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“E-Proxy” – SEC Proposed Rules Regarding Internet Availability of Proxy Materials

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On December 8, 2005, the U.S. Securities and Exchange Commission (the “SEC”) proposed amendments to the proxy rules (the “Proposed Rules”) to take advantage of communications technology and provide an alternative method for the dissemination of proxy materials that could reduce the printing and mailing costs associated with furnishing proxy materials to shareholders. The SEC believes that the proposed “notice and access” model could facilitate effective and cost-efficient communications between companies, shareholders and intermediaries.

Proposed “Notice and Access” Model for Furnishing of Internet Proxy Materials by a Company

Notice of Internet Availability of Proxy Materials. Under the Proposed Rules, a company relying on the “notice and access” model would have to notify its shareholders of the availability of the proxy materials on an Internet website by sending a Notice of Internet Availability of Proxy Materials (the “Notice”) to its shareholders 30 days or more in advance of the shareholder meeting date or, if no meeting is to be held, 30 days or more in advance of the date that votes, consents, or authorizations may be used to effect the corporate actions to be voted on. A company could send this Notice electronically, under existing permitted methods, or in paper, to its shareholders. In addition, the Proposed Rules would allow a company to send (i) the proposed Notice and (ii) the notice of a shareholder meeting required under state corporation law in a single document, unless prohibited by state law.¹

The Notice would have to include:

- ▶ A prominent legend with prescribed language, including the Internet website address where the proxy materials are available;
- ▶ The date, time and location of the meeting;
- ▶ An identification of each matter to be acted upon and the company’s recommendations regarding such matters;

¹ The SEC does not intend for the Proposed Rules to affect applicable state law requirements regarding delivery of documents related to either an annual meeting or a proxy solicitation. Thus, if the state of incorporation of a company requires notices of shareholder meetings or proxy materials to be transmitted to shareholders in paper, the company must continue to follow such state law even under the Proposed Rules.

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- ▶ A list of materials available at the specified website; and
- ▶ A toll-free telephone number and e-mail address for shareholders to request a copy of the proxy materials.

Mechanics of the Proposed “Notice and Access” Model. The Proposed Rules would permit a company to furnish the proxy card together with the Notice by means of the same delivery method, such as by using existing permitted methods. Any proxy materials to be furnished to shareholders through the “notice and access” model would have to be posted to a publicly accessible Internet website² no later than the time the company sends the Notice to its shareholders. Furthermore, this “notice and access” model would be effective only with respect to a specific meeting and, therefore, each time a company chooses to use this model for a shareholder meeting it would have to comply again with the “notice and access” requirements, including Notice delivery and the required 30-day notice period. Additional soliciting materials also would have to be posted to the same publicly accessible Internet website where the proxy materials were posted.³

Requests for Copies of Proxy Materials. Under the Proposed Rules, a company could satisfy its requirements to furnish proxy materials to shareholders through the “notice and access” model, but there would be a separate requirement to deliver to any requesting shareholder a copy of the proxy materials. Once the company receives a request from a shareholder for a copy of the proxy materials, the company would have to send a copy of the proxy materials to the requesting shareholder by regular mail or e-mail (as requested by the shareholder) within two business days.

The Role of Intermediaries

Current SEC rules address the issue of distributing proxy materials to beneficial owners and impose obligations on companies and intermediaries, such as banks, associations and other entities that exercise fiduciary powers, to ensure that a company’s beneficial owners receive the company’s proxy materials and are afforded an opportunity to vote. As noted by the SEC, “[b]asically, these rules require issuers to send their proxy materials to intermediaries for forwarding to the beneficial owners.”

The Proposed Rules provide that intermediaries may follow the “notice and access” model only if a company requests it to do so. The Proposed Rules would impose certain responsibilities on intermediaries that are requested to follow the “notice and access” model, including requiring the intermediary to (i) forward a company’s Notice to the beneficial owners, unless it prepares its own notice, (ii) clarify how beneficial owners can return their voting instructions if the company posts its proxy card on an Internet website, and (iii) request and forward a copy of the proxy materials from a company in response to a request from a beneficial shareholder.

² This website must be one other than the SEC’s EDGAR website, and the website address must be specific enough to lead shareholders directly to the proxy materials. The website address of the company’s home page or even the website address on which the proxy materials are posted would not suffice as it would require some level of shareholder effort to browse the website to find the relevant proxy materials.

³ Such electronic posting of additional soliciting materials must be done by no later than the day on which the materials are first sent to shareholders or are made public.



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Proposed “Notice and Access” Model for Furnishing of Internet Proxy Materials by a Soliciting Person Other Than the Issuer

The Proposed Rules also would allow persons other than a company to undertake a proxy solicitation and rely on the “notice and access” model. The SEC believes this will significantly decrease the cost of a proxy solicitation. The Proposed Rules would allow a soliciting person other than the company to conduct a proxy contest in the following ways:

- ▶ Furnish a proxy statement and proxy card under existing permitted methods;
- ▶ Furnish a Notice and proxy card together, and through the same medium, and post the proxy statement on an Internet website;
- ▶ Furnish a Notice and post the proxy statement and proxy card together on an Internet website; or
- ▶ Do not furnish a Notice and post the proxy statement and proxy card together on an Internet website and direct interested persons to that Internet website with a Rule 14a-12 communication.

Under the last three options above, a soliciting person other than the company may either (i) undertake to furnish shareholders with copies upon request, or (ii) clearly indicate in the Notice or on the Internet Web site that it will not provide copies upon request as the solicitation is conditioned on a shareholder accepting proxy materials via access to an Internet website.

Business Combination Transactions

The Proposed Rules would not apply to business combination transactions as the SEC believes such transactions (i) constitute extraordinary events, (ii) often involve a registered securities offering and the delivery of a prospectus, and (iii) also frequently involve complex and lengthy proxy statements.

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