

March 19, 2007

## Electronic Proxy Delivery: SEC Adopts "Notice and Access" Rules

A new model for delivering annual reports, proxy statements and other proxy materials to shareholders of public companies will be test driven in 2007. The Securities and Exchange Commission has recently adopted a voluntary "notice and access" system under which issuers and other soliciting persons can satisfy their proxy delivery requirements by posting proxy materials on an Internet website, notifying shareholders of the availability of such materials and sending paper or e-mail copies of such materials upon request.<sup>1</sup> The voluntary notice and access rules will become effective July 1, 2007, but will not apply to proxy solicitations involving business combinations. In addition to adopting the voluntary notice and access rules, the SEC separately proposed to move to a regime in which Internet access to proxy materials would be a required element for all proxy solicitations.<sup>2</sup> In this advisory we discuss the notice and access rules and how they apply to issuers, intermediaries and soliciting persons other than the issuer. We also explore the practical implications of the notice and access model, including the impact on the costs and timing associated with proxy solicitations.

### Background

In recent years, many issuers have been concerned with the rising costs of proxy solicitations. Such issuers have expressed that the costs of proxy solicitations far outweigh their benefits, particularly in light of the low levels of shareholder participation in proxy solicitations. Shareholder groups have found reason to be concerned as well. Shareholders who wish to elect their own candidates to the board of directors often complain that the costs of engaging in a proxy solicitation are prohibitively high.<sup>3</sup> In light of these concerns, the SEC proposed the notice and access rules "to update [the] regulatory framework to take advantage of communications technology and provide an alternative proxy model that could reduce the printing and mailing costs associated with furnishing proxy materials to shareholders."<sup>4</sup>

Most proxy solicitations involve a complex process that requires coordination amongst the issuer, its transfer agent, banks, brokers and their agents. This process is largely the result of the U.S. trading and settlement system in which shareholders are divided into two categories: (i) "registered holders" and (ii) beneficial holders whose securities are held in the name of intermediaries, such as

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<sup>1</sup> See Internet Availability Of Proxy Materials, Rel. No. 34-55146 (Jan. 22, 2007) (the "Internet Availability Release"). All references to page numbers in the Internet Availability Release refer to the page numbers on the pdf version of the release that is available on the SEC's website at <http://www.sec.gov/rules/final/2007/34-55146.pdf>.

<sup>2</sup> See Universal Internet Availability of Proxy Materials, Rel. No. 34-55147 (Jan. 22, 2007) (the "Universal Availability Release"). All references to page numbers in the Universal Availability Release refer to the page numbers on the pdf version of the release that is available on the SEC's website at <http://www.sec.gov/rules/proposed/2007/34-55147.pdf>. The comment period for the proposed "universal" notice and access model closes on March 30, 2007.

<sup>3</sup> See Internet Availability of Proxy Materials, Rel. No. 34-52926 (Dec. 8, 2005) (the "Proposing Release").

<sup>4</sup> See Proposing Release at 1.

banks and brokers, so-called “street-name holders.” The securities of a registered holder are held by, and in the name of, such registered holder, whereas the securities of a street-name holder are held in the name of a bank, broker or other intermediary on such holder’s behalf. Under the law of most states, only registered holders are entitled to vote, and as a result, intermediaries, and not the beneficial owner clients on whose behalf they hold securities, are entitled to vote the shares held of record.

Issuers typically mail proxy materials to their registered holders and rely on those holders that are intermediaries to identify and communicate with their street-name holders. Both the SEC’s proxy rules and the rules of self-regulatory organizations require that intermediaries forward copies of an issuer’s proxy materials to the beneficial owners of the issuer’s securities promptly after receiving them from the issuer.<sup>5</sup> With few exceptions, however, intermediaries do not directly manage the voting of the shares they hold of record; in most cases they hire an agent, typically Automatic Data Processing, Inc., to manage the voting process on their behalf. The agent, in turn, sends the proxy materials to the issuer’s beneficial owners. Since beneficial owners are not entitled to vote, the agent sends beneficial owners a request for voting instructions in lieu of a proxy card. Beneficial owners complete the voting instructions and return them to the agent, which tabulates them along with votes cast by the intermediary when permitted and sends the consolidated votes to the issuer or the issuer’s inspector of elections.<sup>6</sup>

The notice and access rules have been structured to operate within this framework. They include provisions that apply to issuers and persons other than issuers with regard to the distribution to registered holders and to intermediaries with regard to the distribution to street-name holders. We discuss these provisions in the following sections.

