Business Law Section
AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654
(312) 988-5588
Fax: (312)988-5578
www.ababusinesslaw.org
businesslaw@abanet.org

ASSOCIATION YEAR 2009-2010
CHAIR
Nathaniel L. Doliner
4221 West Boy Scout Boulevard
Suite 1000
Tampa, FL 33607-5780

CHAIR-ELECT
Lynne B. Barr
Exchange Place
53 State Street
Boston, MA 02109-2803

VICE-CHAIR
Linda J. Rusch
P.O. Box 3528
721 North Cincinnati Street
Spokane, WA 99220-3528

SECRETARY
Martin E. Lybecker
1875 Pennsylvania Avenue NW
Washington, DC 20006-3642

BUDGET OFFICER
Renie Yoshida Grohl
8300 Fox Hound Run NE
Warren, OH 44484-1774

CONTENT OFFICER
Scott E. Ludwig
Suite 900
200 Clinton Avenue W
Huntsville, AL 35801-4933

IMMEDIATE PAST CHAIR
Karl J. Ege
Suite 4800
1201 Third Avenue
Seattle, WA 98101-3099

SECTION DELEGATES TO
THE ABA HOUSE OF DELEGATES
Mary Beth Clary
Naples, FL

Barbara Mendel Mayden
Nashville, TN

Maury B. Poscover
St. Louis, MO

Hon. Elizabeth S. Stong
Brooklyn, NY

COUNCIL
William H. Clark, Jr.
Philadelphia, PA

Donald W. Glazer
Newton, MA

Stephanie A. Heller
New York, NY

Dixie L. Johnson
Washington, DC

William B. Rosenberg
Montreal, QC

Mitchell L. Bach
Philadelphia, PA

Conrad G. Goodkind
Milwaukee, WI

Paul (Chip) L. Lion III
Palo Alto, CA

Timothy M. Lupinacci
Birmingham, AL

Jacqueline Parker
San Jose, CA

Margaret M. Foran
Naperville, IL

Lawrence A. Hamermesh
Wilmington, DE

Myles V. Lynk
Tempe, AZ

Christopher J. Rockers
Kansas City, MO

Jolene A. Yee
Modesto, CA

Doneene Keemer Damon
Wilmington, DE

Jean K. FitzSimon
Philadelphia, PA

Lawrence A. Goldman
Newark, NJ

Joel I. Greenberg
New York, NY

Donald C. Lampe
Greensboro, NC

BOARD OF GOVERNORS LIAISON
Stephen L. Tober
Portsmouth, NH

SECTION DIRECTOR
Susan Daly
Chicago, IL
(312) 988-6244
suedaly@staff.abanet.org

December 2, 2009

Via e-mail to: **rule-comments@sec.gov**

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attn: Elizabeth M. Murphy, Secretary

RE: File No. S7-22-09
Release Nos. 33-9073; 34-60825; IC-28946
Amendments to Rules Requiring Internet Availability of Proxy Materials

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law (the "Section") of the American Bar Association (the "ABA") in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its October 14, 2009 proposing release referenced above (the "Proposing Release").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section, nor does it necessarily reflect the views of all members of the Committee.

I. Overview

We strongly support the Commission's continuing efforts to improve the proxy disclosure and solicitation process. In particular, we believe that the Commission's adoption of the notice and access model in 2007 represented a significant step forward in allowing issuers and others to use technology to ease the costs and burdens of proxy dissemination while also assuring the ready availability of proxy materials to shareholders and other market participants. Many corporations have realized significant cost savings with respect to printing and mailing expenses, although some have expressed concerns regarding the fees charged by proxy delivery service providers (which we outline below). And we commend the Commission for undertaking, in the words of Chairman Schapiro, "a comprehensive review of the mechanics by which proxies

are voted and the way in which information to shareholders is conveyed."[1] This project should ensure that the Commission obtains the more holistic, "big-picture" perspective necessary to evaluate the overall effectiveness of the current proxy rules in achieving their principal goal of informed shareholder voting.

