SULLIVAN & CROMWELL LLP
125 BROAD STREET
NEW YORK, NEW YORK 10004-2498
212-558-4000

February 13, 2006

VIA E-MAIL: rule-comments@sec.gov

Nancy M. Morris,
Secretary,
Securities and Exchange Commission,
100 F Street, NE,
Washington, DC 20549-9303.

Re: Proposed Rules Relating to Internet Availability of Proxy Materials (Release No. 34-52926); File No. S7-10-05

Dear Ms. Morris:

We are pleased to respond to Release No. 34-52926 (the "Proposing Release") in which the Securities and Exchange Commission (the "Commission") solicited comments on proposed rule changes (the "Proposed Rules") that would permit delivery of proxy materials to shareholders through the Internet.

We support strongly the Commission's efforts to permit the use of the Internet to reduce the costs of proxy solicitation and to improve the efficiency with which proxy materials are delivered to shareholders. In our experience, the printing, mailing and administrative costs associated with the delivery of proxy materials to shareholders represent a very significant expense on the part of registrants, with some large issuers bearing costs in the millions of dollars to carry out this function. The time and effort to mail proxy statements and annual reports for large issuers should not be underestimated. Some of our large capitalization clients must sign off on their proxy statement and annual report two weeks before the first mailing occurs. This type of delay in the proxy statement delivery process compresses the time allotted for review of the proxy statement and annual report and subjects the issuer to the risk that events could occur which would necessitate changes to those documents and require the issuer to discard thousands of

printed annual reports or proxy statements. Accordingly, we strongly encourage the Commission to permit registrants to take advantage (to the extent consistent with adequate disclosure standards) of technological advances to reduce these costs, delays and risks.

In particular, we support the "notice and access" model as being consistent both with current levels of Internet availability amongst investors and with the approach taken by the Commission in its recent securities offering reforms.[1] We perceive no basis upon which to treat the delivery of proxy statements and annual reports differently from the delivery of prospectuses. In each case, the investor will receive a notice of electronic delivery and in each case the investor can request a paper copy of the document. It would seem to us that the initial decision to invest in an issuer is at least as important as a subsequent voting decision. Thus, we believe the Proposed Rules are consistent with and, to some extent, mandated by the new prospectus delivery rules under the Securities Act of 1933.[2]

In response to a specific request for comment made in the Proposing Release, we do not believe that the notice and access model should be restricted to any particular class of issuer or shareholder. There is, in our view, no rational basis upon which to permit the use of this model to (for example) well-known seasoned issuers ("WKSIs"), but deny it to other registrants. While WKSI status or similar qualification may affect the nature and amount of disclosure appropriate in certain Commission filings, or the extent to which the Commission should conduct a pre-effective review of offering materials, it does not bear any relation to the adequacy of a delivery mechanism. Similarly, it is appropriate, in our view, that mutual funds and other investment companies be accorded the full benefit of the Proposed Rules. As issuers with typically high proportions of retail investors, the cost savings and timing benefits to these companies (and therefore, their shareholders) associated with Internet-based delivery is even more significant than for other registrants.

Despite our general view that the Proposed Rules should be broadly applied, we agree with the Commission that the Proposed Rules should not extend to business combination transactions at this time. Our view, similar to that expressed by the Commission in the Proposing Release, is that such transactions are of such singular importance, and the associated proxy materials of sufficient complexity and volume, that it would not be appropriate to extend the Proposed Rules to these transactions.

While we fully support a notice and access model for proxy material delivery, we have concerns about several aspects of the Proposed Rules. As we detail below, we believe that the delivery obligations imposed on issuers are too onerous; that the application of the Proposed Rules to intermediaries will be unduly complicated and

---

1 See Release No. 33-8591 (July 19, 2005).

2 See Rules 172 and 173 under the Securities Act of 1933.

confusing; and, with respect to proxy solicitations by non-issuer parties, that the Proposed Rules may be used to circumvent the carefully crafted requirements and procedures of Rule 14a-8 and lead to a proliferation of economically wasteful proxy solicitations.

