & Reindel in New York City.

Mr. Cahn is a member of the ACC's Board of Directors. He was chair of ACC's Corporate And Securities Law Committee and served as chair of ACC's Council Of Committees. He also has served on the advisory board of the ACC Docket and is a frequent lecturer and panelist at corporate and securities law seminars.

Mr. Cahn received a B.A. from Michigan State University and his J.D. from Harvard Law School.

Paula Dubberly

Paula Dubberly is associate director (legal) of the division of corporation finance at the U.S. SEC. Ms. Dubberly oversees various aspects of the division's interpretative, rulemaking, and enforcement liaison functions. Ms. Dubberly was chief counsel of the division. Prior to becoming chief counsel, Ms. Dubberly was an assistant director. Registrants in her office included Internet companies, investment banks, real estate investment trusts, and asset-backed issuers. Among some of the major projects under Ms. Dubberly's leadership have been the executive compensation rule revisions, the promulgation of Regulation AB and the 2002 requirement pursuant to Section 21(a) that the CEO and CFOs of the largest companies certify to the accuracy of their public reports.

Prior to joining the commission, Ms. Dubberly was an associate at Jones, Day, Reavis and Pogue.

Alan Dye

Alan L. Dye is a partner with Hogan & Hartson L.L.P., a Washington, DC law firm, where he specializes in securities matters.

Before joining Hogan & Hartson, he worked in SEC's division of corporation finance and served as special counsel to the SEC chairman. Prior to that, Mr. Dye served as a law clerk for the Honorable Ellsworth A. Van Graafeiland of the US Court of Appeals for the Second Circuit.

He is an active member of the ABA, serving as chairman of the securities, commodities, and exchanges committee of its administrative law section and as a member of the committee on federal regulation of securities of its business law section. Mr. Dye has written extensively on various issues under the federal securities laws, including his co-authorship of the Section 16 Treatise and Reporting Guide (Executive Press 1994), the Section 16 Forms and Filings Handbook (Executive Press 2000), and the Comprehensive Section 16 Deskbook (Executive Press 2000). Mr. Dye, together with Peter Romeo, also manages the content of Section16.net, a website for Section 16 practitioners and compliance officers. He is a frequent lecturer at professional seminars and was an adjunct professor at the Georgetown University Law Center.

Broc Romanek

Broc Romanek is general counsel of executive press and editor of TheCorporateCounsel.net and CompensationStandards.com.

Before this, Mr. Romanek was founder and editor of RealCorporateLawyer.com. In addition, he has served as assistant general counsel at a Fortune 50 company, was in the office of chief counsel of the SEC's division of corporation finance, acted as counselor to former SEC commissioner Unger, and was in private practice.

Mr. Romanek has served as chair of the ACC's Corporate and Securities Law Committee. He frequently writes and speaks about corporate and securities law; he teaches a MBA corporate governance class at George Mason University; serves on the advisory council for the SEC Historical Society and is editor of the Corporate Governance Advisor. He also is on the National Board for the Society of Corporate Secretaries and Governance Professionals and is president of the Society's Mid-Atlantic Chapter.

"How to Implement E-Proxy: Avoiding the Surprises and Making the Calculations"

Thursday, June 14, 2007

Audio Archive

Course Materials – Alan Singer's Presentation

Course Materials – Sample Calculation of Potential E-Proxy Costs

Course Materials – Broadridge

As the SEC's E-Proxy becomes effective this summer, many are wondering what the real impact this new initiative will have on their next proxy season. The answer is "a lot more than they might realize," as voting patterns and solicitation strategies may change and being prepared for third-party solicitations should now be the order of the day. Often forgotten is that E-Proxy also may force companies to make their proxy materials more "usable" on the Web. Join these experts:

- **Thomas Ball**, Senior Managing Director, Morrow & Co.
- **Joe Frumkin**, Partner, Sullivan & Cromwell LLP
- **Carl Hagberg**, Independent Inspector of Elections and Editor of The Shareholder Service Optimizer
- **Dominic Jones**, Editor, IR Web Report
- **Alan Singer**, Partner, Morgan Lewis & Bockius LLP
- **Sid Rodrigue**, Vice President, Broadridge (formerly known as ADP)

BROC ROMANEK, *Editor of TheCorporateCounsel.net*: Hi. It's Broc Romanek, Editor of TheCorporateCounsel.net. Welcome to today's webcast, "How to Implement E-Proxy: Avoiding the Surprises and Making the Calculations."

As I indicated in my blog yesterday, I really think this topic is a sleeper, primarily because we've all been so busy with the hectic proxy season. A lot of us have not focused on what the E-Proxy rules entail, particularly since they're voluntary. I do note that next week the SEC's going to have an Open Commission meeting to consider adopting what they're calling Universal E-Proxy, meaning it's mandatory. But it's not that scary, as we're going to hear later on in this program.

Before I introduce the panel, I want to remind everyone to print off the course materials that are available from the page where you link to this webcast. There are three sets of course materials – a little bit unusual for us. But hats off to the speakers that put them together because I think they'll help you understand not only what we're going to discuss right now, but also as you try to analyze whether you want to voluntarily adopt E-Proxy.

Let me go ahead and introduce our panel. This is a large panel, but there are a lot of moving parts of E-Proxy and each panelist brings something different to the table. They are the finest experts in the area. Not a lot of people know a lot about E-Proxy, but these people do.

We have Tom Ball, the Senior Managing Director at Morrow & Company, the proxy solicitor; Joe Frumkin, who is a Partner at Sullivan & Cromwell; Carl Hagberg, who is an Independent Inspector of Elections and Editor of The Shareholder Service Optimizer; Dominic Jones, who is Editor of the IR Web Report; Alan Singer, who is a Partner at Morgan Lewis; and Sid Rodrigue, who is a VP for Broadridge, which was formerly known as ADP until they split off from ADP several months ago.

For the first half of this webcast or more, we're going to go through Alan Singer's slides and the other panelists will provide color commentary. Then Sid is going to talk about what Broadridge has been seeing. Tom will then go through a sample calculation of potential E-Proxy costs that he's put together. Joe will lead a discussion on third-party solicitations and then Dominic is going to talk about the important topic of how to create a usable document.

So Alan, let me turn it over to you.

Overview of E-Proxy

ALAN SINGER, *Partner, Morgan Lewis & Bockius LLP*. Thank you, Broc. As I talk about the E-Proxy rules, I'll be referencing my slides which, as Broc mentioned, are included in the course materials for the program. And to help everyone follow along, I'll refer to slide numbers. You'll find those on the bottom left corner of the slides.

Now as a preliminary note, although I will be discussing the new rules in the context of proxy solicitations, note that they'll also apply to consent solicitations and information statements.

We'll start with Slide 2. This slide addresses the key points regarding the E-Proxy rules, which were adopted earlier this year in Release Number 34-55146. These rules apply the "access equals delivery" concept to the delivery of proxy materials, namely the proxy statement and annual report to shareholders.

In a nutshell, an issuer can satisfy its proxy delivery requirements by posting proxy materials on its website and sending a notice to shareholders advising them that the materials are available. An issuer does not need to obtain shareholder consent to use the notice and access model, although it would have to provide an e-mail or a paper copy of the materials upon request. It's important to note, however, that the notice and access model does not apply to business combination transactions.

In the adopting release, the SEC noted that business combination transactions constitute highly extraordinary events for issuers and typically involve long and complex proxy statements. Therefore, the SEC was not yet ready to apply the Rule 14a-16 notice and access model to business combination transactions. However, the SEC left the door open for considering an extension to business combination transactions in the future.

Okay, on Slide 3 we're turning to the notice itself. Slide 3 shows the legend that's required to be included in the notice. Numbered paragraph 3 of the legend provides a placeholder for an issuer to insert a date by which a shareholder should request an e-mail or a paper copy of the proxy materials if the shareholder wants to obtain the materials in time to vote the proxy.

However, the regulations do not call for any specific date; the issuer will determine how much lead time it will need to deliver materials to shareholders early enough so that they can cast a vote at the meeting.

ROMANEK: Alan, let me just ask one question. The prominent legend - that language is mandatory, right?

SINGER: That is correct. And obviously, if you're dealing with a consent solicitation you would revise the language accordingly.

Slides 4 and 5 set forth the other items that must be included in the notice, although unlike the legend, no specific language is mandated. One of the more important requirements appears in the second bullet on Slide 4, namely the requirement that the agenda items and the issuer's recommendations must be described, but no supporting statements can be provided by the issuer.

In addition, the SEC has mandated that issuers must provide three specific means – a toll-free telephone number, an e-mail address and an Internet website – by which shareholders can request e-mail or paper copies of the proxy materials.

Also, shareholders are not restricted to asking for copies of proxy materials with regard to any specific meeting. If they wish, they can make a permanent request to receive proxy materials with respect to all future shareholder meetings.

ROMANEK: Now this is a question for Sid. Last I heard, Broadridge was discussing with the SEC Staff the language that would be on the voting instruction form. And obviously that language would be important for a lot of issuers to see because then they could perhaps match their proxy card language to what's in the VIF. Do you know if the specific language has been finalized?

SID RODRIGUE, *Vice President, Broadridge*. We are still working with them to get final approval on that language. We should have that within the next week – obviously before the end of this month when it kicks off.

We have implemented language since March '07 where we've been requesting the preference choice from the shareholder on the voting instruction form. That language has already been improved and it is in fact, in place.

CARL HAGBERG, *Independent Inspector of Elections and Editor of The Shareholder Service Optimizer*. Can I make a point on Slide 6? One of the choices noted correctly here, is that you can't send anything

with the notice except for these two items. And the first one is a pre-addressed, postage-paid reply card for requesting a copy of the proxy materials. My advice would be don't do that. Give people the toll-free number. Let them call that. If a holder feels they need to get this material in order to cast their vote, sending back a postcard is the longest possible way around the horn. So I wouldn't be giving them choice if it were up to me.

SINGER: Okay. We're almost there, Carl. I'm just going to conclude a couple of things on Slide 5 and then I'll address the Slide 6 requirements.

HAGBERG: Oh I'm sorry. I thought you had passed that Slide.

SINGER: That's okay. Slide 5 has the final couple of requirements with regard to the notice. And it points out an important proviso for the requirement that the notice include instructions on how to access a form of proxy.

While the notice is required to provide information as to how a proxy can be accessed, it cannot enable a shareholder to execute a proxy before the shareholder actually has access to the proxy statement. In other words, an issuer cannot include in the notice a telephone number through which a shareholder can place a proxy vote.

The SEC included this prohibition because there is no assurance that a shareholder using the telephone number would have access to the Internet. Such a toll-free number can be placed on the website that provides the access to proxy materials because the use of the telephone number in that context will indicate that the shareholder did in fact have access to the Internet.

And now we are on Slide 6. I've entitled this slide "The Notice Must Stand Alone" to emphasize that very little additional information can be added to or accompany the notice. The state law mandated notice of shareholder meeting can either be included in or accompany the notice.

The notice may also state that no personal information other than an identification or control number is necessary to execute a proxy. The SEC added the optional inclusion of this statement in response to commenters' privacy concerns. And we'll address other responses to privacy concerns shortly.

Finally, in addition to the notice of shareholder meeting, the only other document that can accompany the notice is a pre-addressed, postage-paid postcard for requesting a copy of the proxy materials. And as Carl has indicated, sending back a postcard is probably the slowest way for a shareholder to actually get these materials.

Slide 7 indicates that plain English principles will apply to the notice, which means short sentences, everyday words, active voice, no legal jargon, etc. Issuers can use logos, but the logos can't obfuscate the content.

Now we're on Slide 8. We've talked about the contents of the notice, so let's turn to requirements relating to the issuer's website. The rules require that the website address in the notice be specific enough to lead shareholders directly to the proxy materials, although as indicated by the sub-bullet on this slide, it would be permissible to direct shareholders to, for example, an investors' page that includes a prominent link to the proxy materials.

The proxy materials can be on the issuer's website or another publicly accessible website, although I would imagine that most issuers would make the materials available on their own site. In any event, an issuer cannot satisfy these rules by linking shareholders to the SEC's EDGAR site.

In addition, in order to assure that shareholders can obtain access to the materials immediately upon obtaining the notice, the rules require an issuer to post the materials on the website by the time the notice is sent to shareholders. Any additional soliciting material must be posted at the time it is first sent to shareholders or otherwise made public.

The requirement that the materials have to be presented in a format convenient for both reading online and printing on paper is an interesting one. In the adopting release, the SEC speculated that it might be necessary for companies to provide proxy materials in two formats. With regard to the requirement that a format be convenient for reading online, the adopting release makes it clear that the SEC is looking for a presentation in a readily searchable format such as HTML. The format convenient for printing on paper must provide a version of the proxy materials that is substantially identical to the paper version of the materials, which I think in most cases means PDF. The adopting release suggests that under current technology, it might be necessary to post the materials in two different formats.