We share the concern expressed by the Commission, in the Proposing Release, that issuers' use of the notice-only option for retail shareholders may be linked to lower voting response rates by this segment of the shareholder population as compared to issuers using the full set delivery option. Accordingly, we fully support the Commission's decision to investigate the possible causes of low retail shareholder participation rates including, but perhaps not limited to, confusion generated by the notice and access model to the distribution of proxy materials, within the broader framework of the "proxy mechanics" project now underway.[2] In the meantime, we encourage the Commission to act now to improve those aspects of the notice and access model that have been addressed in the proposed amendments. A combination of greater flexibility afforded to all soliciting persons regarding the format of the Notice, and the ability to educate investors about both the how and why of e-proxy in supplemental materials - along with the additional improvements we suggest below - should significantly assist the Commission's goal of alleviating any shareholder confusion regarding the notice and access model.

We view the Commission's e-proxy proposals as a constructive step in its broader initiative to assure that the proxy rules continue to operate as intended to facilitate informed shareholder voting in the Internet era, and support the adoption of the proposed amendments (as modified pursuant to our recommendations below). We urge the Commission to focus its future efforts on further refining the notice and access model. As part of the Commission's comprehensive proxy review, we recommend that the Commission consider such creative ideas as client-based directed voting by street-name holders[3], as well as the possibility of permitting an issuer greater latitude to communicate directly (rather than indirectly, through intermediaries) with a substantial portion of its shareholder base.[4]

---

[1] Speech by Chairman Mary Schapiro, U.S. Securities and Exchange Commission, Address to the Practising Law Institute's 41st Annual Institute on Securities Regulation (New York, New York, Nov. 4, 2009)("Chairman's Address"), available at http://www.sec.gov/news/speech/2009/spch110409mls.htm.

[2] As the Commission observed, "[t]he available data do not necessarily exclude the possibility that factors other than requirements of our notice and access rules may contribute to the different voting response rates, although the available data do not identify them." Proposing Release at 7. Put another way, a correlation does not necessarily demonstrate proximate causation. In our view, the observed decline in retail voting may be related to a number of different factors, including (i) the degree to which the retail shareholder understands the operation of the proxy voting system; (ii) the willingness of the retail shareholder to dedicate appropriate time and effort to accessing and reviewing proxy materials; and (iii) the willingness of the retail voter to participate in the vote. Tied to these considerations are matters such as whether a retail shareholder considers the marginal benefit (to the shareholder and the corporation) of casting a vote (representing what might be a very small percentage ownership) to exceed the marginal inconvenience relating to the effort required to do so. While the Commission's proposals address (i), in our view the Commission's comprehensive efforts should also address (ii) and (iii) above.

[3] By client-based directed voting, we are referring to standing instructions provided to a securities intermediary by a shareholder beneficially owning the shares owned of record by the intermediary or the custodian of a depositary in which the intermediary is a participant.

[4] Also, along these lines, the Commission should consider, in connection with its broader review of the proxy solicitation process, whether to allow issuers and other soliciting persons the right to disseminate a "form of proxy"

II. Improving Clarity of the Notice and Permitting Use of Educational Materials

A. General Comments

1. Permitting Greater Flexibility in Formatting and Selecting Language to be Used in the Notice

We support the Commission's proposal to amend Exchange Act Rule 14a-16(d) to permit greater flexibility in formatting and selecting language to be used in the notice of Internet availability of proxy materials (the "Notice"). By eschewing boilerplate in favor of a more flexible approach to the required disclosure, it would be our hope that shareholders would be more inclined to read the Notice. As companies (and other soliciting persons) experiment with different forms and styles of the disclosure, we would hope that the most informative and reader-friendly forms of Notice would be the most frequently used. We view this as an educational process for holders of retail shares, and believe that if a retail shareholder reads and understands one company's (or other soliciting person's) description of the Internet availability of proxy materials, the shareholder will be better informed in connection with the availability of all future proxy materials to which the shareholder may have access, whether from that company or another soliciting person.

We urge the Commission to permit a reasonable degree of "free-writing" in the Notice, delimited by a simple set of "principles-based" line-item requirements designed to deter abusive "electioneering." In this regard, we suggest that the Commission should permit the inclusion of voting recommendations in the Notice, as provided in existing Rule 14a-16(d)(3). If the Commission remains concerned about the possibility that some shareholders will mistake the Notice for a proxy card, it could require a legend (as the Commission stated in the Proposing Release) "to the effect that the Notice should not be used for voting on matters, and that a separate proxy card or Vote Instruction Form should be used for voting."