## Issuers

An issuer intending to solicit proxies for an annual meeting of shareholders at which directors are to be elected must contemporaneously deliver a copy of its proxy statement, annual report to shareholders and form of proxy (collectively, “proxy materials”).<sup>7</sup> Under the notice and access model, an issuer may satisfy this requirement by posting its proxy materials on an Internet website and sending a notice to shareholders indicating the availability of such materials. To ensure that

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<sup>5</sup> See Rules 14b-1 and 14b-2 under the Securities Exchange Act of 1934. Rule 14b-1 applies to registered brokers and dealers, and Rule 14b-2 applies to banks, associations, and other entities that exercise fiduciary powers. Under these rules, the intermediary must forward the issuer’s proxy materials, within five business days of receiving them, to beneficial owners who will not receive those materials directly from the issuer. In addition, these rules require that, within seven business days of receiving a request, intermediaries provide the issuer with:

- the number of customers of the intermediary who are beneficial owners of the issuer’s securities for which the intermediary is the holder of record;
- the names, addresses and securities positions of the issuer’s beneficial owners who have not objected to such disclosure, as well as the number of beneficial owners who have objected to such disclosure; and
- the identity of the intermediary’s agent that will fulfill the intermediary’s obligations under the rule.

<sup>6</sup> Self-regulatory organization rules dictate when certain intermediaries, such as brokers, may vote shares for which they have not received instructions. See, e.g., Rule 452 of the New York Stock Exchange.

<sup>7</sup> See Exchange Act Rule 14a-3. An issuer must send an information statement to any shareholder from whom the issuer is not requesting a proxy. See Exchange Act Rule 14c-2.

shareholders receive proxy materials in the manner they prefer, an issuer that relies on the notice and access model must provide paper or e-mail copies of such materials to shareholders upon request.<sup>8</sup>

#### *Internet Posting of the Proxy Materials*

The first step in the notice and access model is the posting of an issuer's proxy materials on an Internet website. These materials must be posted at or prior to the time shareholders are notified that such materials are available and must remain posted through the conclusion of the shareholder meeting (or in the case of an information statement, through the date upon which the corporate action is taken).

#### **Format of Online Proxy Materials**

The new rules require that the electronic version of an issuer's proxy materials be in a format that is convenient for reading online and printing on paper. This may require posting the materials in two different formats: first, in a format that is substantially identical to the paper version of the materials (including all charts, tables, graphics, and similarly formatted information), and second, in a readily searchable format, such as HTML.

#### *Notice and Timing*

Once an issuer has posted its proxy materials, it begins the solicitation process by sending shareholders a "Notice of Internet Availability," which is a short notification informing shareholders that the issuer's proxy materials are available on the Internet (the "Notice"). The Notice must be sent at least 40 calendar days before the date of the shareholder meeting.<sup>9</sup> The Notice must be written in plain English and must include the following:

- a prominent, bold-face legend that (i) indicates that the Notice is only an overview, (ii) identifies and encourages shareholders to access the website where the proxy materials may be found and (iii) includes a date by which shareholders must request paper or e-mail copies of the proxy materials to ensure timely delivery;
- the date, time and location of the shareholder meeting;
- a clear and impartial identification of the matters to be acted on and the issuer's recommendations regarding those matters (but no supporting statements);
- a list of the materials being made available at the specified website;
- a toll-free telephone number, e-mail address, and Internet website address where shareholders can request copies of the proxy materials for all meetings and the particular meeting to which the Notice relates;

#### **Website Reference Must be Specific**

The Notice must refer to the specific web page upon which the issuer's proxy materials are posted. Directing shareholders to the home page of the issuer's website or to its filings on the SEC's website is insufficient. Shareholders should not be forced to browse the issuer's or the SEC's website to find the proxy materials.

<sup>8</sup> See Exchange Act Rule 14a-16(j).

<sup>9</sup> The 40-day period is intended to provide "issuers with time to encourage shareholders who have not executed a proxy to participate in the voting process and to provide shareholders with sufficient time to receive the Notice, request copies of the materials, if desired, and review the proxy materials prior to executing a proxy." Internet Availability Release at 14-15.

- any control or identification numbers necessary to access the proxy card and instructions on how to do so; and
- information on obtaining directions for attending the meeting and voting in person.

The Notice must be sent separately from any other shareholder communication and may not contain any additional information other than the notice of meeting required under state law and, if desired, a reply card to request copies of the proxy materials.<sup>10</sup> The Notice constitutes soliciting material under Exchange Act Rule 14a-6(b) and must be filed with the SEC no later than the date on which it is first sent or given to shareholders.