A. The Effect of the Proposed Rules on Registrants

As discussed in the introduction to this letter, we believe that the notice and access model has the potential to provide significant cost and time savings to registrants. We have concerns, however, that as drafted, the Proposed Rules lack the flexibility to permit registrants to realize all of these potential benefits. We also believe that issuers and non-issuers alike should be permitted (and with respect to some information, required) to include information on the Notice beyond that permitted under the Proposed Rules. Our specific suggestions follow.

1. *The timing rules for distribution of printed materials should be altered to allow registrants to more fully realize the significant benefits potentially available through the use of the Internet for proxy material delivery.*

The two-business day mailing requirement faced by registrants who receive requests for printed materials presents a significant obstacle to the full realization of all of the benefits potentially available under the Proposed Rules. Since a registrant is unlikely to know in advance with any precision the number of shareholders who will request printed materials, and since two business days is generally an insufficient amount of time to print such materials, registrants will have to estimate the number of printed copies they will require. Since an under-estimate would result in a failure to meet proxy material delivery obligations, we expect that registrants will tend to err on the side of caution, potentially by printing almost the same number of copies as they do under present rules. This, of course, will undermine one of the goals of the notice and access delivery model.

One simple solution to this problem would be to increase the time that issuers are permitted to send out materials after they receive a request. Extending the period to ten business days, for example, with a proviso that such period not extend beyond the day that is two weeks before the shareholders' meeting, would allow issuers to better match supply and demand for printed proxy material. Given the economic nature of commercial printing, however (which we understand to involve very high set-up costs and relatively low marginal production costs), we believe that, even with such an approach, issuers will be forced to print many more copies than they would otherwise need, since requests will have to be met on a "rolling" basis. Printing materials in small batches, which would be the most efficient approach to meet such requests, is not the most practical or cost-effective method.

In light of this, our preferred approach would permit issuers to print all of their materials in a single batch, after they have received all requests from shareholders. Such an approach would require requesting that shareholders submit their request for

printed copies a set amount of time (we suggest 21 days) prior to the shareholders' meeting.[3] Issuers would then be required to send such materials out within a further period of time (we suggest five business days following the request cut-off date). While we are aware that, even under such a system, many issuers will not be able to print proxy materials within the prescribed turn-around time and will therefore still be required to estimate demand for printed materials, we believe that such estimates will be far more accurate if they can be made some period after the Notices are first sent (which would not be possible under the Proposed Rules as currently drafted). It is also the case, however, that many other issuers, including many that are widely-held, will likely be able to time their printing runs so as to print precisely the number of copies they require. In our view, such an arrangement would provide shareholders with ample opportunity to receive and read printed materials, while allowing issuers to manage their printing requirements with far greater precision. We believe this approach will maximize cost savings to issuers without material disadvantage to shareholders.

Also, consistent with current practices, we believe that mailing should be permitted by third class mail, as is typically the case today. Annual reports and proxy statements can easily run over 200 pages on a combined basis. A package of this size and weight would be very expensive to send by first class mail. Accordingly, we believe that the current mailing practices should be retained. We believe that our proposed new time frames for requesting and mailing printed copies will give enough time for the mailing to arrive sufficiently in advance of the meeting date for shareholders to meaningfully examine the relevant documents.

2. *The permitted content of the Notice should include information about when and how shareholders can vote their proxies and a control ID should be mandatory.*

We agree with the Commission's general proposition that Notices should be streamlined documents that do not become "mini-proxy statements." However, we do believe that it would be desirable to permit the Notice to include the method by which the proxies may be voted by telephone and the Internet. Currently, this information is most frequently printed on the cover letter to the proxy statement package sent by issuers, where it is readily notable, and on the proxy cards. Since, in an Internet-based proxy statement, a "cover letter" is rendered obsolete, we believe that forcing issuers to print this information only on the proxy cards will lead to fewer shareholders being aware of the electronic or telephonic options for voting their proxies, and may lead to lower participation by many (especially smaller) investors. Since the document most analogous to a cover letter in an Internet delivery model is the Notice itself, we believe that the Notice should be permitted to contain this information.