However, following discussions with the SEC Staff, I understand that the Staff is rethinking whether PDF may be a suitable format, both for reading online and printing, because of the enhancements in search functionality of PDF files over the last few years. Moreover, the SEC now posts its own releases in PDF format rather than HTML, as formerly was the case. The issue likely will be addressed in FAQs relating to the E-Proxy rules that the Staff hopes to have released before the effective date of the rules.

And finally, the materials need to remain posted on the website until conclusion of the meeting.

We'll turn to Slide 9. This slide addresses the prohibition on including a proxy card along with a notice when the notice is initially sent. As noted earlier, the SEC does not want persons to submit a proxy vote until it is reasonable to assume that the person has access to the proxy materials on the Internet. However, while a proxy card cannot accompany the initial notice, a proxy card accompanied by another copy of the notice can be sent ten days after the initial notice was sent.

The SEC reasoned that the ten-day period would be long enough to provide shareholders an opportunity to access the proxy materials or request a copy of the materials by the time the issuer sends the proxy card after the ten-day period is over. If an issuer does not wish to wait the full ten days, it would have to send all of the proxy materials prior to or together with the proxy card.

HAGBERG: Alan, could I make an observation and ask a question about Slide Number 8? And that has to do with the searchability and the navigability of the material.

It seems to me, if I were going to rely on this model, and I was an issuer, I would want to be 100% certain that people would be able to toggle back and forth. In other words, to navigate the document and skip back and forth. And if you want to get their vote, I think it's very, very important that they be able to go back and forth between the proxy materials and the voting site itself without being dead-ended or getting lost or cut off. Otherwise, people will give up and won't cast their vote.

I wanted to ask Sid if Broadridge was contemplating doing anything to assist issuers with that and how its own website was shaping up in terms of being able to navigate between the materials and the voting site.

RODRIGUE: Yes, we are working on a shareowner landing page that will be a central portal for enhancing a shareowner's experience. Since the focus is on the electronic, it's got to be visually pleasing, it's got to be logical, it's got to be intuitive, because it is a self-service model. We are working on the implementation of having a single source for shareowners to go to that just is an enhancement beyond our ProxyVote.com, where we can have links to the issuers' documents and also collect material preference elections and so forth.

HAGBERG: When I have paper in front of me and I want to vote against directors or I want to look them over very carefully, I would start with the first one. I'd look at their picture and their bio and I'd say, "Yeah okay, I'll vote yes on this one." I want to be able to go and cast that vote and then come back to director number 2. When you have paper, it's pretty easy to do this. But if all you're looking at is a screen, unless you can quickly toggle over to the voting site, it seems to me that you run the risk of just having people give up in frustration here.

Any thoughts on that? Will I be able to vote one director at a time – to look at the bio, come to the site and vote - or no?

RODRIGUE: I'm not quite sure if we're there yet. We're still in the final beta testing phases of it. But you raise a good point that I can address with our systems group and see if that's something that we can make available.

JOE FRUMKIN, *Partner, Sullivan & Cromwell LLP*. Can you open two browser windows onto the site? Because that would be another way of doing it.

RODRIGUE: Yes.

DOMINIC JONES, *Editor, IR Web Report*. On this issue, what Carl is raising is extremely important because the user experience that people have the first time they use this process is going to determine whether or not they'll use it in the future. This ability to seamlessly navigate between documents is vital. Having them in PDF only, as Alan mentions the SEC is thinking of doing, will make it very difficult for them to do that.

So this idea of having two formats, one in HTML and one that you can print off if you wanted to and have a substantially identical version of the printed report; you could sit with the printed report next to your computer and do what Carl is trying to do. Or if you had HTML, you could provide the ability to seamlessly link between the two – the proxy form and the HTML document.

HAGBERG: And if I could add another comment on this: If you think about what you would be doing to vote your proxy without any paper in front of you – and if you can't toggle back and forth – you'd end up saying, "Oh shucks, I have to print the whole thing out – print this PDF out." And then, "Why did I do that? I'm never going to come back to this system again. Just send me the paper in the future." So if you don't do this right, you run the risk of throwing the baby out with the bathwater by giving that bad experience the first time somebody tries it.

JONES: There's another really important point to make here. And that is when you refer to HTML, there's valid HTML and there's non-valid HTML. The HTML that we're seeing right now - 90% of it is non-valid HTML. The documents are presented in images and that really doesn't allow people to view that information in a way that is easy for them to read on the screen. It's essentially a reproduction of the

printed document.

Companies are taking photographs, essentially, of their printed annual reports and pasting those up, stringing them together in a kind of slideshow. And the text is blurry. People aren't able to increase the text to a size that is convenient for them. The entire user experience is diminished by these documents. We looked at 215 U.S. companies and only 10% of them had a full HTML annual report. And 9% of them had a proxy statement that was full HTML.

The real challenge here, and I'm sure the SEC's getting some pressure on this, is that companies have not been, to date, providing useable documents. And now suddenly realizing that this is not an easy thing to do if you're going to do it at the end of the document preparation process.

SINGER: We're up to Slide 10. And for the most part, this slide addresses the requirement that an issuer has to provide its shareholders with a means to execute a proxy as of the time the notice is first sent. However, a somewhat different gloss on this requirement is contained in the adopting release. The adopting release says that an issuer following the notice and access model must post a proxy card on the website with the other proxy materials. The adopting release then says that "in addition," the issuer must concurrently provide shareholders with at least one method of executing a proxy vote.

Now on its face, this seems somewhat confusing because the posting of a proxy card by itself would seem to provide an accessing shareholder with a means of executing a proxy vote. But what I think the SEC was getting at here was addressing a concern regarding use of a posted proxy card. Typically, proxy cards have preprinted information, often including a control or identification number. This information would facilitate both the confirmation that the person submitting the proxy card is the shareholder to whom the materials were sent, and would facilitate vote counting. A proxy card printed off a website would not provide the preprinted information and could cause administrative difficulties in connection with vote tabulation.

In a discussion I had with the SEC Staff, I was advised that the Staff was focusing on this problem by using the "in addition" language. However, the Staff also confirmed that if the issuer wanted the posted proxy card to satisfy the requirement of providing at least one method of proxy vote and did not provide any other means of submitting a proxy, that would be okay.

But, if as is likely the case, an issuer does not want the posted proxy card to be used in that fashion, it is permissible for the issuer to place a prominent legend on the proxy card stating something like, "Do not use this form of proxy to vote your shares. Please use the printed proxy card that is being separately mailed to you or use the toll-free telephone number or Internet address to vote your shares."

Now in that instance, the issuer would have to post the toll-free telephone number or website address or both to enable the shareholders to submit a vote.

HAGBERG: I could add – have a hotlink. If you're going to post the form of proxy so people can see all of the items on the agenda at one shot, which sounds actually like a pretty good idea, then you'd have a hotlink to the voting site that would let you execute that proxy. That would make a lot of sense and that would enable me to cast my vote over the Web without printing out a whole lot of paper.

SINGER: I think that's a good point.

Slide 11 deals with filing requirements. The SEC stated in the adopting release that the notice would constitute other soliciting material and therefore, it would have to be filed on the date it is sent to shareholders.

Slide 12 deals with householding. As many of you are aware, the proxy rules permit companies to household the mailing of proxy statements and annual reports. If the conditions of the householding rule are met, an issuer need send only one copy of the annual report and proxy statement to shareholders having the same address. In addition, if the shareholders have the same last name or if the issuer reasonably believes that the shareholders are members of the same family, an issuer does not have to obtain affirmative consent to household proxy materials, provided certain notice provisions are satisfied. A separate proxy card has to be sent for each account, however.

The SEC amended the householding rule to apply it to the notice and access model. However, an issuer that follows the model has to enable each household account to execute separate proxies. This means that if the issuer uses identification or control numbers for proxy voting, it has to provide a separate number for each household account.

Slide 13 discusses certain timing requirements that are applicable to issuers. If an issuer utilizes the notice and access model, the notice must be sent at least 40 calendar days prior to the meeting. In addition, because most beneficial owners are provided proxy materials through intermediaries such as broker-dealers or banks, the rules require that the information that will be provided in the notice must be provided to each intermediary in sufficient time so that the intermediary can prepare its own notice and send it out to its clients at least 40 calendar days before the meeting date. We'll talk more about intermediaries shortly.

FRUMKIN: How much time is that in practice?

SINGER: In talking with Broadridge a week or so ago, they speculated that five business days should be enough.

HAGBERG: If I could make a comment on this one, too: It seems to me – currently, and let's say through the present – that most people aren't even close to being able to post their annual report and proxy statement on the Internet until well after that 40-day period has begun to toll. I think people are going to have to really revisit their schedules and be ready probably a week or more earlier than they normally would be, when they're just relying on throwing stuff into the mail and having those proxies come back. Sid, do you have any thoughts on that?

RODRIGUE: I'd agree. The schedule of that definitely has to be accelerated somewhat. But if you look at just mailing traditional packages, we usually recommend 30 to 35 days out from the annual meeting. So you're really looking at about a five to seven-day window.

HAGBERG: Sid, I think you can vouch for this, that many people are barely able – in fact, they're lucky if they're getting their stuff in the mail 30 days or 25 days before the meeting. And now you have to be ready not only with your material but with a posting. It has to be live on the Internet 40 days ahead of time. So this is a substantially different kind of schedule, I think, than most people have been adhering to.

RODRIGUE: Yeah. Absolutely. There are some different timing requirements here.

JONES: The issue with the PDF is not – it's not going to be difficult to create a PDF from the printed

annual report and proxy – it will be very quick.

The difficulty is with the online version. And if you leave that to a point where you've completed your documents and then you start thinking about how you're going to create an online version, you're going to have difficulty. So you really need to move that forward and begin thinking about that early on in the process so that you're working on it while you're producing your material.

SINGER: As I mentioned previously, the notice must include an e-mail address, a toll-free telephone number and an Internet address by which shareholders can request paper or e-mail copies of the proxy materials.

If the issuer receives such a request from a shareholder, it must send the materials in the requested format no more than three business days after receiving the request. An issuer must continue to honor these requests until one year following conclusion of the meeting.

In explaining the one-year requirement, the SEC noted that the proxy statement contains a portion of the total package of annual disclosure for public companies. We're all familiar with the fact that most issuers satisfy the disclosure requirements of Part III of Form 10-K by incorporating the proxy statement by reference – or at least relevant portions of the proxy statement. In addition, the SEC noted that the proxy rules require issuers to undertake to provide copies of annual reports on Form 10-K for the most recent fiscal year. So it reasoned that it is appropriate to require that issuers provide copies of the proxy materials to requesting shareholders until one year after the conclusion of the annual meeting.

We're turning to Slide 14. As I mentioned previously, shareholders requesting paper or e-mail copies of the proxy materials may make a permanent request so that they would receive paper or e-mail copies of materials not only for the particular meeting to which notice relates, but for all subsequent meetings. The rules require that the issuer maintain records of these requests, and the issuer must continue to provide materials in connection with future meetings until a shareholder revokes the request.

I've added the text of Footnote 86 of the adopting release to this slide because I think it's very interesting. Footnote 86 states that nothing in the proxy rules prohibits an issuer from structuring incentives to encourage shareholders to accept electronic delivery or the notice and access model. I guess this means that just as utility companies sometimes offer gift certificates to subscribers who agree to take electronic delivery of their bills, issuers may provide gift certificates, free hamburgers or whatever to shareholders who are willing to revoke their request for e-mail or paper delivery.

We're on Slide 15. The rules reflect the SEC's response to concerns of commenters about the security and confidentiality of shareholder information that may be transmitted over the Internet. The rules provide generally that an issuer needs to maintain the website on which the proxy materials are posted in a manner that does not infringe on the anonymity of the person accessing the website. The slide lists several prohibitions set forth in the rules or addressed in the adopting release that are designed to achieve that result, including no tracking of a user's identity, no use of cookies, no use of the e-mail address of a shareholder requesting an e-mail copy other than, of course, to send the e-mail copy to the shareholder, and no provision of the e-mail address to other persons except where those other persons are assisting in the distribution of proxy materials.

ROMANEK: Dominic, do you want to talk a little bit about privacy?

JONES: This is going to be an issue for probably 100, 150 companies that are currently using tracking tools to keep tabs on what individual shareholders, analysts and portfolio managers are doing on their investor relations website. These tracking tools may also be used on HTML annual reports and proxy statements.

These companies using these will not be able to do so if they decide to use this E-Proxy process. This could cause some difficulty for a few vendors that are integrating these tracking tools into their product. So they may have to turn this off for their clients. But it's an issue that quite a few companies, and very prominent ones, probably aren't aware that they have because they're not quite sure how they are tracking people's use of their website. And the items the SEC lists here are precisely how it is being done by these vendors.

HAGBERG: If I could add something too, Dominic, Slides 14 and 15 raise another set of issues. And that is that many companies have very cleverly – and investors actually have welcomed this – allowed people to sign up to have their e-mails filed and to get updates of various kinds – offers, and deals of various kinds. Some, in fact, have been giving investors incentives – that they will pay lower fees for dividend reinvestment or that the company will pay all the commissions on dividend reinvestment account for holders who agree to receive all their materials electronically.