Similarly, we do not support the imposition of any new regulatory limitations on issuers' ability to choose those shareholders for whom the notice-only option is appropriate. Unlike non-issuer soliciting persons, issuers must provide proxy materials to all shareholders – not just to targeted groups. Before considering additional restrictions in this area, the Commission should allow continued latitude for issuer experimentation under the amended rules, to enable issuers to realize the anticipated cost savings that prompted the Commission to move to the notice and access proxy model in 2007. Instead, the Commission should wait and see whether the amended rules accomplish their intended goal of mitigating shareholder confusion

---

along with the notice delivered by electronic means or, at a minimum, allow for the delivery of the company's glossy annual report by electronic means. An alternative measure might be to allow companies to offer shareholders an incentive to vote (e.g., inexpensive give-aways or trinkets) if they return a proxy, regardless of how voted. In our view, all possible means of increasing the participation of retail holders should be explored and considered.

over the course of at least one more proxy season. As discussed above, the Commission ultimately may determine that the apparent decline in retail voting may be attributable to a variety of factors related to the disintermediation of share ownership and the operation of the complex NOBO/OBO system created by Commission Rules 14a-13 and 14b-1 and 14b-2.[5]

2. Permitting Issuers and Other Soliciting Persons to Accompany the Notice with an Explanation of the Notice and Access Model

We also support the Commission's proposal to permit companies to provide an explanation of the notice and access model, but urge the Commission to take a less restrictive approach than that set forth in the Proposing Release. Investor educational materials regarding the operation of the notice and access model should be helpful in promoting increased shareholder voting. However, we submit that it may be desirable for companies (or other soliciting persons) not only to explain the "how" to shareholders – they may also want to explain "why" the issuer has chosen an electronic over a paper-based format for proxy delivery. To this end, we recommend that the Commission allow companies (and other soliciting persons) to outline the benefits of using the notice-only option (whether on a mix-and-match basis or exclusively), together with an explanation of how the notice-only option actually works.

Rather than taking a prescriptive approach to the contents of the educational materials, we recommend that the Commission specify by rule the topics that cannot be included. Alternatively, if the purpose of such prohibitions would be to prevent use of the educational materials as a soliciting tool, the Commission could simply embed this principle directly in Rule 14a-16.

With respect to solicitations of street-name holders, we believe that intermediaries and their agents should be required to pass educational materials – whether prepared by an issuer or other soliciting person -- through to beneficial holders, subject to reimbursement of the reasonable cost of doing so.

3. Technical amendments to the Rules for Registered Investment Companies

We support the Commission's proposal to amend Exchange Act Rule 14a-16(f)(2)(iii) to permit registered investment companies to accompany the Notice with a summary prospectus. Rule 498 requires that the summary prospectus contain the same key information that is included in the new summary section of the statutory prospectus. As a result, shareholders will continue to have access to key information about a fund through delivery of the summary prospectus. Furthermore, since Rule 498 provides for a layered approach to

[5] The Commission may want to consider, as part of its review of the voting process, permitting companies using the full set delivery option to send their annual reports to shareholders by electronic means.

disclosure, shareholders will still have access to the statutory prospectus online or in paper format.

III. The Commission Should Relax the Notice Mailing Deadline for Issuers

A. The minimum time period prior to the shareholder meeting for issuers to send out the Notice should be shortened from 40 days to 30 calendar days.

We believe that the notice and access model for delivery of proxy materials has provided a number of benefits, including cost savings to issuers (which indirectly benefit shareholders) and facilitation of a "green" proxy material distribution process, which benefits everyone. We strongly encourage the Commission to continue to permit companies to use the notice and access model and to fine-tune it based on experience to date.

In our view, the single greatest impediment to increasing the number of issuers that use the notice-only option is the requirement under the current Rule 14a-16(a) that issuers using the notice-only option must send out their Notice at least 40 days prior to the shareholder meeting date. Due to the requirement of intermediaries and/or their agents (such as Broadridge) that all of the documents be completed and provided to them at least five business days prior to the mailing date of the Notice, as a practical matter the deadline for issuers is typically 47 calendar days prior to the shareholder meeting date. This imposes a significant burden on issuers to complete the preparation of their proxy materials much earlier than would have been the case had they chosen the full set delivery option. We are aware of a significant number of issuers that have chosen not to use the notice-only option because of these timing concerns.

