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**Recent Addition to the E-Proxy Regulations Shareholder Choice Regarding
Proxy Materials Mandatory Internet Availability of Proxy Materials**

The SEC adopted amendments on July 26, 2007, to the Internet Availability of Proxy Materials regulations that require issuers to post proxy materials on its Web site.¹ Large accelerated filers must comply with the requirements in time for any proxy solicitations that take place on or after January 1, 2008, and registered investment companies, persons other than issuers, and issuers that are not large accelerated filers may follow the compliance time line for large accelerated filers, but must comply in time for all proxy solicitations made on or after January 1, 2009.²

I. Issuers

The amendments give issuers two ways to comply with the mandatory e-proxy provisions. An issuer can comply according to the Notice and Access model as is, under the “Notice Only” option. Alternatively, “The Full Set Delivery Option” (“Full Set”) requires an issuer to post proxy materials on its Web site and notify shareholders of their Internet availability, and to also send a full set of proxy materials to shareholders.³

Under the Full Set option, an issuer must send its proxy materials accompanied by notification of Internet access by using the same mandatory language required of the Notice Only issuers, minus the warning that the Notice is not a complete set of proxy materials, and minus instructions on how to obtain paper copies of the proxy materials.⁴ Because the issuer will already have sent proxy materials, both the

¹ *Shareholder Choice Regarding Proxy Materials*, Release No. 34-56135; IC-27911; File No. S7-03-07 RIN 3235-AJ79 (July 26, 2007) available at <http://sec.gov/rules/final/2007/34-56135.pdf> (the “Adopting Release”). No Federal Register version is yet available, but the amendments are to be codified at 17 C.F.R. part 240.

² Adopting Release at 28-29.

³ Rule 14a-16(n). An issuer does not have to choose exclusively one or the other, but can decide to use the one that best works with its timing and scheduling. Adopting Release at 8.

⁴ Rule 14a-16(n)(3) and (4). These sections apply equally to the issuer and to other soliciting persons.

warning and paper-request language are unnecessary.⁵ The mandatory language, other contents, and timing requirements are set forth in Schedule A to this memorandum.

An issuer using the Full Set option may send notification of Internet availability of proxy materials either in the form of a Notice, separate from the proxy materials, or the issuer may incorporate notification into the proxy materials.⁶ The issuer does not have to provide a means for the shareholder to execute a proxy at the time of notification as under the traditional Notice and Access method, because the proxy card sent with the materials satisfies the requirement that the shareholder have a way to execute a proxy contemporaneous with access to the proxy materials.⁷ The issuer also does not have to send notification and post its proxy materials according to the 40 day time-line under the Notice Only option, because the shareholder will already have the proxy materials and will not need any extra time to request paper copies.⁸

II. Intermediaries

Intermediaries are also released from the 40 day requirement under the Full Set option, and as such, the issuer need send its proxy materials to intermediaries so that the intermediary has sufficient time to forward the materials to beneficial owners.⁹ The intermediary has five days from the receipt of materials to forward them to beneficial owners.¹⁰ The same method and contents of notification applicable to issuers and other soliciting persons apply to intermediaries: “When the issuer is delivering full sets of proxy materials to beneficial owners, the intermediary must either prepare a separate Notice and forward it with the full set of proxy materials, or incorporate any information required in the Notice, but not appearing in the issuer’s proxy statement, in its request for voting instructions.”¹¹

III. Conclusion

By mandating that issuers make proxy materials available on the Internet, the SEC is increasing shareholders’ options for access to proxy materials. At the same time, the mandate does not preclude an issuer from following a more traditional method of distribution, and an issuer that chooses the Full Set option will not have to respond to shareholder requests for paper copies. The issuer may choose to use Notice Only or the Full Set option depending on whichever may be preferable to the issuer in any given proxy season.

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⁵ Even though the issuer sends paper copies, the proxy materials must be available on the Web site by the time it sends notification to shareholders. Rule 14a-16(n)(2).

⁶ Rule 14a-16(n)(ii). *See also* Rule 14b-1(d)(5)(i) (applying to intermediaries).

⁷ Adopting Release at 19-20. A full set of proxy materials includes a form of proxy. Rule 14a-16(n)(1)(iii).

⁸ Rule 14a-16(n)(3)(i); Adopting Release at 21.

⁹ Adopting Release at 24.

¹⁰ Rule 14b-1(b)(2).

¹¹ Adopting Release at 24.

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 Jon Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at 212-701-3323 or jschuster@cahill.com.

Schedule A

Time line: under the Full Set option, the issuer does not have to prepare all of its materials to meet the 40-day deadline required under the Notice Only option.

Contents of Notification

A prominent legend in bold-face type that states:

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

- **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer’s recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- Any control/identification numbers that the shareholder needs to access his or her proxy card;
and
- Information about attending the shareholder meeting and voting in person.