There is the need, in my opinion – and both from the corporate perspective and from the investor perspective – of having the ability to say, "Yes indeed, please feel free to use my e-mail address to send me my statements, to let me know when they're posted, to tell me when the quarterly report is posted up there." We need to be sure that the system doesn't fall afoul of these rules. Maybe for some people they're going to have to have two different systems or they'll have to have a box where people can check off and say, "I have no issue with the issuer using this to send me other materials." So it's something that needs to be thought through with a little more care.

ROMANEK: For companies out there that are using third parties to help them with their IR function on the Internet, the takeaway for you is to go ahead and question your service provider about exactly what kind of tracking is being done– because you shouldn't rely on the service provider to make sure you're in compliance with this new SEC law as they may very well not be fully aware of it or they may wait for you to tell them to turn it off.

JONES: There are a number of issues here because you could inadvertently breach someone's anonymity on the site. You really have to do some due diligence on the way you're tracking because you could be tracking people on another section of your corporate website and they move over to the investor section and you know who they are. Then they go off and vote and you can see that somebody voted a huge block of shares. You basically know who they were and how they voted. So there's a lot of work that companies need to do, just to be sure that they're not contravening this particular issue.

HAGBERG: Right. And also not making it impossible for people who want to get e-mails pushed to them by the company, who don't want to close that door. There are a lot of people who would rather have their dividend reinvestment statement or their quarterly report or whatever pushed to them. So you want to be sure that you don't inadvertently close off that opportunity in the way you're designing your site.

SINGER: Let's turn to Slide 16 now. We've talked about the requirements of the rules as they relate to issuers. Slide 16 begins to address how these new rules affect intermediaries.

The rules relating to intermediaries are significant because securities of many, if not most, larger public companies are held largely through intermediaries. And by intermediaries we're talking about banks, broker-dealers and other institutions that hold shares for the accounts of their beneficial owner clients.

Actually, there is an additional step involved because most shares held by these institutions are in fact held of record by Cede & Co., which is the nominee name for the Depository Trust Company, or DTC. In connection with shareholder meetings, DTC will issue an omnibus proxy providing to its participating institutions a proxy to vote the shares held of record by Cede & Co.

In the current paper-based model, the intermediaries, or to be more precise, in many instances Broadridge, which is retained by the intermediaries, sends a request for voting instructions to the beneficial owners. If they return those instructions, Broadridge submits voting information on behalf of the intermediaries. As I'll get to in a bit, in certain instances even if they don't return their instructions, Broadridge will submit voting information to the extent that the brokers have the authority under applicable, typically New York Stock Exchange, rules to vote the shares.

The SEC fashioned the new rules to accommodate the notice and access model to the intermediary solicitation of voting instructions. Specifically, the rules provide that if the issuer tells the intermediary that it intends to rely on a notice and access model and provides the information required to be included in the issuer's notice, the intermediary must prepare its own notice. This is not an option for the intermediary. If the issuer uses the notice and access model, the intermediary must utilize the notice and access model. Conversely, if the issuer does not use the notice and access model, the intermediary typically cannot follow that model. However, in the context of a contested election, if another soliciting person utilizes the notice and access model and appropriately advises the intermediary, then the intermediary would use the notice and access model with regard to the other soliciting person's proxy materials.

This does not mean that a broker cannot continue to seek the consent of its clients to electronic delivery outside of the notice and access model. If the client affirmatively consents, the broker can deliver proxy materials electronically.

We're on Slide 17. If an intermediary is using the notice and access model, it must establish a website where beneficial owners can access the request for voting instructions. The intermediary may but does not have to include the proxy materials on the website that it establishes. If it chooses not to do so, it can reference the issuer site.

Generally, the website requirements applicable to issuers, including the timing requirements, the means to execute a proxy – which in this context means to execute the voting instructions – the format requirements and proxy requirements would apply here.

HAGBERG: Alan, could I interject here, too? Your middle point on Slide 17 says, "Yes, you can use the issuer's own website."

But I would say, "Boy, do that at your peril," because then, yes, you can hotlink over to the issuer's site but then you can't get back to the voting site. So you've again pretty much cancelled out any chance that that holder will be voting a proxy using this method. I would say that using the issuer's site to post proxy materials would be the least preferred thing to do unless you as the issuer are also tabulating the votes.

FRUMKIN: What's Broadridge intending to do?

RODRIGUE: As I mentioned earlier, we're going to have a Web portal that's going to be a single source for shareowners to go and vote and have the option of viewing material. So it's going to be the issuer's choice of whether they want to utilize that or not or they want us to link to their own website.

HAGBERG: But the risk of being just dead-ended – once you link over there it's like you can never get back. So then you throw up your hands in utter frustration and anger and you never come back to that site again. That's been my experience.

SINGER: Well I guess then the advice for issuers would be that if they want to maximize the opportunity to obtain votes from beneficial owners, it would make some sense to advise Broadridge that they can link.

HAGBERG: Correct. And you also want to maximize the opportunity of people to be completely satisfied there, so they don't call that toll-free number then make you send them that whole package separately. That's the worst of all outcomes. You're better off to have sent it to them in the first place bulk rate mail than to have to send it to them in onesies and twosies later on when they wake up in dismay. So quite an important consideration, I would say.

SINGER: We're on Slide 18. We're talking here about the intermediary notice. The intermediary notice generally will provide the same kind of information as the issuer notice but modified to address beneficial owners, who will be the persons to whom the intermediary notice is directed. It's helpful to look at the discussion of this aspect of the rules in the adopting release because the adopting release provides some specific guidance on the content of the intermediary notice that you won't find in the regulations themselves.

Among other things, the intermediary would have to provide its own contact information to service requests from beneficial owners for paper or e-mail copies of the proxy materials. In addition, if the intermediary is a broker-dealer, it has to describe the effect of applicable rules permitting broker-dealers to vote if the beneficial owner does not provide voting instructions. For most broker-dealers this means New York Stock Exchange Rule 452, which will apply to broker-dealers who are members of the New York Stock Exchange, even if the issuer is a NASDAQ issuer. As many of you know, under Rule 452, brokers are permitted to vote on so-called "routine matters" such as ratification of the selection of auditors and, at least for now, election of directors in uncontested elections, even if the broker does not receive voting instructions from the beneficial owner. Other requirements relating to the issuer notice, including limitations on additional or accompanying materials and plain English requirements, apply here as well.

We're on Slide 19. Here we'll discuss the timing requirements for intermediaries, which get a bit more complicated than the requirements that apply directly to issuers. The timing requirements, as we noted previously, begin with the requirement that an issuer has to provide the information contained in the issuer notice in sufficient time so that the intermediary can prepare, print and send the intermediary notice at least 40 days prior to the meeting. As I mentioned before, Broadridge told us that it thinks five business days will be sufficient time. I think I heard five to seven in the course of this presentation a little earlier.

RODRIGUE: It's actually five.

SINGER: Five? Okay. Five business days for it to send a notice on a timely basis. Since I suspect that they'll be sending out most of the intermediary notices, that's a pretty good guideline. As is the case for issuers, the intermediary has to send the intermediary notice at least 40 days prior to the shareholder meeting.

There is a different timing requirement for soliciting persons other than the issuer in contested elections. Because other soliciting persons often will not have advance notice with respect to when an issuer intends to send its notice, intermediary notices, with regard to the proxy materials of other soliciting persons, can be sent as late as ten days after the issuer sends its notice. Of course, if the issuer notice is sent more than 50 calendar days prior to the meeting, the intermediary notice with regard to the other soliciting person would be subject to the standard 40-day requirement.

If an intermediary client requests a paper or e-mail copy of the proxy materials, the intermediary must then request those materials from the issuer within three business days after it receives the request from its client.

We're on Slide 20. The timing requirements continue on this slide. As we mentioned before, when the issuer receives a request for the paper or e-mail copy of the materials, it must send a copy to the intermediary within three business days after receiving the intermediary's request. And then, in turn, the intermediary has three business days after it receives the copies to send the copies to its clients.

Now there are a lot of steps here and it will be interesting to see if this timetable will provide for the submission of e-mail and especially paper copies to beneficial owners so that beneficial owners have the ability to review the proxy materials and vote on a timely basis.

We discussed before that the regulations do not permit a proxy card to accompany the issuer's initial notice, but that a proxy card could be sent together with another notice more than ten days after the initial notice is sent. In a corresponding fashion, if an issuer, or for that matter another soliciting person, makes the request, an intermediary must send to those shareholders that are specified by the issuer or the other soliciting person, as the case may be, a request for voting instructions together with a copy of the intermediary notice ten or more days after the initial intermediary notice was sent. Now keep in mind, of course, that an intermediary doesn't have to do any of this if it does not receive assurance of reimbursement of its reasonable expenses.

We're on Slide 21. We mentioned before that under the new rules, issuers are required to keep a record of persons who have made a permanent request for delivery of paper or e-mail copies of proxy materials. A similar requirement applies to intermediaries. But the intermediary requirement relates to all securities that are held in the beneficial owner's account at the intermediary. This reflects the SEC's observation that intermediaries typically keep records of whether a beneficial owner has affirmatively consented to electronic delivery of proxy materials on an account-wide basis rather than on an issuer-by-issuer basis. The adopting release states that the intermediary notice must clarify that a permanent election to receive copies of the proxy materials in paper or e-mail form will apply to all securities in the beneficial owner's account.

On Slide 22, we're going to turn to the regulations as they relate to other soliciting persons. This will come up, obviously, in the context of contested elections. Because we've touched on other soliciting persons on a couple of occasions, it'll be no surprise that the notice and access model will be available to these persons. In fact, these rules will likely facilitate election contests, as Joe will address in a short while.

The notice and access model reflects a major difference in delivery requirements between issuers and other soliciting persons that are under the proxy rules now – namely, other soliciting persons need not solicit all shareholders. Therefore, they need not send the notice to all shareholders and can make targeted

solicitations. What this means, for example, is that if a shareholder has a permanent request to receive paper copies, the other soliciting person can determine not to solicit that shareholder at all. However, the other soliciting person must provide a paper or e-mail copy of its proxy materials if it sends the notice to a shareholder and the shareholder requests a copy.

In addition, as indicated previously, the deadline for sending the other soliciting person's notice can be shorter than 40 days prior to the meeting and can be as late as 10 days after the issuer sends its notice, assuming that the 10-day period would end later than 40 days prior to the meeting.

We're now on Slide 23. As mentioned previously, an issuer is required to list in its notice each matter that will be considered at the meeting. The other soliciting person may not know all of the matters that will be considered at the meeting. So it would be difficult for the other soliciting person to comply with this requirement. Therefore, the rules provide that the other soliciting person need only list those agenda items that he or she is aware of.

The other soliciting person's notice will, however, have to state that there may be additional agenda items and that the shareholder executing the other soliciting person's proxy card will not be directing a vote on the other agenda items. In addition, the other soliciting person's notice needs to address the possible invalidation of a shareholder's earlier vote on those other agenda items. As many of you know, in contested elections, proxy cards often include language indicating that the shareholder, by executing the proxy card, revokes all prior proxies.

Now if a shareholder votes on an issuer proxy card that may include, for example, a vote on a benefit plan, and then signs the other soliciting person's proxy card that does not address the benefit plan and the other soliciting person's proxy card has language revoking earlier proxies, the shareholder's vote on the benefit plan would be revoked. In that instance, the other soliciting person's notice must indicate that the invalidation of the vote on the benefit plan will occur.

HAGBERG: I'd like to offer a practical tip on Slide 23. This is an excellent slide. And it's easy to read this and think "Oh well, this is never going to apply to me." But I think as we'll probably be discussing later, I think almost everybody is expecting more of these Internet-only solicitations to come out of the woodwork. And so this may very well be a real-world consideration for a lot of the people who are listening to this webcast.

My advice would be if you know that somebody is soliciting proxies with a short slate, let's say, or a full slate of directors, you probably would want to clue them in as to the other items that are on the ballot. And normally the contestant would be happy to include them on his ballot too so you don't have the kind of nightmare outcome that you sort of outlined, Alan.

So, if somebody is going to solicit against you, I think you'd be wise to clue them in as to what other items were on the agenda. And make sure that they got onto his proxy card so you wouldn't have the worst of all outcomes that could indeed happen to you.

FRUMKIN: Could the contestant also provide in its proxy that it's a limited revocation of prior proxies so that it's only a revocation with respect to the matter of its being contested?

HAGBERG: In most of the proxy contests I've seen, the contestant will usually print out all of the items that are up for a vote, as long as everyone's paying attention here. And you could eliminate the revocation

part, but you probably don't want to do that if you're the contestant. It's the latest dated one received that's the one that counts.

THOMAS BALL, *Senior Managing Director, Morrow & Co*. Right. You'd have a problem if you had two proxies because you can only appoint one proxy committee. So you couldn't have a limited revocation of a prior proxy. And the other thing to Carl's point of informing a dissident that they should put all proposals on their card, another way to look at that strategically is maybe you don't want to tell them that so you can tell shareholders, "Look, if you want to exercise your full vote, you should vote management's card."

