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SEC Proposes to Provide Internet Availability for Proxy Materials

On December 8, 2005, the Securities and Exchange Commission (“SEC”) proposed rule amendments to the Securities Exchange Act of 1934 (the “Exchange Act”) that would allow issuers and other persons to use the Internet to satisfy proxy material delivery requirements based on a “notice and access” model.¹ If adopted, this alternative method² for furnishing proxy statements to shareholders would:

- lower costs incurred by issuers to comply with proxy rules, ultimately decreasing the costs borne by shareholders; and
- provide persons other than the issuer with a more cost-effective means to undertake their own proxy solicitations.

Under current rules, most proxy statements and annual reports are delivered in paper form. Only in limited circumstances, where a shareholder affirmatively consents, can they be sent electronically. As proposed, an issuer would be permitted to post its proxy materials on a publicly accessible website (other than EDGAR) without gaining individual consents if it sends a “Notice of Internet Availability Proxy Materials” (“Notice”) at least 30 calendar days prior to a shareholder meeting.³

A. Issuer’s “Notice and Access” Model

Under the proposals, the Notice would be required to include a specified legend in bold face including language substantially found in Annex A. In addition, it would have to include the follow

¹ See Securities Exchange Act of 1934 Release No. 34-52926, Proposed Rule, *available at* <http://www.sec.gov/rules/proposed/34-52926.pdf> (Dec. 8, 2005).

² The proposed rules would not affect the availability of any current methods for furnishing proxy materials.

³ The proposed rules would not have an impact on state law obligations related to an annual meeting or proxy solicitation. Further, they would not apply to business combination transactions.

ing clearly stated and identified information:

- the date, time, and location of the meeting;
- a clear and impartial identification of the matters to be considered and the issuer's recommendations;
- the availability of certain electronic proxy materials on the specified website; and
- a toll-free telephone number and e-mail address where a shareholder can request a copy of the proxy materials.

The proposals would prohibit the inclusion of any additional information. The release notes that since this alternative "notice and access" model would only be effective with respect to a particular meeting. Issuers would have to comply with delivery of the Notice requirement for each subsequent meeting.

B. Proxy Materials and Website Access

Under the proposals, an issuer could furnish a proxy card to shareholders either together with the Internet Notice or on its website together with its proxy statement. Through the "notice and access" model, all proxy materials, other than additional soliciting materials, would be required to be posted on the specified Internet website (other than EDGAR) on or before the time the Notice is sent to the issuer's shareholders and must remain accessible until the date of the shareholders meeting. The designated website address must provide a direct link to the proxy materials and not require a shareholder to browse the website to access the materials.

Although an issuer would satisfy its proxy rule requirements by posting proxy materials on its website, it would also be required to deliver a copy of the materials to any requesting shareholder. Upon such a request, proxy materials must be sent within two business days, at no charge to the requesting shareholder and if paper is requested, it must be sent by first-class mail or other reasonably prompt means of delivery, regardless of the request date.

C. Intermediaries

The proposed rules would permit issuers to require certain intermediaries such as banks, brokers or other nominees, who are obligated to provide proxy materials to shareholders who beneficially own shares held of record by such intermediaries to utilize the "notice and access" model. As proposed, in order for an intermediary to be required to utilize this method, the issuer would: 1) have to request that the intermediary do so; and 2) furnish the intermediary with copies of the Notice at least five business days prior to the deadline for furnishing the Notice to shareholders. An issuer may either directly deliver its proxy card to intermediaries along with the Notice or post it on its website.

Thereafter, the intermediary would be required to forward the Notice and if applicable, the proxy card, to beneficial owners within five business days, in a manner similar to the current process by which proxy materials are forwarded. At its option, the intermediary could either elect to:

- prepare and send a copy of the intermediary's request for voting instructions along with the Notice; or
- post the request for voting instructions on its own website and include the issuer's proxy statement and all other proxy related material from the issuer's website (other than the proxy card).

If the intermediary chooses the former, the issuer's Notice could be used and no separate website would be maintained. If, however, the intermediary chooses to establish its own website for collecting voting instructions from beneficial owners, it would have to supplement or make appropriate modifications to the issuer's Notice (or prepare its own Notice) to guide beneficial owners to the intermediary's website for voting rather than to the issuer's website.

As proposed, a beneficial owner would be able to request a copy of the proxy materials from either the issuer or the intermediary. If requested from the issuer, the same two business day rule would apply and if requested from the intermediary, the intermediary would be required to promptly request such materials from the issuer within two business days.

D. Other Soliciting Persons' Use of "Notice and Access" Model

Under the proposed rules, a person other than the issuer that is soliciting proxies would also be able to rely on the "notice and access" model. In general, the proposed framework is similar; however, given the fact that soliciting persons are not required to furnish information to *all* shareholders and can solicit proxies from select groups, the following highlights some of the key differences in the rules proposed for other soliciting persons:

- a soliciting person could elect not to furnish any Notices and would only post its proxy card and materials on a publicly accessible internet website.
- a soliciting person could elect not to provide a copy of the proxy statement to any shareholder that requests it, as long as its Internet Notice clearly explains that it is only soliciting shareholders who are willing to access the materials via the Internet postings.
- a soliciting person would be required to send out its Notice prior to the later of: (a) 30 calendar days prior to the shareholders meeting; or (b) ten days after the issuer first sends out its proxy solicitation materials.
- a soliciting person's Internet Notice need only include known agenda items; and

- any person soliciting proxy authority in opposition of only certain agenda items would be required to clearly indicate that execution of the proxy disseminated by such person may invalidate any prior shareholder votes on other matters.

In addition, where a soliciting person requests a shareholder list from an issuer, the issuer would also be required to furnish any information about a shareholder's electronic delivery consents. Finally, the proposals would clarify that intermediaries must deliver proxy materials on behalf of soliciting persons, as well as issuers.

Comments for the rule proposals should be received by the SEC on or before February 13, 2006.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; John Schuster at (212) 701-3323 or jschuster@cahill.com; or Boji Wong at (212) 701-3011 or bwong@cahill.com.

Annex A

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

- This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.
- The [proxy statement] [information statement] [annual report to shareholders] [proxy card] are available at [insert website address].
- If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date that is two weeks or more before the meeting date] to facilitate timely delivery. If you hold your shares through a broker, bank, or other intermediary, you may request delivery of a copy of the proxy materials through that intermediary, but it likely will take longer to receive your materials through an intermediary than directly from the company.