#### *Access to and Execution of Proxy Cards*

An issuer relying on the notice and access model cannot send the proxy card with the initial Notice. Instead, it must wait 10 calendar days after sending the Notice to send shareholders the proxy card.<sup>11</sup> This waiting period is intended to allow sufficient time for shareholders to access the proxy statement and annual report or request copies before executing the proxy card. An issuer may, however, send a proxy card before the conclusion of the 10-day period if it is accompanied or preceded by a copy, via the same medium, of the proxy statement and annual report.

If an issuer does not wish to mail paper copies of the proxy card and chooses instead to rely on the form of proxy card posted on the Internet website with its other proxy materials, it must provide shareholders with a means to execute the proxy card that ensures that shareholders have access to the proxy statement and annual report. This could be accomplished, for example, by using a hyperlink that connects the proxy statement and annual report to the proxy card. Alternatively, an issuer may provide a telephone number for executing a proxy card on the electronic proxy card itself.<sup>12</sup> An issuer may not, however, place a telephone number for executing a proxy card on the initial Notice because shareholders executing the proxy card through such telephone number may not have access to the proxy materials available on the specified website.<sup>13</sup>

#### *Requests for Copies*

A key aspect of the notice and access rules is the requirement that an issuer provide paper copies of its proxy materials to a requesting shareholder via first class mail or provide e-mail copies to a requesting shareholder within three business days of the shareholder's request. This obligation lasts for one year after the shareholder meeting or corporate action to which the proxy materials relate and was included in the rules to ensure that investors who do not have access to the Internet (or do not want to access the Internet) are not excluded from the proxy solicitation process. To avoid imposing

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<sup>10</sup> See Internet Availability Release at 14.

<sup>11</sup> If an issuer chooses to send shareholders a proxy card after having sent out the Notice, the proxy card must be accompanied by a copy of the initial Notice (or a copy of the proxy statement and annual report). See Exchange Act Rule 14a-16(h).

<sup>12</sup> The means of executing the proxy card posted on the Internet website must ensure that the shareholder can execute the proxy card as soon as the shareholder electronically accesses the proxy statement. Thus, merely providing a means to request a paper proxy card would not be sufficient. See Internet Availability Release at 23 – 24; see also Exchange Act Rule 14a-16(b)(4).

<sup>13</sup> See Exchange Act Rule 14a-16(f).

an obligation on shareholders to respond to such requests every year, the rules allow a shareholder to make his or her election with respect to a particular solicitation or with respect to all future solicitations conducted by the issuer.

## **Intermediaries**

As noted above, most proxy solicitations require careful coordination amongst the issuer, its transfer agent, banks, brokers and their agents. The notice and access rules do not change much about this process for intermediaries. As is currently the case, intermediaries and their agents will continue to play a central role in the distribution of proxy materials to street-name holders under the notice and access rules. The new rules do, however, place additional burdens on intermediaries, which are discussed below.

### *General*

Intermediaries must follow the proxy delivery model chosen by the issuer whose proxy materials they deliver: if the issuer elects to follow the notice and access model, so too must the intermediary. If an issuer does not choose to follow the notice and access model, the intermediary must deliver the issuer's proxy materials and request for voting instructions in paper, as under the current rules (unless the intermediary is servicing accounts that already have affirmatively consented to receive proxy materials through electronic means, such as e-mail).

The same time frames applicable to an issuer's use of the notice and access model generally apply to an intermediary. The new rules require an issuer relying on the notice and access model to provide its intermediaries with all the information needed by the intermediaries to prepare and send a Notice to the issuer's beneficial owners at least 40 calendar days in advance of the date of the shareholder meeting.<sup>14</sup> An intermediary may not deliver the voting instruction form to beneficial owners until at least 10 calendar days have elapsed since the date the Notice was sent. Unlike an issuer, however, an intermediary is not required to deliver copies of an issuer's proxy materials within three business days of a shareholder's request. Rather, the intermediary must forward such requests to an issuer within three business days and must forward the materials to the requesting shareholder, at the issuer's expense, within three business days of receiving such materials from the issuer.