HAGBERG: Yes, except though if he gets 51% and then your other proposals don't pass because they weren't on his card, then you're in a very bad bind. You would have to have a new meeting to ratify your auditors. So I don't think you would really want to do that. You'd want to consider it carefully.

BALL: Directors are usually the most important issue. And if you have to lose on one other issue to get your directors elected, you might choose to do that.

SINGER: While we're on the subject of proxy contests, Slide 24 focuses on an important component of the new rule's approach to proxy contests, namely amendments to Rule 14a-7. This rule provides alternative means of facilitating the delivery of the other soliciting person's proxy materials. Under the rule, delivery of the other soliciting person's proxy materials can be effected by having the other soliciting person provide the materials to the issuer, who would then send the materials to shareholders.

Alternatively, the issuer can provide a shareholder list to the other soliciting person, who would then send out the materials. Except in the case of a going private or roll-up transaction, the alternative used is at the option of the issuer.

Under the new rules, if the issuer provides the shareholder list to the other soliciting person, the issuer must identify the shareholders that have made a request for paper copies of the proxy materials so that the other soliciting person does not use the notice and access model with regard to the requesting shareholders. The other soliciting person can choose to send paper copies of its materials or it could choose not to send materials to the requesting shareholder at all. Due to privacy concerns, however, the rules do not require the issuer to identify shareholders who have requested e-mail copies of the materials.

In thinking about that, I guess what could happen is that the other soliciting person may send a notice to someone who has made a request for e-mail copies of the materials. That person may then direct a request for copies of the e-mail materials to the other soliciting person. And the other soliciting person would then have to deliver an e-mail copy of those materials. It would not have the choice of opting out of doing so at that point.

If the issuer is forwarding the other soliciting person's proxy materials, the other soliciting person cannot seek to have its notice delivered to persons who have requested paper or e-mail copies of the materials. It would have to provide those materials in the requested form.

FRUMKIN: On Slide 24, I'd also note that listeners should be aware that there are also state law statutes which permit access to shareholder information, shareholder lists. I think that you can expect that dissidents would make use of that avenue to get information and e-mail addresses, as well as 14a-7.

SINGER: All right. That takes us to Slide 25. And as indicated on Slide 25, the new rules become effective on July 1, 2007 and early adoption is not permitted. This means that the notice and access model can first be used for shareholder meetings that will occur on or after August 10 of this year, which is 40 days after the July 1 effective date.

The SEC has proposed making the notice and access model mandatory and in the proposing release stated that if it decides to make the notice and access model mandatory, the requirement will apply to large accelerated filers on January 1, 2008 and to other issuers on January 1, 2009. I understand that the SEC is actually going to be considering making the rules final. Broc, I think it's within the next week or so?

ROMANEK: Next Wednesday.

SINGER: There's been widespread comment that the January 1, 2008 date is too soon. In fact, more than half of the commenters on the proposal have indicated that additional time should be provided under the voluntary rule to gauge how the notice and access model has operated and whether any adjustments are advisable. And I guess we'll find out Wednesday whether or not those commenters have successfully convinced the SEC. *[Ed. Note: In adopting the rules requiring all issuers to post their proxy materials on the Internet, the SEC did not change the proposed effective dates. The universal Internet availability rules will become effective for large accelerated filers, other than registered investment companies, on January 1, 2008; and for other issuers, including registered investment companies, and other soliciting persons on January 1, 2009.]*

HAGBERG: When these rules come out, I think we have to pay very careful attention to what they mean when they say the notice and access model will become mandatory. My interpretation would be that yes, they're going to make it mandatory that you post your materials on the Internet 40 days ahead of your meeting in a searchable format. And perhaps in a printable format too. But it doesn't mandate, of course, that you use that model, but that the materials be there. That's the way I would interpret this. I think we will have to look very closely at what is said and what it means to say, "This model is now mandatory."

I don't believe that they're going to try to say to everybody, "Oh yes, you must use the model." What they're really saying is, "You must have the material live on the Internet in searchable and printable form 40 days ahead."

SINGER: I think the real key is that it would be mandatory in the sense that you would have to provide the notice and you would have to provide access. But that doesn't mean that you're precluded from utilizing traditional methods of proxy solicitation.

HAGBERG: Correct. To me, the operative word here about making it mandatory, what they're really going to make mandatory, if I'm understanding all this correctly, is that on whatever day they pick, you have to have your materials live and on the Internet in the format that they ultimately dictate. And that for many people – as Dominic said, for like 90% of the companies in America – this is going to be a new set of tasks for them: Something that they haven't tried before or done before.

SINGER: I think in essence, what it really means is that once what's called the "universal Internet availability model" is adopted, then at that point issuers would have to deal with posting the proxy materials on their site and sending out a notice at least 40 days prior to their shareholder meeting. But again, and I think it's important, that doesn't mean that they can't send out proxy materials by mail in the traditional way if they want to focus on that form of solicitation. And if they send the notice together with

a full set of proxy materials, the 40 day requirement would not apply.

HAGBERG: Right.

SINGER: The last slide is a slide that sets out certain timing requirements for issuers with regard to the various requirements under the new notice and access model. It includes rule references, which hopefully would be helpful to people using these materials. And that, in a pretty big nutshell, is the notice and access rules.

ROMANEK: Alan, thank you very much for the presentation. It was great. This last slide really brings home one point, and that is something I blogged about today: every company is going to have to re-look at their time and responsibility schedules if they're going to be using voluntary E-Proxy at all, because the amount of time that you plan out when you need to post something - and when you need to file something with the SEC and when you need to give it to Broadridge - it's going to be significantly enlarged.

As I blogged about today, there's a sample time and responsibility schedule put together by John Newell – I want to thank John – that's 20 pages long that covers many of the different types of issuers out there. That is now available for you to download and look at. So you will want to look at what John has prepared, as well as this slide here to compare against what you've used in the past.

When the SEC does put out some interpretive points, let me raise a few issues that hopefully will be addressed by the Staff in their guidance. One is Rule 428 and the ability to deliver to plan participants electronically. Rule 428 was not amended when these voluntary E-Proxy rules were adopted. I know the SEC is considering guidance on whether plan participants can be delivered to electrically. There is some 1996 interpretive guidance, FAQ #1, if you remember back to the so-called "interpretive Internet releases" - that might work here. But we need to hear it from the Staff whether that's going to work.

SINGER: Broc, just for everyone's information, the interpretive release is Release Number 33-7288. That was issued on May 9, 1996.

ROMANEK: One question I've gotten during the webcast is something that that I am not sure if anyone on the panel knows. This might be something for the SEC to address. But one E-Proxy requirement is that the notice requires a toll-free telephone number. But is there such a thing as a toll-free international number?

JONES: Yes, there is an international toll-free number. [*Editor's note*: more information about these numbers is posted in our Q&A Forum if you use the search term of "toll-free.]

ROMANEK: Okay. So there's an easy solution to that one. Then Keith Bishop e-mailed me something I'm going to blog about on Monday and it deals with California's complicated electronic communications law that apparently requires an unrevoked consent that potentially causes a state law conflict – that will impact a large number of companies.

Issuer Options and Concerns

ROMANEK: Let me turn it over to Sid to talk about Broadridge. I know that everyone at Broadridge has been out talking to their constituents, so you probably have a pretty good feel for whether companies are thinking of doing this and then what sort of issues are arising.

RODRIGUE: Thank you, Broc. The presentation we're going to be referencing is the "Notice and Access Issuer Options and Concerns". What I hope to do here is just outline some considerations that issuers have to take into account, as well as what Broadridge is currently up to in - and around - notice and access.

On Slide Number 1, just to tell you what we've done in preparation before July 1 hits, we've been collecting material elections. We've been doing this since the week of March 19, 2007. And we've been collecting the material elections on the current voting instruction forms, as well as through telephone and Internet voting as well. We've been loading these preference collections to a preference database. It's an expansion of our current preference database where we currently house preferences from the shareowners for householding and electronic delivery. This is just an expansion of that. Anyone listening out there that access our Web portal now, ICSonline, we will make this information available soon. It's going to be up probably just before the kickoff of July 1.

As of today, we've collected about 700,000 shareowners that have elected to receive the hardcopy materials, which represents – based on what we've mailed out – about a 3% to 4% return. That's not to indicate that you won't have more individuals that elect to receive it in hardcopy form, it's just those 3% to 4% paid attention to the actual information as far as collecting that consent.

These elections will be applied to all notice and access mailings, should the issuer choose to do so. And those preferences will be honored throughout all securities within their indicated brokerage account. The material elections process will continue to be offered to shareowners under the current rule and they may change once we have the Web portal up that we discussed. By utilizing their control number, they may go in and change and have the opportunity to change their preferences and elect preferences at that time.

Moving on to Slide 2, we'll talk a little bit about current implementation. We've already had several issuers come to us and indicate that they are going to use some form of the notice and access model for meetings as early as August 10, 2007. That's your 40 day window from July 2, which is the first week-day after July 1.

The issuers can choose between the traditional process or a notice and access model - meaning it doesn't have to go all one way or another. We can work with issuers to help them develop a targeted approach utilizing things such as share range analysis, geographic analysis, as well as basing whether they are heavily held institutional versus retail. So there are a couple of different ways that we can slice and dice this to be the most cost effective means possible.

HAGBERG: Could I ask you about this collecting the preferences here?

RODRIGUE: Sure.

HAGBERG: Three or 4% say, if I'm hearing you right, "I want paper, I don't want to be part of this." But in your preference collecting, is electronic delivery now the default?

RODRIGUE: It's actually going to be the last election that they've indicated to us will be the default. So if they've previously selected electronic delivery consent and they've now changed that to paper, they will receive it in paper form.

HAGBERG: But if they don't choose a preference, it will go the old way? Would that be right? It's not

the same as having their affirmative consent.

RODRIGUE: That is correct. If they have not elected a preference and we do have electronic delivery consent prior, then that will be the default.

HAGBERG: But if you have not had electronic delivery before, sending out a form asking people for their preference won't result in them defaulting to electronic. Is that correct?

RODRIGUE: That is correct. What we're hoping to gain with this information is a little bit of a prequel to what to expect if an issuer chooses to adopt the notice sending out to shareowners; how many people so far we've collected that have indicated they do want to receive it in paper form and you won't obviously have to send a notice to those individuals. Does that answer your question?

HAGBERG: Yes it does, thanks. As a comment, in Canada where they've had this for a couple years now, this is consistent with what has been happening up there. Only 2% to 5% of the people say "yes, I want my paper." So your early indications seem to be about on target.

RODRIGUE: Yes. Alan was very good at describing that to use notice and access, issuers are obviously going to have to meet some new requirements and there are going to be changes to the timelines, there is going to be a material management aspect, fulfillment, warehousing, the three days that the intermediary has to provide this information, and also Web hosting and document conversion. So there are a lot of additional things to consider as far as adopting this. And issuers are aware of that, the ones that I have discussed this with, and they are looking to various service providers to find what tools are out there and available that will meet these needs.

The issuers do need to balance several factors to make the right decision and some of those being the new requirements. I'll discuss these in the next slide as some of the key points in developing a strategy.

That moves us to Slide 3. The first and foremost probably key point here is quantifying all the costs under both the traditional distribution model and the new notice and access model. It's got to make sense from a cost perspective, and I know Tom is going to get into that in a moment with his analysis. But some of the key points here are determining print unit costs at shorter runs. Obviously there is a potential for print savings, but at a reduced run the unit cost probably will increase over a larger run, so you lose some economies of scale there.

You'll have potential postage savings and costs associated that you'll have to balance in how you determine what targeted distribution model do you want to go with, how many traditional packages versus the notice and access. And then you do have to make some assumptions first here on fulfillment costs in the short and the long-term for that full year that it has to be made available to shareowners.

Another key point of consideration is identifying voting patterns and any concerns there. And this can be based on both historical and future conditions as well as participation. We have a lot of historical data that we can provide on the beneficial side and that may help in making some decisions here on who receives it hard copy versus notice.

Construction of a new timeline we've discussed. The orientation will reflect the earlier creation of the documents. Obviously live at 40 days is a concern for the notice mailing and have that to be able to be made available. So there are going to be some accelerated timetables for you to consider.

Then how to support the model of choice, what tools are going to be made available to the shareowner, and how to collect and maintain and manage their preferences. As we discussed earlier, the success of this electronic experience is going to be largely based on the service that they receive online. So as we discussed earlier, the Web-based requirement is going to be fundamental to the success of the new notice and access model, so it should be visually pleasing, logical flow, intuitive in nature. So the experience should be one of self-service from the shareowner perspective.