Most state corporate laws require that the record date for a shareholder meeting be no more than 60 days prior to the meeting date.[6] Because information responsive to certain of the Schedule 14A line-items cannot be determined until after the close of business on the record date (such as the number of outstanding shares eligible to vote at the meeting), issuers have less than two weeks in which to finalize the proxy materials if the notice-only option is used for <u>any</u> shareholder constituency (*e.g.*, institutional holders of more than 10,000 shares). On the other hand, if an issuer uses the full set delivery option, the issuer deadline for the proxy materials and notice of shareholder meeting is as few as 10 days prior to the meeting (based on a 10 day statutory period between the notice and the meeting.[7] This significant difference between 47 days and as few as 10 days has induced many issuers to elect to use the full set delivery option.

---

[6] *See, e.g.*, Delaware General Corporation Law Section 213(a) and California Corporations Code Section 701(a).

[7] *See, e.g.*, Delaware General Corporation Law Section 222(b) and California Corporations Code Section 601(a). This assumes that it is not a merger proxy statement that incorporates by reference to documents that are not delivered with the proxy materials.

In the ordinary course, most calendar-year companies hold their annual meeting of shareholders in May. This timing has historically enabled them to prepare and file their Form 10-K and to prepare their annual report to shareholders prior to focusing on and finalizing their proxy materials. Because many of the same corporate personnel are involved in the preparation of all of these documents, separating the Form 10-K/annual report deadline from the proxy statement deadline can be very useful (and sometimes essential). Many issuers that expect to incorporate certain proxy statement information by reference into their Form 10-K[8] view the period between filing of the Form 10-K and filing of the proxy materials as critical to their being able to devote the requisite time and attention to preparation of the proxy materials. Under the full set delivery option, they can file on the 120th day and still hold their meeting at the end of May. Unfortunately, they cannot follow this schedule under the notice-only option in its current form.

We believe shareholders are disadvantaged under the current rules, which may operate to compel some companies that want to use the notice-only option for some or all segments of their shareholder populations to defer the date of their annual meetings to June (for calendar-year companies), nearly six months after the fiscal year end. There is a benefit achieved by holding a shareholder meeting as soon as practicable after the end of a fiscal year.

For the reasons discussed in this letter, we believe that the Commission should shorten the minimum time period prior to the shareholder meeting for sending out the Notice of from 40 days to 30 calendar days.

B. Shortening the minimum period for sending the Notice of Internet Availability of Proxy Materials to shareholders from 40 days to 30 calendar days prior to the meeting would not harm investors.

In our view, a shareholder who is sent a Notice at least 30 days prior to the meeting would have adequate time to receive that Notice, request a paper copy of the proxy materials if desired, receive and review the requested materials, and vote. The shareholder could, of course, also access the materials on the Internet during this period. We note that under existing Rule 14a-16(d)(5), the Notice must include a toll-free telephone number that a shareholder can use to request a copy of the proxy materials and that existing Rule 14a-16(j) requires that the company send paper copies by first class mail (or other reasonably prompt means) within three business days after receiving a request. According to the United States Postal Service, the estimated delivery time for domestic first-class mail is two to three days.[9] Assuming delivery time using first-class mail of four days (versus the typical two to three days) and that the company does not send a paper copy until the third business day after receiving a request, in the normal course, a shareholder would still have well over a week after receiving the

[8] General Instruction G(3) to Form 10-K, which provides that such information may only be incorporated if the definitive proxy statement is filed within 120 days after the end of the issuer's fiscal year.
[9] *See* USPS – Frequently Asked Questions – Domestic mail estimated delivery times.

Notice to telephone the company[10] to request that a paper copy be sent. A shareholder who requested e-mail delivery of the proxy materials would have an even longer period of time to make his or her request (or would receive his or her materials sooner after making a request). We note also that data from Broadridge indicate that the percentage of shareholders who receive a Notice and then request a full set of proxy materials is small and declining.[11] We believe it is reasonable to assume that the request rate will continue to decline as shareholders become more familiar with the notice and access model and the overall level of Internet and email access grows.

Moreover, because current Rule 14a-16(j)(4) enables a shareholder to make a permanent one-time election to receive paper copies, every shareholder is able to elect to receive paper copies of proxy materials (and thus have the maximum available time to review the printed materials and to vote) by simply making a single request at any time.