### *Intermediary-Prepared Notice*

With the exception of modifications related to the fact that it will be sent to beneficial owners, rather than registered shareholders, a Notice prepared by an intermediary generally must include the same information as the Notice prepared by an issuer. The intermediary's Notice may direct beneficial owners either to the intermediary's website or to the issuer's website to access the proxy materials.<sup>15</sup> A Notice prepared by an intermediary must include a toll-free telephone number, e-mail address or

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<sup>14</sup> Exchange Act Rule 14a-16(a)(2) requires issuers to deliver such information "in sufficient time" for the intermediary to prepare, print and send the intermediary's Notice to beneficial owners at least 40 calendar days prior to the shareholder meeting date.

<sup>15</sup> If the intermediary chooses to direct shareholders to its own website, it must make the issuer's proxy materials available free of charge and may not compromise the anonymity of beneficial owners who visit the intermediary's website. If an intermediary chooses to direct beneficial owners to the issuer's website, it must inform them that they can submit their voting instructions to the intermediary, but cannot execute a proxy directly in favor of the issuer unless the intermediary has executed a proxy in favor of the beneficial owner. This is based on the fact that the intermediary, and not the beneficial owner, is the registered holder of the securities. See Internet Availability Release at 37.

Internet website address of the intermediary or its agent where a shareholder can request copies of the proxy materials, and, if applicable, a brief description of the rules that permit the intermediary to vote the securities if the beneficial owner does not return his or her voting instructions.<sup>16</sup> Also, like an issuer, an intermediary may not provide a beneficial owner with a means to provide voting instructions unless it ensures that the shareholder has access to the proxy statement and annual report.

*Requests for Paper or E-Mail Copies Must be Applied Across Accounts*

In a nod to commenter concerns about having to elect to receive paper or e-mail copies year after year and from issuer to issuer, the new rules require an intermediary to apply such requests across all of the beneficial owner's accounts with such intermediary. Further, the notice and access rules place an affirmative obligation on an intermediary to keep track of requests for copies from beneficial owners. We expect that intermediaries and issuers may try to anticipate such requests, in advance of any specific shareholders' meetings, by asking shareholders about their delivery preferences in order to determine how many shareholders will elect to receive copies of proxy materials.

**Soliciting Persons Other Than the Issuer**

One aspect of the new notice and access rules that was hotly debated is the treatment of proxy solicitations by persons other than the issuer. Many shareholders and shareholder advocacy groups have lamented the costs that the SEC's proxy rules impose on shareholders and other groups engaging in proxy solicitations. With the adoption of an electronic proxy delivery regime, hope has been expressed that the costs of proxy solicitations by shareholders will decrease.<sup>17</sup>

Originally, the SEC had proposed to permit persons other than the issuer to rely on a modified notice and access model pursuant to which they could engage in Internet-only proxy solicitations and would not be required to deliver paper or e-mail copies of the soliciting materials upon request. Many commenters objected to this proposed approach, however, in part due to concerns regarding the potential for abuse presented by such a model. In response to these comments, the notice and access rules treat issuers and other soliciting persons similarly in most respects. Like an issuer, a soliciting person who intends to rely on the notice and access delivery model begins the process by posting its proxy materials on an Internet website and sending a Notice to the issuer's shareholders. Such person must also deliver paper or e-mail copies of its materials upon request. As discussed below, however, there are some noteworthy differences between the issuer notice and access model and the model that applies to other soliciting persons.

*Limited Solicitations*

As is the case under the current proxy rules, a soliciting person other than the issuer may limit its solicitation to shareholders from whom it hopes to solicit a proxy and is not required to send a

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<sup>16</sup> The intermediary's Notice may not inform a beneficial owner of how to request copies of the proxy materials from the issuer. In fact, a beneficial owner may not request a paper or e-mail copy from the issuer at all. The SEC adopted this aspect of the notice and access rules in response to comments and in order to allow shareholders to make permanent elections to receive paper copies that could be applied across their accounts with an intermediary. See Internet Availability Release at pages 12 and 38-39. See, e.g., Exchange Act Rule 14b-1(e)(1).

<sup>17</sup> See, for example, the comment letter submitted by Institutional Shareholder Services.

Notice to all of an issuer's shareholders.<sup>18</sup> Based on these provisions, a soliciting person other than the issuer may limit its solicitation to shareholders who receive delivery only by Internet access – i.e. they have not elected to request paper or e-mail copies of proxy materials. The soliciting person would still be obligated to deliver copies of its materials upon request, however.