Moving on to Slide 4 and continuing along the theme of developing the strategy a little bit more, this is a little bit repetitive, but just for emphasis on the SEC timelines and some of the identification of savings. The notice must be mailed at least 40 days prior to the meeting date. Meeting related documents including the proxy statement, the annual report and the 10-K must be completed to that notice mailing. The disclosure documents must be available in both electronic and in paper form for up to one year after the meeting date. So that's 40 plus 365. The shareowner request for material must be fulfilled within the three business days of the shareowner request. And that's three business days if it's gone to the issuer and then to the intermediary, so that could be six days potentially. And then costs and costs savings, we discussed this a little earlier, determine the print unit costs, determine the postage unit costs and then estimate some initial shareowner material request which we gathered some information in that area. There are some other tools that can be implemented to do some of this to get that information prior to the actual mailing.

And then estimate the long-term fulfillment. And in Year One it's going to be somewhat difficult to pinpoint. It's going to be a learning curve for everyone here. By Year Two we feel most people should be pretty comfortable with what kind of response rate they're going to get from their shareowners should they choose to adopt the notice and access model.

SINGER: Can I mention one thing about the timetable?

RODRIGUE: Sure.

SINGER: What we're really dealing with is nine days, and maybe even more than nine days, because what will happen with regard to a request through an intermediary is that if a beneficial owner requests through an intermediary that the beneficial owner be provided with copies of the proxy materials, the intermediary then has three days to go to the issuer who then has three days to send the material to the intermediary, who then has three days to send it to the beneficial owner. So that's nine days. And in addition, if the sending involves the U.S. mail, we're probably adding a couple of days to each of these steps as well. So this could start to crunch up against the time by which timely delivery, at least for a vote by a beneficial owner, would be possible.

RODRIGUE: Alan, you're absolutely right. There is the potential for that. One of the things Broadridge is implementing is the ability to provide warehousing and fulfillment for issuers in regards to this timing so that once the request comes in, it's fulfilled directly from our facility.

SINGER: Okay.

JONES: There is potentially some PR issues around that too. I recall the *Wall Street Journal* several years ago testing how responsive companies were for printed annual reports, etc. So look for the media to test this model potentially and "name and shame" companies that don't meet the deadlines.

ROMANEK: Sid – and maybe this is a question also for Tom – I've heard that there is an East

Coast/West Coast split in mentality. So far, I hear that more companies on the West Coast seem to be receptive to testing the waters and doing voluntary E-Proxy compared to the East Coast, where companies are either thinking of not doing it at all or trying a bifurcated approach (ie. where smaller retail investors will get paper but the larger holders will get the voluntary E-Proxy). What have you been hearing?

BALL: I think Sid can talk to this in terms of the broader scope in terms of number of companies. I think we've got a smaller sample to work from, which would be our clients and so I don't necessarily see that bifurcation. I think it's just, for us, across the board just a lot of questions about what's involved. I know we have two companies that are looking at it. These are companies that have meetings coming up in the Fall and are most likely to do it, and it's not necessarily a West Coast thing. But I think that Sid might have a different experience on that.

RODRIGUE: Yes, we do. We have experienced a lot of input from West Coast companies first and foremost. I think because predominantly they are 6/30 year-end companies and they would be the first available to adopt notice and access. And from the East Coast perspective, I think a lot of companies I've discussed it with, they've not gone full feet into it. They want to take the wait and see approach and see what these companies do, because they are going to be the 12/31 year-end companies that are going to implement it after the beginning of the new calendar year.

We're going to have some statistical information available from some of the companies that I indicated earlier in my presentation that are going to be implementing this early on. We can't share any company names as of yet. We would need their permission once their meetings are complete, but we'll have some information that we'll be able to share to the industry and hopefully allow people to weigh in and make a better decision and see if it's successful.

JONES: I'm assuming quite a few of these companies would be technology companies that have a shareholder base that is more comfortable with technology.

RODRIGUE: Absolutely. Silicon Valley is a hot spot right now. We've been putting on some local educational seminars and had great responses to those. Most of them are technology-based companies that are going full force with implementing notice and access.

HAGBERG: Tom, are you going to cover some of the strategic considerations here? If you're a Silicon Valley company where you've got a lot of employee ownership and you're a tech company and so everybody is comfortable with the Internet, and if you have no hot items on your ballot, it seems to me this is a slam dunk. You do this, you produce maybe 5% of the reports you would have produced otherwise and you can sleep soundly.

But if you've got issues, God forbid an active solicitation against you, or a "vote no" thing or you've had some performance issues or whatever, it seems to me that you would be really foolish to be a pioneer here because you're basically relying that yeah, it's there and people will come. They don't really have a compelling need to come and visit your website and vote unless they're really angry. So all the angry people will come to your website and vote, but the people who are kind of neutral to favorably disposed won't come.

BALL: Okay, I'm going to take a crack at that Carl.

HAGBERG: Good. Please do.

ROMANEK: Are you done Sid?

RODRIGUE: I have one more slide and actually it touches a little bit on what Carl has indicated. I would be more than happy to just go ahead and finish this up, and then we could in summary discuss it.

The last slide here, Slide 5, the voting considerations. This is a key concern, and Carl, you were going down this path a little bit. The key areas here include determining the percentage of the retail versus the institutional ownership. That's important because, depending on what proposals are on the ballot and if you're going to get that institutional support, it may make sense – a lot of these people are already set up to receive it electronically – but it may make sense to implement the notice and access model here. Identifying the voting patterns of participation is going to be key to this, and any quorum concerns.

And then on the meeting proposal concerns, whether you have some volatile proposals on the ballot from shareowner or nonroutine proposals, and then also considerations to the changes in discretionary voting that are going to be coming in January of '08. Then the reminder mailings can be done in conjunction with the notice and access model that we've talked about where the second notice mailing can go out ten days later and can be targeted again based on share range, and this can be done on unvoted positions. So there is a way to get that information to the right people to get voted. That is a concern. And that concludes my portion of the presentation.

Sample Calculation of Potential E-Proxy Costs

ROMANEK: Tom, do you now what to go over your example?

BALL: Yes. There is an illustration posted in which we go through the assumptions and try and come up with what we think the potential cost savings might be under the notice and access model. And obviously one of the main driver for using notice and access is to save money, potential cost savings. I think it's important to caution that it's not a risk free decision – look to see whether you save money or not and make your decision solely on that. You've got to consider, as Sid was saying, one of the most important things I think is the impact on the vote. As we've already touched on, you have to consider the timing issues and shareholder perception.

With regard to the impact on the vote, we don't know what it's going to be. What will the impact be if you use notice and access? I would submit that at least initially for the first year or so, it's not going to help improve your vote from your retail and your record holders. So you really need to consider, as Sid mentioned, what is the profile? How many shares in registered name, how many in retail, what has the vote been from those holders in the past. Most importantly, what are the proposals shareholders are going to vote on? What is the vote requirement? A lot of companies have switched to majority voting for directors, and if the vote is going to be impacted and you have majority voting, you might want to think twice about using notice and access, especially if you're in a position where, due to some technical foul last year, you're going to get an automatic withhold vote from ISS and Glass Lewis.

Another factor is the possible loss of discretionary voting. That's being contemplated by the SEC, but as some of you may know, brokers are starting to act on this on their own. Scottrade, which is a large discount broker, has already taken the step of eliminating broker discretionary voting. Related to that, a phenomenon that has been growing is proportional voting by brokers. Brokers such as Goldman, Charles Schwab, Merrill, Morgan Stanley, Edward Jones, are voting proportionally, so they are voting unvoted retail shares in proportion to those that have voted. But they are also carving out and not voting nonretail

shares. So if you have hedge funds holding behind Goldman, those shares don't get voted discretionarily as they have in the past.

The result of that, again depending on the profile, is and we've seen it with some of our clients, as much as 6% to 12% of the quorum has been lost. So if you've got a quorum that typically is in the 80s or high 70s and you lose 12% and you have something like majority voting and you expect withhold votes, it could get dicey. So I think it's very important to consider the impact on the voting.

The timing issue has already been noted. You're going to need realistically 50 days prior to the meeting - you're going to have to have your proxy material and report ready and delivered to Broadridge and to the other brokers. Probably could go with less time, but as things go, you probably are going to have some glitches and you might want to plan on 50 days. And so can you actually have your annual report ready on time? I know our experience here is many of our clients are hard pressed to get it ready and out 30 days prior to the meeting. So that could be a difficulty for many issuers. What is the record date requirement? Some states only allow 50 days between the record date and the meeting date. So you need to factor that in as well.

The third thing companies need to think about is just the perception. You know, are you as an issuer comfortable with this form of communication? There probably will be a backlash, certainly some confusion. Will shareholders, retail holders and record holders get upset because they didn't get a hardcopy? An alternative view here is, and I'll just throw this out is, will a company be looked at negatively if they don't use notice and access? Another reason notice and access is being promoted is because it's green. It's good for the environment. We save trees. We don't have to print. We save on ink. So if notice and access gains any steam, will companies be looked at negatively if they don't use it? It's just food for thought there.

That's my cautionary notes. Now I want to go to the actual illustration. I'm calling it an illustration. It's not a model because there are just too many unknowns at this point in terms of fees and costs. But we put this together really just to highlight, as a channel marker, things that you need to think about when assessing whether to use notice and access or not. To keep things as simple as we can, we haven't broken out transfer agent broker charges separately on all items. We also haven't listed certain charges that would be applicable under either scenario, either the current scenario or notice and access, such as mailing suppression charges, nominee fees, etc. This also doesn't take into account some of the unknown costs such as how much extra will it take you to have your annual report and proxy ready and printed 50 days in advance of the meeting.

Let's go to the illustration itself. I thought the easiest thing to do was just walk through the illustration section by section and in some cases line by line just to explain what our thinking was in putting this together.

Our first assumption on Line 1 is that your shareholders, total shareholders both record and street would be 100,000. So 100,000 shareholders who would receive proxy material.

The next section in Lines 2 through 5, which would be your current costs, assumes that the proxy is sent out bulk, that you've got a handling fee of 50 cents, your printing per unit is $3 and that you're going to print 5% more than you actually need.

Now let's go to the next section which is where we try to analyze what the cost will be under notice and

access. On Line 6 we've assumed that in Year One, 100% of the shareholders will be sent the notice. In Year Two we assume that 80% will be sent the notice. And Year Two goes down to 80% because we've assumed 20% will elect paper in Year One. And this is reflected in Line 7 where we indicate that 20% in Year Two will have previously elected paper.

Line 8 is fulfillment. I don't know, Sid if you have any thoughts. What is Broadridge going to charge on fulfillment?

RODRIGUE: We are still waiting for final comment on fees. They have not been set as of yet. But we should have those probably within the next two weeks confirmed.

BALL: Will that be set by the NYSE or is that something that you can set?

RODRIGUE: We've discussed it with both the NYSE and the SEC and so they are in conversations with us on those.

BALL: Will it be regulated, do you know?

RODRIGUE: That is yet to be determined.

BALL: Okay. Well in any case, we've assumed that 20% will request hardcopy in the first year and 10% will request in the second year. Of course this is a wild card. It's a very important number. It really impacts your cost estimates. And one possibility that we've talked about is that in Year Two you can possibly see a slight increase in the request rate, because people go through an entire proxy season, realize that they never get hardcopy, and actively seek out hardcopy in Year Two. So that might be a phenomenon to keep in mind.

On the next section, Number 9, the second notice with the proxy card, we've assumed in Year One that we would send a second notice with a proxy to 100% of the shareholders and the reason for doing that is concern about the vote. You don't know what the impact will be on the vote so to be conservative you assume you send a second notice with a proxy card which we would anticipate would get a higher vote than the initial notice. You send it out to everybody.

In Year Two you send it out to 50% of the holders because you're more comfortable with the vote. I would note here though that this is of course totally voluntary. You don't have to send out the second notice and a company could save significant money if they don't send out the second notice. Based on our assumptions in Year One, you could save about $100,000 – in Year Two about $50,000 – if you didn't do the second notice. So again it depends on your shareholder profile and how comfortable you are with the vote and what your proposals are.

Now let's take a look at the actual costs under notice and access. We've put those costs into four buckets - the Postage, Handling, Printing, and then the catch-all, Additional Costs. With regard to Postage, Line 11, we've assumed that you'll use bulk postage for holders that have previously requested hard copy. Of course this only applies to Year Two because under our illustration here we've assumed that nobody has made a previous request as of Year One. Lines 12 and 13 with regard to Postage, we've assumed as required first class postage for the notice and the second notice and for the fulfillment. Fulfillment again, big wild card here and it could be a very expensive item, $4.60 to send out that package as opposed to 90 cents if you send it out bulk rate. So fulfillment is again a big wild card here.

Lines 14 through 17 are handling fees. We've assumed 50% for handling of the paper, annual report and proxy statement as well as the notice. And for fulfillment, we've assumed a fee of $3. Again another wild card, we didn't distinguish here between broker charges and transfer agent charges. And those could be substantial. Transfer agent may charge a lot more than somebody like Broadridge, who has a lot more scale and perhaps can offer a more competitive rate. You really have to look at both transfer agent and broker charges there. We've also assumed that there wouldn't be any print on demand here because that can get to be very expensive.