IV. Proposed Amendment to Notice Deadlines for Soliciting Persons Other Than the Issuer

A. General Comments - Amendments to the Time Periods under Rule 14a-16(1)(2)(ii)

We support the Commission's proposal to amend Rule 14a-16(l)(2)(ii) to require a soliciting shareholder relying on this alternative to file a preliminary proxy statement within 10 days after the issuer files its definitive proxy statement and to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the Commission, and agree that this would provide sufficient time for a soliciting person to prepare its proxy statement and respond to staff comments, while still permitting the soliciting person to use the notice and access model. We do not believe the Commission should impose a specific time period by which a soliciting person other than the issuer must send its Notice.

[10] The household telephone subscribership rate in the United States was 95% in July 2007, according to Trends in Telephone Service, published in August 2008 by the Industry Analysis and Technology Division, Wireline Competition Bureau of the Federal Communications Commission (available at http://braunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf).

[11] The Broadridge data showed that 0.78% of shareholders who received a Notice requested a full set of proxy materials in the period 7/1/08 to 5/31/09, a decrease from 1.05% in the period 7/1/07 to 6/30/08. *See* Notice and Access, Statistical Overview of Use with Beneficial Shareholders (as of May 31, 2009).

V. Other Observations and Suggestions

A. Notice and Access Fees

As the Commission observed in requesting comment,[12] "[s]ome issuers have expressed concern regarding the fees charged by proxy distribution service providers". We are aware that some corporations that have expressed such concerns have pointing to their inability to understand the bases for the fees charged by such providers to implement e-proxy (in part because of the lack of transparency that otherwise would be injected if these fees were covered by New York Stock Exchange Rule 465), much less negotiate the level of notice and access fees actually charged. However, we are not aware of any reliable empirical evidence that would permit us to respond to the excellent question posed in the Proposing Release: "Have the fees charged by proxy distribution service providers affected use rates of the notice and access model?" This situation is an inevitable consequence of the disintermediation of share ownership mirrored in the existing NOBO/OBO communication mechanism, and therefore should be considered within the broader framework of the Commission's ongoing "proxy mechanics" project.

B. The Importance of Investor Education

We applaud the Commission's decision to focus on the need for enhanced retail shareholder education, both in light of its experience with administering the e-proxy amendments over the past two years, and its concern regarding the potential decline in retail shareholder voting following the January 1, 2010 effective date of amendments to NYSE Rule 452 barring member firms from exercising discretionary voting authority in uncontested director elections. This Committee would be pleased to work with the Commission's staff in helping to develop educational materials that companies could use to assist all shareholders, but particularly the retail component, to understand the scope of their proxy voting rights and to exercise them on a fully informed basis regardless of the existence of a proxy contest.

VI. Conclusion

We believe the changes proposed by the Commission will help to inform shareholders of the operation of the notice and access model. We encourage the Commission to consider extending the scope of the amendments to permit issuers and other soliciting persons to explain the benefits of this model. With our recommended modifications, the changes should, in our view, enable shareholders who desire to cast (or beneficial owners who direct their recordholders to cast) votes at shareholder meetings to be better able to do so. We would hope that, once more fully understood, use of the model by issuers and other soliciting persons alike will encourage shareholders who either have not voted historically, or who had expected to

---

[12] At p. 17 of the Proposing Release.

receive physical (*i.e.* paper) proxy materials prior to casting (or directing) a vote, to use the system to access the proxy materials and to vote. In this connection, we fully support – and would like to participate in furthering – the Commission's efforts to promote enhanced shareholder education regarding the rights and responsibilities associated with the shareholder franchise. We would hope that, as shareholders learn more about the accessibility of web-based information regarding the companies in which they own shares, as well as their rights and responsibilities as shareholders, they will become more interested in understanding the strategic and other issues confronting such companies, and thus will exercise their voting power on a more fully informed basis. Looking forward, we hope that greater numbers of retail shareholders will be encouraged to view, by videoconference or otherwise, shareholder meetings as they occur (where otherwise permitted by applicable state law), and to participate in the various investor education and communication opportunities being made available by an increasing numbers of companies.

****

The Committee appreciates the opportunity to comment on the Proposals and requests that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Sincerely,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin, Chair of the Committee
on Federal Regulation of Securities

cc: Mary L. Schapiro, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Meredith B. Cross, Director, Division of Corporation Finance
David M. Becker, General Counsel

Drafting Committee:

Catherine T. Dixon
Joseph P. Kelly II
Carol McGee
James J. Moloney
Ronald Mueller
Robert A. Robertson
Jeffrey W. Rubin
Ann Yvonne Walker
Jonathan Wolfman