#### *Greater Timing Flexibility*

Due to the fact that a soliciting person may choose to commence a solicitation in advance of an issuer's solicitation or in opposition to a solicitation that already has commenced, the notice and access rules provide a soliciting person other than an issuer with greater flexibility as to the timing of the Notice. Such person may send its Notice at the later of (a) 40 calendar days prior to the meeting; or (b) 10 calendar days after the issuer first sends out its proxy statement or Notice to shareholders.<sup>19</sup>

#### *Information Included in Notice and Proxy Card*

A solicitation in opposition may be launched before the issuer has sent its own proxy statement or Notice. In consideration of this possibility, the notice and access rules provide soliciting persons with flexibility regarding the information that must be included in the Notice. Specifically, the Notice sent by a soliciting person other than an issuer may be limited to the agenda items known to the soliciting person at the time the Notice is distributed.<sup>20</sup>

A soliciting person other than the issuer may distribute proxy cards that only seek proxy authority for specific matters, as opposed to all items on the agenda (i.e. only a partial slate of directors or only one of several agenda items). Because such a proxy, as with any proxy, would revoke any previously-executed proxy submitted by the shareholder, the shareholder could lose his or her ability to vote on matters other than those indicated in the soliciting person's proxy card. A soliciting person other than the issuer who solicits proxies for only some of the matters to be considered at the meeting must indicate clearly on its Notice whether execution of the proxy card will revoke any previously executed proxies by shareholders (as would be the case for any solicitation by a soliciting person that follows the issuer's distribution of its own proxy cards).

#### *Shareholder Lists*

Under current Exchange Act Rule 14a-7, a soliciting person other than the issuer may request the issuer to provide it with a list of the issuer's shareholders. In the alternative, the issuer can choose to mail the soliciting person's proxy materials to its shareholders at the soliciting person's expense. The SEC has left this structure largely intact but has made two changes. First, an issuer that is providing its shareholder list to a soliciting person must indicate which of those shareholders have

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<sup>18</sup> Under the proxy rules, an issuer that intends to hold an annual or special meeting must solicit proxies for such meeting with a proxy statement on Schedule 14A. If the issuer does not intend to solicit proxies, or if it only intends to solicit proxies for some, but not all of its shareholders, Section 14(c) of the Exchange Act requires that the issuer distribute an information statement to the shareholders from which it is not soliciting proxies. Soliciting persons other than the issuer are not subject to the requirements of Section 14(c). Thus, unlike an issuer, they have no obligation to furnish an information statement to shareholders from whom no proxy authority is sought.

<sup>19</sup> See Exchange Act Rule 14a-16(d)(1)(ii)(A).

<sup>20</sup> See Exchange Act Rule 14a-16(l)(3)(i).

permanently requested paper or e-mail copies of proxy materials.<sup>21</sup> Second, an issuer that elects to send the soliciting person's proxy materials must honor the soliciting person's election to follow the notice and access rules.<sup>22</sup>

### **Effective Dates of the Voluntary Notice and Access Model**

The notice and access rules will require that issuers that wish to rely on the new rules and intermediaries make significant logistical and practical adjustments in order to implement the new rules. With these considerations in mind, the SEC has adopted an extended implementation period. Issuers may not send a Notice in reliance on the new rules before July 1, 2007. In practical terms, this means that an issuer may not use the notice and access delivery model for meetings held before August 10, 2007. If an issuer's meeting will be on or after August 10, 2007, it may only send the Notice on or after July 1, 2007.

### **Proposed "Universal" Notice and Access Rules**

In addition to adopting the voluntary notice and access model, the SEC proposed to amend the proxy rules to move to a regime in which Internet access to proxy materials would be a required element for all proxy solicitations in the future. This proposed universal notice and access model would operate substantially the same as the voluntary model: an issuer would satisfy its proxy delivery obligations by posting a copy of its proxy materials on the Internet, notifying its shareholders that the proxy materials are available and sending paper or e-mail copies of such materials to shareholders upon request. Although an issuer could choose to continue to deliver paper or e-mail copies of its proxy materials, it would be required to post its proxy materials on an Internet website regardless of which delivery model is chosen. The universal model would apply to intermediaries and soliciting persons other than the issuer in the same manner as the voluntary notice and access model. The universal notice and access model may become effective as early as January 1, 2008 for large accelerated filers and on January 1, 2009 for all other issuers. The comment period for the proposed rules will end on March 30, 2007.

### **Practical Impact of the Notice and Access Rules**

As issuers consider whether to adopt the notice and access model, several practical implications should be kept in mind. The notice and access model requires issuers to send the Notice at least 40 calendar days prior to the shareholder meeting. This is likely to be sooner than is currently customary and will compress the time available following year-end to complete the preparation of the proxy materials.<sup>23</sup> It will also impose greater time pressure on related processes, such as Rule 14a-8

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<sup>21</sup> Contrary to the original rule proposals, an issuer is not required to provide a soliciting person with the e-mail addresses of shareholders.