The next section – Lines 18 through 21 – are printing costs. As Sid mentioned, you're per unit cost is going to go up. If you're only printing 20,000 annual reports versus 100,000, your per unit cost will go up. It's hard to say what it would be. We've assumed here that it will cost you $4.50 as opposed to $3 when you're doing the full run. The cost of design and getting that first annual report printed is where most of the money is. After that, it's mostly paper. So you do have to assume a higher per unit cost. Then with regard to the other items – proxy card notice, second notice, inexpensive items – we've assumed five cents each for those.

Then we get down to some of the real unknowns at this point – the additional costs. And these are important to consider and there's probably more we could put on this list but we put these here because if you run your illustration and you think you're close on cost and you may save a little money or not lose too much, these additional costs could make the difference in your decision.

Line 22 - the cost of the advance mailing seeking consent – if a company wants to they can go out in advance and find out if their shareholders want to receive hard copy. The reason for doing that would be that it takes a lot of the surprise factor out – or a lot of the guess work out – once you're mailing your proxy material and printing it.

What will your transfer agent charge to set up a website and phone line for requesting a hard copy? Same goes for what brokers, Broadridge, will charge for that same service. As Sid mentioned, Broadridge will provide warehousing of proxy material. If somebody wants hard copy and Broadridge has it, they can mail it out. What is the cost of that going to be? And if you're not using Broadridge, what is it going to cost you to store the material and ship it to Broadridge? And then finally, what is the material storage charge for printing on demand post-meeting? So when we put all the numbers in, plug in the variables, what we come up with is compared to the current costs of $455,000 to mail to 100,000 shareholders in Year One potentially you could lose $24,000; but in Year Two, if these assumptions hold up, you would save $78,000 and possibly more if you didn't do that second notice. So Year Two on, you could be potentially saving money.

Now again I just want to bring you back full circle to where I started, which is savings are important but do remember the vote and experience for your shareholders.

ROMANEK: Thanks. Let me go ahead and turn this over to Joe unless there are any questions on Tom's spreadsheet?

HAGBERG: Broc, could I offer a comment on this?

ROMANEK: Sure.

HAGBERG: This is a great starting document. But I think the most important point, and Tom has made it

well – it's highly sensitive to what kind of a company you are, what kind of stockholders you have, and what kind of issues you have on your ballot. I came at this a different way, saying that if I were a company where I had no particular issues and my stock-performance had been pretty good, I would order about half as many annual reports, maybe even less than I would have ordered otherwise. And I would have slept pretty comfortably that I wouldn't get many people asking me to re-start the presses. So I'd cut my postage and my printing in half right off the bat, especially after hearing from Sid and knowing that in Canada only about two or three percent of the people ever ask for paper. I think that's another way to look at the numbers. But another important point to have in the back of your mind would be just that if you do guess wrong, and you need to re-start those presses, what is that going to cost you. And sometimes that becomes a deal breaker and you say, "gee why would I even do this under those circumstances?"

BALL: I think you're right Carl. The type of company is very important. I think a public utility might not want to do this, at least initially, given the types of shareholders that they have – often elderly and often rate payers as well, so the type of company is very important in the consideration here.

ROMANEK: We have two important sections to cover. I'll go ahead and turn it over to Joe to talk about third party solicitations.

Third-Party Solicitations

FRUMKIN: Broc, thank you very much. I will attempt to be reasonably brief. I think that's made a lot easier by the excellent presentation that Alan gave.

Notice and access is going to be an important additional tool in the hands of dissidents, activists, and other third parties. It's going to be applicable and available for votes other than in connection with business combinations. So that important category will still be relegated to the world of paper proxies and electronic voting in the current sense. I think we'll see persons other than issuers use e-solicitations and notice and access for elections of directors both in connection with withhold campaigns and for election of competing either full or short slates as well as for shareholder proposals and solicitations against non-business combination matters, whether it's things like stock options or new share authorizations or the like.

I think these things will be used by shareholders in many cases, unlike issuers where, as has been discussed earlier, there is a need to really give careful consideration as to the advisability for a particular issuer given the issues it has going on and the nature of its stockholder base as to whether or not to use it. I think for third parties, using notice and access will often be relatively a straightforward decision to do so. The reasons not to use it will largely be the timing considerations that were discussed – the need for the notice mailing 40 days or 10 days after the issuer may be faster than some third parties are ready. In addition, they may conclude in some circumstances that it may just not be necessary to do a notice and access where, for example, they believe they only need to solicit 20 or 40 or 60 or 100 shareholders in order to conduct an effective solicitation.

I think in a very substantial proportion of cases, they will use notice and access and I think the reasons they'll use it are that it will become expected as a means of delivery and I think that it will be a very powerful tool in proxy contests, particularly when used in conjunction with e-mail communication. And I think that it will also be powerful because the use of HTML will create the opportunity to do things visually in a multimedia ways which will be potentially very effective as means of communicating ideas.

A lot of the fights these days are about differing ideas about the future direction of companies – also as a

way of getting attention. When you think about some of the 14a-8 shareholder proposals, a lot of times they're just trying to expose shareholders to their social point of view and increase consciousness of their social agenda. This will be another way for them to do that in a very visually powerful effective way at a very low cost.

There will be some collateral consequences that will come out of the use of notice and access. As a practitioner, I'll see some greater fluidity in proxy contests. I think there will be the ability to communicate and respond very rapidly, which could cause shifts in the perceived direction of outcomes of proxy contests.

We may see more litigation. It's possible that notice and access will lead to the same phenomenon we've seen with the use of e-mails where people write and then think and as a result of that sequence sometimes send things that haven't been fully though through. If they do that in a proxy contest, you increase the risk of posting false and misleading statements that could be subject to legal challenge. So there may be a bit more work for the lawyers in that regard.

And lastly and perhaps most important for many of the people listening to this, I think it will increase the number of communications and given that often times managements pay attention to every communication in a proxy contest, there's the risk or the potential for a substantial increase in the amount of management attention that gets diverted during proxy season to proxy contests with considering every posting and whether there's a need to respond to it and if so how to respond. This is going to make for a very interesting set of developments and is a very significant tool for third parties in connection with proxy contests.

ROMANEK: Our most recent issue of the new M&A print newsletter - *Deal Lawyers* - has a lead article about how E-Proxy impacts third-party solicitations. There's a copy of the issue on the home page of DealLawyers.com. Four questions answered in the article – how do the longer E-Proxy deadlines impact solicitation? Does a company want to disclose a counter-solicitation? Can dissidents E-Proxy if the company doesn't? And the answer there is yes. And how do state inspection statutes come into play? So you might want to look at that article to learn more.

I think this is one of the sleepers of E-Proxy is that the world is changing. ISS has a corporate governance blog and recently they blogged about examples of how third parties are already using the Internet more and more. And I know Dominic has probably got a number of examples.

HAGBERG: Can I say that I think that Joe's points were right exactly on the money. There's no question that you see change in behaviors here – and the one point that I think is very worth keeping in mind is that issuers actually need to think about being in the offensive mode rather than in a defensive mode. Rather than to be responding to allegations on other people's chat rooms, they need to be really thinking about making their own presentation good, about being geared up to be able to deliver rebuttals and fresh information as in as vigorous a manner as some of the activists will do. So I do think that it requires an adjustment of your mental set here as a result of these changes.

BALL: I think what you're going to see in terms of use of this process – I can certainly see we have a number of situations that we were involved in this year where we had 14a-4 solicitations where somebody came in after the proxy had been filed or after the deadline date for 14a-8 and ran a Rule 14a-4 campaign. And often times their agenda has nothing to do with the proposal that they're promoting, but they will go out and do a mailing to, for example, all shareholders of 20,000 shares or more through Broadridge. They

don't even bother requesting a shareholder list.

I can see this being a very effective tool in their arsenal when they can – maybe they still do the mailing to 20,000 and over and then they ask Broadridge to send out e-mail copies to every shareholder who has requested e-mail proxy material and therefore increasing their reach tremendously and complicating things for the company because it's going to be difficult to keep track of what the dissident might be doing in that type of solicitation. It can be pretty messy, in other words.

How to Create a Usable Document

ROMANEK: The last part in a sense is as important, if not more important, than what we've been talking about for the audience that we have out there today. All of you out there will now need to develop a new skill set - and that is drafting disclosure for the Internet. Really drafting disclosure for the end user. Many of us draft our disclosure documents in response to liability concerns and SEC line items. But in terms of putting this information – these filings, these documents - online a lot of us haven't learned enough about how to create them so they're easily navigable and easy to use online – something that's been one of my pet peeves for awhile.

In our "E-Proxy" Practice Area, there's an article that I wrote for *Insights* about five years ago about this topic. But Dominic Jones clearly is the foremost expert in this area. The other thing I have in the "E-Proxy" Practice Area is links to a lot of these campaign-type sites that Dominic is going to talk about.

JONES: Thanks Broc. As Joe mentioned, this is an opportunity for third parties. And companies really need to start thinking the same way. How are third parties going to be using the Internet? And Joe referenced, the ability to provide an interactive engaging experience to people when they go online to the third-party site. Companies have to be ready for that. Our research over the years has found that the focus right now has been on just meeting the deadlines and complying. There's been very little focus on trying to use the Internet to communicate and engage in a unique and engaging manner.

When I look at the E-Proxy rule, it was interesting that the SEC required this document that was suitable for online reading and ready searching. Because it was really the first time there was an acknowledgment that there was a need for that kind of document when people are starting to use the Internet as their primary way of staying informed. Of course there's also the need for the printable version for those people who are not comfortable reading online and being able to print something out. Now mostly that's going to be people who are not on their home computers and are willing to print out these large documents.

A lot of people, and there's research into this, because of the electronic nature we're able to track how long people use online documents, what sort of things they look at. It's very informative and useful. What we've typically found, the various surveys that have been done on server logs, is that visits to online annual reports and proxy statements are very short. They're typically around three minutes. People look at the things you expect them to look at and then move on. So the objective – the challenge - is how are you going to engage people? How are you going to, one – make sure they're making an informed voting decision, and two – try to encourage them to spend a little bit more time and become more engaged?

Currently when we look at the practices on the Internet, the majority of companies are posting their annual reports in a PDF. In fact all of them would have a PDF version of their annual report – the print version. And only 10% of the 215 U.S. large cap companies that we monitor provide a full HTML annual report. Now there are some – quite a few – that will provide a highlights report, essentially a letter and some

narrative material. But the financials are available either as a link to the 10-K on EDGAR or as a PDF. There are very few that will provide a full HTML annual report.

Good examples of a full HTML annual report would be General Electric and IBM. These are two companies that have for a long time provided very engaging and highly developed HTML annual reports. GE this year used some video for the first time of the CEO to really engage people. Another company that would do an HTML annual report, but it's a more of a bare bones-type document, is Microsoft. They've always done HTML, but they tend to do a 10-K wrap HTML annual report and there's not much communication value to the document. It's very much an informative disclosure-based document. There's really just a small group of companies that are using these custom HTML documents.

Then there's the next tier and this is really where there's going to be some debate and some issues. And that is what we call image-based documents. All the major providers – Broadridge, Thompson Financial, Shareholder.com, SNL Financial, all of the major online investor relations service providers – are providing these image-based documents. Essentially they are images of the printed report's pages strung together with a dropdown menu with the ability to sort of navigate to individual pages. But the information is locked within a photograph and so it's impossible to increase the size of the page without the text becoming blurry. It's impossible for people who use screen readers – blind Web users who use screen readers – to read these documents. So they're not accessible to users with disabilities which may cause some issues for companies that would have that as a concern.

The other major issue is that they cannot be re-used. The information is locked in an image and therefore you cannot copy and paste the text, which essentially makes the document very difficult for someone like an analyst or a journalist to use because they typically like to copy and paste information into their own documents before writing their own reports. All of those issues relate to the fact that the information is image-based.

There are some other issues with these documents and that is that they all use a dropdown menu approach for navigation. Dropdown menus are fine for most people, but elderly users have greater difficulty with their mouse skills than do younger users. So it's more difficult for them to select the item in the menu that they want to view and then go to that page. Another negative of the dropdown menu approach is that it hides your navigation options until the user activates the menu. So it doesn't encourage users to broaden their visit to an annual report or a proxy statement because they don't see the available options without activating the menus.

The best approach really is an HTML annual report. There's the simple way, which is essentially you could take your annual report and put it on a single Web page or your proxy statement on a single Web page and provide a table of contents on the left side of the page – so that the table of contents is always visible no matter where the person is in that HTML report. Essentially if you think of an EDGAR filing, in most cases you can click on an item in the table of contents and you will jump down the page. But then if you want to go back to the table of contents, you have to click on a link to go back to the table of contents. What I'm suggesting is you remove the table of contents from the main document and put it on the left, in a frame or an inline frame and allow people to just use that to navigate a single document. That is the simplest way to provide a readable online document.

Then you can move to something more advanced. Also with that document you can provide a local search, a search field just for that document. People are able to search using their browsers, but most people don't know how to do that. It's the same as PDFs. PDFs are searchable. PDFs may be navigable, but most

people don't know how to use those tools. What you want to do is provide a document that is going to be intuitive immediately upon people arriving on the document site. They shouldn't have to do too much thinking about how to use the document.

As I mentioned, General Electric and IBM have for a long time done the best annual reports in the U.S. IBM does a full HTML proxy statement – one of only nine percent of companies that do that. There's a link from IBM's HTML proxy statement through to a gateway page, which then links shareholders to either – if they're registered or beneficial holders to the voting site. So while they're actually viewing the proxy statement, people can click through from any page to the voting site. As someone mentioned earlier, it would be potentially a good idea to open the voting site in a new browser, however depending on the sophistication of the user, that may represent some issues for people who are not comfortable using multiple windows.

But aside from just these documents, a major consideration for companies is the entire user experience of the annual meeting event. And that starts well before the documents are prepared and it doesn't end until well after the meeting. Companies really need to be focused on creating an experience that sends the message to shareholders that their participation is valued and that their vote actually matters. Very few companies really see the annual meeting as that kind of campaign rather than a series of events that they have to go through. Some of the issues I'd like to bring up that relate to usability is the notice that gets sent to shareholders will have to be very clear. The URL in that notice – you're essentially asking people to drop whatever they're doing when they get the notice and type in a URL because they can't cut and paste that URL into the address bar in their browser. So there's going to be lots of people who are going to mis-type. There are going to be questions if the URL they see is something like Broadridge and we're talking about GE here – they're going to wonder in this day and age of phishing and scams who they're actually dealing with. That URL or Internet address is going to be vitally important. It's a small detail but very important.

There are technical issues that companies have to consider. Do they have the server capacity to handle the kinds of usage that they're going to get on their website? The privacy issues we dealt with already - that is something that companies need to do their due diligence on.

Longer term, I think there is a concern here and that many companies should be concerned. We currently have a lot of beneficial shareholders, and also registered, we simply don't pay any attention to. They're not voting. We don't know if they read the materials that they're currently getting. In the future, they will not get any materials unless they specifically request them or unless they go online. These people are going to potentially be in the dark over time. And it remains to be seen what impact that will have on companies' ability to get those shareholders' support if they're potentially in a proxy contest situation.

Finally, I'd just like to talk about the annual meeting and the fact that only 28% of the companies we track actually webcast the annual meeting and provide an archive of the annual meeting. It's really important. You're asking people to vote. You're asking them to go online. You're asking them to do something and they're not being provided with any way to actually find out what happened at the meeting.

Also very few companies are posting the preliminary voting results immediately after the meeting. People generally are very interested to know the outcome when they vote in some kind of poll and so just posting the preliminary voting result sends a message to them that their vote was actually worthwhile and valid.

You'll only have one opportunity to make a good impression with the E-Proxy. And often it's not going to

be an opportunity within your control. Early adopters this Fall probably will establish the expectation that users have. If their experience is negative, shareholders are unlikely to bother the next year so the next notice that comes is going straight in the garbage and they're not bothering to do anything with it.

I think that pretty much wraps it up and I would say this shouldn't be seen as a once a year activity. It's really an all year around activity trying to communicate, engaging your shareholders, making the Internet relevant to them so that when that notice arrives they feel confident that if they go online they're going to have a good experience.

ROMANEK: Right and so this is not even about creating a usable document. It's creating a user experience. It's really a different mindset. I think a lot of the folks that are corporate secretaries that typically handle this function will have to be more like IR professionals and I think IR professionals, some of them are going to have to change their own mindset and even leverage their websites more.

JONES: Absolutely.

ROMANEK: For those companies that outsource their IR Internet page to third-party service providers, which many do, I think you need to rethink that - or really put pressure on those service providers to change their ways.

JONES: There's huge opportunity here for those third parties. They see the opportunity. They know what they can do. They know it's about ideas. They know it's about video. They know it's about flash. They know it's about your ability to really engage and win support for your message. And perhaps the most famous of all our websites was the Save Disney website. That was an amazing model for activists on how to just completely outgun a large company like Disney on the web. They did it primarily on the web, but with daily updates, with news or links to news articles. That was an amazing campaign. And sure it had some other cache – a lot of media interest, etc.

ROMANEK: But things can change fast. A prime example is the rise of hedge funds in just a few years. The world's changing and that's another reason for many of you in-house out there to ask for more resources.

I want to thank the panelists. I know this has been a long webcast, but it's been a very important one. It easily could have been even a lot longer. So we'll continue to post resources on the web. The panelists obviously put a lot of time into this, so Alan, Sid, Dominic, Joe, Carl, and Tom, thanks very much for your time and I'll look forward to doing an update at our "Hot Topics and Practical Guidance Conference: *The Corporate Counsel* Speaks" on October 10th. Thanks.

SEC UPDATE

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SEC Proposes to Reduce Rule 144 and Rule 145 Resale Restrictions

On June 22, the SEC published in Release No. 33-8813 proposals to revise Rules 144 and 145 under the Securities Act of 1933. The proposals would liberalize many restrictions on resales of restricted securities and securities held by affiliates, and codify various interpretations by the SEC staff. Under the proposals, a non-affiliate who has not been an affiliate during the preceding three months would be able to sell under Rule 144 unlimited amounts of restricted securities of a reporting company after holding the securities for six months (as contrasted to the two-year holding period currently required for unlimited sales). Affiliates also could sell restricted securities of a reporting company after a six-month holding period, but generally would continue to be subject to the volume limitations and other requirements of the rule. The Rule 145 proposals would eliminate presumptive underwriter status for affiliates of all companies, other than shell companies, who acquire securities in a Rule 145 business combination or similar transaction. The comment period for the proposals will close on September 4, 2007.

Rule 144 Resales of Restricted Securities and Securities Held by Affiliates

Rule 144 provides a safe harbor from registration under the Securities Act for resales of restricted securities and securities held by affiliates that satisfy the applicable conditions of the rule. (Restricted securities are securities acquired from the issuer or an affiliate in a private offering or one of the several other types of exempt offerings specified in the rule.) The proposals, which would recast the rule in plain English, are described below.

Preliminary Note

The SEC is proposing to simplify the lengthy Preliminary Note to the rule by replacing the detailed explanation of the legal theory underlying the rule with a straightforward two-paragraph statement of the rule's principal effects. Among other things, the revised Preliminary Note would make clear that (1) the rule provides a safe harbor from the definition of the term "underwriter" for a seller who complies with the applicable conditions of the rule, (2) the buyer of restricted securities sold in compliance with the rule will receive securities that are not restricted, and (3) the rule is not the exclusive means of selling restricted or affiliate securities. The last item reflects the position presently expressed in paragraph (j) of the rule, and therefore would permit that paragraph to be deleted.

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Definitions

The SEC is proposing to expand the definition of "restricted securities" in Rule 144(a)(3) to include securities acquired from the issuer in an offering to accredited investors that is exempt under Section 4(6) of the Securities Act.

Conditions to be Met

Non-Affiliates. Under the proposals, non-affiliates who have not had an affiliate relationship with the issuer during the preceding three months could sell unlimited amounts of restricted securities of a reporting company if the company is in compliance with the reporting requirements and the non-affiliate has satisfied a holding period of six months from the date the securities were acquired from the issuer or an affiliate. (A reporting company is one that has been subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act for at least 90 days.) A holding period of one year would be necessary in the case of restricted securities of a non-reporting company or a company that is not in compliance with the reporting requirements. No other conditions would apply to non-affiliates.

The principal effect of this rule change would be to shorten the one and two-year holding periods presently required for restricted securities by paragraphs (d) and (k) of Rule 144, respectively. Paragraph (k) would be subsumed by this new approach and no longer would exist. Another effect would be to deny persons who cease to be affiliates the ability to sell securities under Rule 144 until a waiting period of three months has elapsed from the date on which they last were an affiliate. Currently, these persons may sell restricted securities within the volume limits of the rule immediately after ceasing to be an affiliate if they have held the securities for at least one year.

Affiliates. The proposals would require affiliates to sell all securities, whether restricted or not, in accordance with the applicable conditions of the rule, including the current public information requirement, the limits on the amount that can be sold, and the requirement that the securities be sold in brokers' transactions or in transactions directly with a market maker. The holding period requirement, however, would continue to apply only to restricted securities, and the requirement to file a notice of sale would apply only if the amount sold exceeds increased thresholds, as discussed below.

Holding Period

In addition to the changes in the holding period requirements for restricted securities described above, the SEC is proposing to add a provision that would reinstate to a large extent a former requirement that the holding period be tolled (i.e., suspended) during any period the seller held a short position or engaged in a hedging transaction (as described in the rule) with respect to securities of the class being sold. Unlike the former provision, however, this new approach would have a ceiling on its application because the maximum holding period under the rule after taking tolling into account would be one year. One aspect of the tolling provision that may create difficulties for sellers who seek to "tack" the holding period of a previous non-affiliate owner is the requirement that the seller exclude any period in which the prior owner hedged or shorted the

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securities. This will require some due diligence by the seller to determine whether the previous owner entered into such a position.

The SEC also is proposing to codify the following three helpful interpretations previously issued by its staff:

Formation of Holding Company. A holder of restricted securities of a company that is reorganized into a holding company structure may tack the holding period of the predecessor company's securities to that of the holding company's securities where the securities of the two entities are substantially equivalent and the economic risks of the investment in the predecessor are not significantly altered by the acquisition of the holding company's securities.

Conversion or Exchange. A holder of restricted securities acquired from the issuer solely in exchange for other securities of the same issuer may tack the holding period of the surrendered securities to that of the newly acquired securities, even if the securities were not convertible or exchangeable by their terms. Tacking, however, would not be permitted where the surrendered securities were amended to allow for cashless conversion or exchange and the holder provided consideration other than solely securities of the issuer for the amendment.

Cashless Exercise of Options or Warrants A person who acquires restricted securities upon a cashless exercise of options or warrants may tack the holding period of the options or warrants to that of the newly acquired securities, even if the options or warrants originally did not provide for cashless exercise by their terms. Tacking, however, would not be permitted where the options or warrants were amended to allow for a cashless exercise and the holder provided consideration other than solely securities of the issuer for the amendment.

Volume Limits

The limits on the amount of securities sold under the rule would apply only to affiliates. The only other significant change would be the addition of a note indicating that a pledgee of securities need not aggregate its sales with sales by other pledgees of the same borrower unless the pledgees are acting in concert.

Manner of Sale

With two exceptions, affiliates selling in reliance on Rule 144 would continue to be required to sell their securities in brokers' transactions or in transactions with a market maker. The existing exception for non-affiliate estates and non-affiliate estate beneficiaries would continue to apply, and a new exception for debt securities would be added. The term "debt securities" would include non-equity securities, non-participatory preferred stock, and asset-backed securities.

Notice of Sale

Only affiliates would be required to file a notice of sale on Form 144 under the proposals, unlike the current rule which also subjects to the notice requirement non-affiliate sellers who have not satisfied the requirements of Rule 144(k). Further, in a long overdue move, the SEC is proposing to

increase the thresholds for filing the notice, which have not been changed since their adoption in 1972. The new thresholds for filing would be a sale in excess of 1,000 shares or other units (rather than 500) or a sale in excess of $50,000 (rather than $10,000). Additionally, the SEC proposes to codify a staff interpretation that a seller who has adopted a written Rule 10b5-1 trading plan or given trading instructions under Rule 10b5-1 may indicate on Form 144 that the representation required by the form as to lack of knowledge of any material adverse information regarding the issuer is made as of the date of adopting the trading plan or giving the instructions. Finally, an affiliate seller would have to disclose on the form hedging activities involving securities held less than a year.

An important issue on which the SEC has solicited comment (without publishing an actual proposal) is how best to coordinate the requirement to file a Form 144 notice with the requirement to file a Form 4 under the insider reporting requirements of Section 16(a) of the Exchange Act. One difficulty with coordination is the difference in the due dates for the respective forms. Form 4 is not due until two business days after a reportable transaction has occurred, while Form 144 is required to be transmitted for filing concurrently with either the placing with a broker of an order to sell or the execution directly with a market maker of a sale under the rule. Another problem is that the two forms do not require identical information.

Shell Companies

The SEC is proposing to include a new paragraph (i) in Rule 144 indicating that the rule is not available for sales of the securities of a shell company (i.e., a company with no or nominal operations and non-cash assets). Securities of companies that formerly were shell companies, however, could be sold under the rule if specified Exchange Act disclosure conditions are met.

Conforming Changes to Rules 190 and 701

To fully implement the proposed changes to Rule 144, the SEC is proposing to make conforming changes to Rule 190 relating to asset-backed securities, and Rule 701 relating to offers and sales pursuant to compensatory benefit plans of non-reporting companies.

Resales under Rule 145

Rule 145(d) provides that parties (other than the issuer) to a Rule 145 transaction and their affiliates are deemed to be underwriters of the securities acquired in the transaction and must comply with the restrictions on resales of those securities set forth in the rule. Transactions subject to Rule 145 include reclassifications, mergers, consolidations and transfers of assets subject to a vote of security holders. The SEC now believes that the presumptive underwriter provision of Rule 145(d) "no longer is necessary in most circumstances." Accordingly, the SEC is proposing to restrict the application of that provision solely to business combinations involving shell companies and their affiliates and promoters. Consistent with this approach, the SEC also is proposing to harmonize the requirements of Rule 145(d) with the proposed revisions to Rule 144 that would apply to shell companies.