<sup>22</sup> The amendments to the proxy rules also require intermediaries to follow the notice and access model if so elected by a soliciting person other than the issuer. Currently, although not required to do so, intermediaries generally distribute a soliciting person's proxy materials in reliance on the procedures set forth in Rules 14b-1 and 14b-2, in the same manner that they distribute proxy materials of an issuer.

<sup>23</sup> Neither Exchange Act Rule 14a-3 nor Schedule 14A specifies when an issuer is required to mail its proxy materials, with one exception: an issuer must mail its proxy materials at least 20 business days in advance of an annual or special meeting of shareholders if the proxy statement incorporates other documents by reference in response to Item 13(b) or 14(b) of Schedule 14A. See Instruction D.3 of Schedule 14A. An information statement must be mailed to shareholders at least 20 calendar days prior to the meeting date or the date on which corporate action may be taken. See Rule 14c-2(c). Even (continued...)

shareholder proposal no-action requests. Further, because a proxy card may not be sent with the initial Notice, an issuer using the notice and access model may have to undertake more than one mailing during the proxy solicitation process if it chooses to furnish the proxy card to shareholders in a paper, rather than an electronic, format. This, of course, is in direct conflict with the purposes underlying the notice and access model - to lower the costs of printing and mailing.

The impact of the new rules on shareholder participation remains to be seen. Based on both empirical research and anecdotal experience, several commenters raised the concern that the extra steps shareholders must take to access proxy materials under the notice and access model could have the effect of deterring many shareholders from participating in the proxy voting process.<sup>24</sup> This effect would be exacerbated by proposed changes to NYSE Rule 452, which currently allows an intermediary to vote on "routine" proposals if a beneficial owner has not provided voting instructions to the intermediary at least 10 days before the shareholder meeting.<sup>25</sup> The proposed changes would eliminate broker discretionary voting with regard to the election of directors. Without such broker votes, some issuers may find it challenging to obtain a quorum at shareholder meetings. The combination of the affirmative steps shareholders must take under the notice and access model and the proposed changes to broker discretionary voting may require issuers to spend even more time and resources to encourage desired levels of shareholder participation in the proxy voting process.

While the SEC projects that the rules will significantly decrease the printing and mailing costs associated with proxy solicitations, issuers using the notice and access model may still incur considerable costs. For example, under the notice and access model, issuers would not be able to take advantage of the economies of scale associated with bulk printing and mailing. Rather than coordinating one large bulk mailing of all proxy materials, issuers would coordinate several smaller mailings consisting of Notices, followed by proxy cards and paper copies of proxy materials as requested. Furthermore, issuers are required to satisfy shareholder requests for paper copies for one full year after the shareholder meeting date. As a result of the several smaller series of mailings, issuers may incur printing and mailing costs on a higher per item basis both at points prior to and after shareholder meetings. In addition, issuers face the risk of underestimating or overestimating the number of paper copies of proxy materials needed to respond to shareholder requests, resulting in extra costs for printing and mailing additional copies or already-expended costs that cannot be recouped.

Based on these considerations, an issuer that is considering the notice and access model should consider its corporate profile carefully. An issuer with a predominantly retail shareholder base may find that the projected costs savings of the notice and access rules are illusory; unresponsive shareholders and excessive requests for paper copies may place the potential cost savings of the notice and access model beyond reach. This would be particularly relevant to an issuer that has adopted a majority vote standard for the election of directors, where the failure to obtain the vote of a majority of shares cast for a candidate may result in holdover candidates on the board of directors. In contrast, the notice and access model may be more appropriate for an issuer with a predominantly

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though not necessarily required to do so by the proxy rules, many issuers mail their proxy materials approximately 30 days in advance of the meeting.

<sup>24</sup> See, for example, the comment letters submitted by ADP, AARP and the United States Postal Service. Covington & Burling LLP assisted ADP in the preparation of its comment letter regarding the Notice and Access rules.

<sup>25</sup> See the NYSE's press release, "NYSE Adopts Proxy Working Group Recommendation to Eliminate Broker Voting in 2008," available at <http://www.nyse.com/press/1161166307645.html>.

institutional shareholder base, where achieving a quorum may be easier and where the issuer may expect to receive fewer requests for paper copies. In either case, issuers should begin taking steps now to determine whether the notice and access model is appropriate for them.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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