Commentary

Rule 144 was the first of several rules adopted by the SEC to provide a "safe harbor" from the registration requirements of the Securities Act, and was considered experimental at the time of its adoption in 1972. The safe harbor approach has proven to be a resounding success, in large part because of the SEC's willingness to reexamine periodically how these rules have operated. In the case of Rules 144 and 145, this had led to several revisions in prior years that relaxed requirements that had proven to be more stringent than necessary. The latest proposals, many of which have their origin in proposals issued in 1997 that were not acted upon, are a significant step along the same path.

If adopted substantially in their present form, the proposals will improve the liquidity of restricted and affiliate securities, lessen the risk of holding them, and reduce or eliminate burdensome filing requirements. Although there are aspects of the proposals that can be improved or refined, there is ample reason to expect that the proposals will result in rule changes that will have dramatic beneficial effects.

For more information about the matters discussed in this SEC Update*, please contact the Hogan & Hartson LLP attorney with whom you work, or any of the attorneys below who contributed to this* SEC Update.

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SEC UPDATE

SEC Provides Guidance on Internal Control Requirements and Proposes Other Actions to Modernize Capital Formation Requirements and Reduce Restrictions on Securities Resales

At an open meeting on May 23, the SEC took several significant actions involving internal control requirements, the capital formation process, and resales of restricted securities and securities issued in registered business combination transactions. The SEC:

- Adopted interpretive guidance and related rules regarding management's assessment of internal control over financial reporting that are intended to reduce the time and expense required for this assessment;
- Approved the issuance of rule proposals designed to modernize capital formation requirements, including proposals to (1) ease the registration and disclosure requirements for offerings by smaller companies, (2) broaden the class of issuers eligible for shelf registration of primary offerings to include certain companies with a public float below $75 million, (3) expand the class of accredited investors to whom sales can be made in unregistered offerings under Securities Act Regulation D, (4) exempt from registration under Section 12 of the Exchange Act compensatory stock options issued by non-reporting companies, and (5) limit the application of the so-called offering "integration doctrine" to securities offerings that occur within 90 days of each other; and
- Approved the issuance of rule proposals that would reduce or eliminate various restrictions on the resale of securities under Securities Act Rules 144 and 145, including proposals to shorten the holding period requirements of the rules and raise the thresholds for the filing of Form 144.

At the date of this *SEC Update*, the SEC had not issued any releases containing more detailed descriptions of the changes. Accordingly, the following description is based on statements made at the SEC's open meeting and in SEC documents summarizing the actions. We will issue additional *SEC Updates* on the actions when the releases become available.

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Internal Control Evaluations

SEC Interpretive Guidance and Final Rules

The centerpiece of the SEC's actions was its adoption of interpretive guidance and final rule amendments on management's assessment of internal control over financial reporting required by Section 404 of the Sarbanes-Oxley Act.

The SEC adopted the interpretive guidance in substantially the form it had proposed in December 2006, which we described in our *SEC Update* of January 3, 2007. The guidance is centered around two broad principles. First, management should evaluate whether it has implemented controls that adequately address the risk that a material misstatement in the financial statements would not be prevented or deterred in a timely manner. Second, management's evaluation of evidence about the operation of its controls should be based on its assessment of risk. In response to comments, the SEC adopted modifications to the interpretive guidance designed to (1) align the guidance more closely with Auditing Standard No. 5 of the Public Company Accounting Oversight Board (described below), (2) clarify the role of entity-level controls and the nature of ongoing monitoring activities in relation to management's evaluation, and (3) enhance the guidance on fraud risk considerations.

The rule amendments provide that a company performing an evaluation of internal control in accordance with the interpretive guidance will satisfy the annual evaluation required by Exchange Act Rules 13a-15 and 15d-15. Any company that already has established a compliant evaluation process which differs from the approach outlined in the interpretive guidance will not be required to alter its process. The new rules will require only one opinion by a company's independent auditor regarding the effectiveness of the company's internal control over financial reporting. Thus, there will be no need for a second opinion on management's assessment of internal controls, as currently required. The SEC also has amended its rules to define the term "material weakness" as "a deficiency, or combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis." The rule amendments will become effective 30 days after publication in the Federal Register.

The SEC decided not to extend the deadlines for implementing Section 404 for non-accelerated filers, which were described in our earlier *SEC Update*. As a result, non-accelerated filers must provide management's report on internal control over financial reporting in the annual report for the filer's first fiscal year ending on or after December 15, 2007. The independent auditor's opinion on internal control over financial reporting will not be required for these filers until the annual report due date for their first fiscal year ending on or after December 15, 2008.

PCAOB Auditing Standard No. 5

On May 24, the PCAOB adopted new Auditing Standard No. 5 relating to audits of a reporting company's internal control over financing reporting. According to the PCAOB's press release, the new standard has four principal objectives:

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- To focus the internal control audit on those areas that present the greatest risk that a company's internal controls will fail to prevent or detect a material misstatement in its financial statements;
- To eliminate unnecessary procedures, such as those used to opine on management's own internal control evaluation process;
- To tailor the audit to fit the size and complexity of the company; and
- To conform the audit requirements to the SEC's interpretive guidance regarding internal control over financial reporting.

The new audit standard is subject to SEC approval and is expected to be effective for calendar year 2007 audits, with voluntary early adoption by affected parties encouraged.

Modernization of Capital Formation Requirements

Disclosure and Reporting Requirements for Smaller Public Companies

The SEC will propose rule amendments to increase the number of companies eligible for the Commission's revised disclosure and reporting requirements for smaller companies. The Commission is proposing to combine its current categories of "small business issuer" and "non-accelerated filer" into a new category entitled "smaller reporting companies." A "smaller reporting company" would be a company with a common equity public float of less than $75 million, up from the current $25 million ceiling for small business issuers. The new category would be the smaller company counterpart of the SEC's current reporting company categories of "accelerated filer" and "large accelerated filer" under Exchange Act Rule 12b-2. The smaller reporting companies would be eligible to take advantage of the reduced disclosure requirements under the current Regulation S-B, which would be integrated into Regulation S-K. All "S-B" registration forms would be rescinded. Instead, smaller reporting companies would file registration statements and reports on the Commission's regular forms and would be able to choose on an item-by-item basis whether to take advantage of the reduced disclosure requirements or provide the same disclosure as larger companies.

Form S-3 Eligibility for Primary Shelf Offerings by Smaller Reporting Companies

The SEC is proposing to broaden the eligibility requirements for short-form registration of public offerings on Form S-3 and (for foreign private issuers) Form F-3 to allow "smaller reporting companies" to take advantage of the benefits of abbreviated shelf registration statements for primary offerings if they meet certain conditions. A smaller reporting company would be eligible to use Forms S-3 and F-3 for primary shelf offerings if it:

- Has been timely in its Exchange Act filings for one year, in addition to the other eligibility conditions for the use of the forms;

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- Is not a shell company and has not been a shell company for the prior 12 months; and
- Will not sell more than the equivalent of 20% of its public float in primary offerings registered on Form S-3 or F-3 during any one-year period.

Exemption for Non-Reporting Companies From Exchange Act Registration of Stock Options

The SEC is proposing a new exemption from the registration provisions of Section 12(g) of the Exchange Act for non-reporting (privately-held) companies with 500 or more record holders of compensatory employee stock options. Companies with at least 500 holders of record of a class of equity security and assets in excess of $10 million at the end of their fiscal year must register the class pursuant to Section 12(g). Unless non-reporting companies have qualified for an exemption from Section 12(g) registration based on the terms and administration of their stock option plans, this requirement subjects such companies with 500 or more option holders and more than $10 million in assets to registration of the class of options under Section 12(g).

The new exemption from Section 12(g) registration would apply to compensatory stock options granted by non-reporting companies pursuant to a written compensatory stock option plan where:

- The option holders are limited to employees, consultants, directors, and advisors;
- Limitations on transferability are imposed; and
- Risk factor disclosure and financial information of the type currently required by Rule 701 under the Securities Act is provided, in situations where the $5 million limit of Rule 701 is exceeded, to the option holders and holders of shares received upon exercise of the options.

The proposed exemption would extend only to the class of options and not to the common stock underlying the options. Accordingly, Section 12(g) registration still would be triggered for companies with more than $10 million in assets once they have 500 or more holders of their common stock.

The SEC will propose a second Section 12(g) registration exemption that would apply to compensatory employee stock options of reporting companies that have registered the common stock underlying the options under Section 12. Notwithstanding the technical applicability to them of Section 12(g) registration for a class of stock options, public companies generally have not filed to register this second class of equity securities under Section 12. The registration by public companies of the underlying common stock under Section 12 has afforded their option plan participants access to all reports and other information required of SEC filers.

Regulation D Under the Securities Act

Consistent with previous initiatives to modernize the requirements for the registration of public offerings, the SEC is proposing amendments primarily designed to have a similar effect with respect to offerings that are not registered. Many smaller public companies currently rely

extensively on the exemptions from Securities Act registration provided by Regulation D for private offerings and other capital-raising activities. The SEC is proposing amendments to Regulation D that would reduce or eliminate various regulatory burdens on companies relying on the Regulation.

The SEC proposes to amend Regulation D to add a new Rule 507 containing a registration exemption for offerings made to persons who meet prescribed financial qualification requirements or who are insiders of the issuer. An individual would be a "Rule 507 qualified purchaser" if the person owns at least $2.5 million in investments or has a personal annual income of $400,000 or an aggregate annual income with spouse of $600,000. An institutional investor generally would be a "Rule 507 qualified purchaser" if it owns $10 million in investments. Directors, executive officers, and general partners of the issuer would qualify as "Rule 507 qualified purchasers" without regard to any monetary threshold. Revised Regulation D would permit publication of "tombstone"-type advertising of these offerings.

The proposals also would provide additional ways for a person to qualify as an "accredited investor" under Regulation D. The current standards relating to total assets, net worth, and income would be augmented by a new "investments-owned" standard of $750,000 for individuals and $5 million for institutions. In addition, several new categories of entities would be added to the existing list of approved "accredited investors." The monetary thresholds for "accredited investors" and "Rule 507 qualified purchasers" would automatically be adjusted for inflation beginning September 1, 2012.

Further help to companies making offerings under Regulation D would be provided by the SEC's proposal to require only a 90-day separation between unregistered offerings (rather than the current six months) to qualify for the safe harbor from integration of offerings provided by Rule 502 of Regulation D. In addition, the SEC is proposing to require electronic filing by issuers relying on Regulation D of Form D, which is the notice of sales made under the Regulation and which the SEC says it will revise and update. Finally, the SEC is proposing to update the "bad actor" disqualification provisions that currently apply only to offerings under Rule 505 and to extend the revised provisions to all offerings under Regulation D.

Resales of Securities Under Rules 144 and 145

In a highly significant change, the SEC is proposing to reduce to six months the current one-year holding period required for restricted securities of reporting companies sold under Rule 144. (Restricted securities are securities acquired from the issuer or an affiliate in a nonpublic offering or in certain other types of exempt offerings.) The one-year requirement, however, would continue to apply to restricted securities of non-reporting companies.

The SEC's proposal to adopt a six-month holding period for restricted securities of reporting companies would have a string attached in the form of a provision that would toll (or freeze) the holding period during any period in which the holder had a short position, or had entered into a put equivalent position, with respect to the securities. In 1990, the SEC had eliminated a similar tolling period provision for short positions that had been in the rule since its adoption in 1972.

The proposals also would reduce from two years to one year the holding period for restricted securities required under Rule 144(k) for non-affiliates who have not been affiliates during the immediately preceding three months. This change would enable these persons to be free of all Rule 144 resale limitations if the one-year and non-affiliation requirements are met.

With respect to resales of restricted securities by affiliates, the SEC is proposing to eliminate the manner of sale requirements of Rule 144(f) for debt securities, to raise the thresholds for filing the Form 144 notice of sale, and to codify certain staff interpretations of Rule 144. The SEC also is soliciting comment on whether filings on Form 4 and Form 144 should be coordinated to reduce duplicative paperwork requirements for insiders required to file both forms. Under this approach, affiliates who are subject to Section 16 under the Exchange Act could, at their option, satisfy their Form 144 filing requirement by timely filing a Form 4 reporting the sale of the securities.

Finally, the SEC is proposing to limit to registered business combination transactions involving blank check or shell companies the application of the "presumptive underwriter" provision in current Rule 145(c) that restricts resales of merger securities by directors, officers, and other affiliates of the combining companies. The SEC also proposes to revise the related resale restrictions in Rule 145(d) applicable to such insiders to conform to the modified restrictions proposed for Rule 144.

For more information about the matters discussed in this SEC Update, *please contact the Hogan & Hartson LLP attorney with whom you work, or any of the attorneys below who contributed to this* SEC Update.

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