---

[3] We would expect that this 21-day deadline would be contingent on the Notices of Internet Availability of Proxy Materials (the "Notice") having been sent a sufficient amount of time before such deadline, so that shareholders are given a reasonable opportunity to request printed copies. For example, the deadline might be set at the later of 21 days before the shareholders' meeting or 14 days following mailing of the Notices.

As discussed below in Section A.3, we also believe that all Notices should be required to contain a control ID number, unique to each shareholder, so that shareholder identity can be adequately ascertained for Internet voting purposes.[4] And, as discussed in Section B.1, we believe that the Notices should explain to beneficial owners holding in "street name" that they need to complete the voting instructions sent to them by their intermediary.

3. *The rules should set out clear standards for the validation of shareholder identity when proxies are executed through electronic means.*

In our view, the use of a control ID for each shareholder is necessary to facilitate Internet proxy delivery and to ensure the integrity of the vote. Without a control ID, it will be difficult, if not impossible, for registrants to verify and calculate votes made on a downloaded and printed form of proxy card. It would be a very cumbersome process to manually read and attempt to match the person executing the proxy with the shareholders ledger. This difficulty would be multiplied in a proxy contest where a shareholder could download and execute two different proxy cards. In such an event, the voting tabulator would need to determine which proxy was dated later (in most circumstances, the later dated proxy would control).[5] Accordingly, to achieve the full benefits of Internet proxy delivery, we recommend that the Commission require issuers to provide a unique control ID number to each shareholder on the Notice. Since issuers routinely issue control ID numbers today in order to facilitate and verify telephone and Internet voting, compliance with our proposed requirement would not appear to be difficult or burdensome.[6]

4. *The rules should require (i) that any party soliciting proxies in respect of fewer than all matters before the meeting be required to vote any such proxies in favor of management's recommendation on the matters not subject to the solicitation or (ii) that all proxy cards permit shareholders to provide voting instructions in respect of all matters before the shareholders' meeting.*

Today, most forms of proxy state that a later-dated proxy (or telephone or Internet vote) invalidates a prior-dated proxy (or telephone or Internet vote). Where none of the matters being solicited are subject to a contest and no additional shareholder proposals are made, this is a simple rule to apply. Where, however, one of the matters is

---

[4] We are aware that this requirement would raise difficulties in circumstances where Notices were being "householded". In such a case, we would suggest that all of the control IDs be listed on the Notice opposite each shareholder name.

[5] See Section A.4, below, where we discuss the problems associated with proxy revocations.

[6] In order to permit soliciting persons other than the issuer to effectively conduct an Internet solicitation, it would appear necessary to require the issuer to include the control ID number on any distribution of materials for a soliciting holder pursuant to Rule 14a-7.

contested or an additional proposal is made, the application of the rule becomes more complex. For example, if five matters are being submitted to shareholders and a shareholder either commences a solicitation in opposition to one such matter or subsequently engages in a proxy solicitation with respect to a new proposal, a later-dated proxy on that one matter, which would invalidate a prior proxy that voted on all five matters, could result in the final vote on the four uncontested matters inaccurately reflecting the shareholders' intent. This problem would be especially acute in the context of approval of items that brokers are not permitted to vote upon without express instruction, such as stock option plans, where it is typically difficult to obtain the required vote for approval, not because of opposition to the proposal but because large numbers of shareholders tend not to return proxy cards or provide instructions to their brokers.

To prevent this result, we recommend that the Commission adopt a rule requiring persons soliciting proxies in respect of fewer than all matters before the meeting to vote all shares as to which proxies are given in favor of management's recommendation on those matters not subject to the solicitation. In the alternative, we suggest a rule requiring that proxy cards cover all matters on the agenda. We believe the former is the better option because it might be difficult for shareholders who are only interested in soliciting proxies on a particular matter to include sufficient disclosure in their proxy materials to address the other matters. We do not believe it is sufficient to simply warn shareholders that a proxy card may invalidate an earlier vote. Under the Proposed Rules, the ease with which parties other than the registrant may engage in proxy solicitations makes it much more likely that shareholders will propose matters after the registrant has already distributed its proxy materials. A shareholder who would like to vote on this new matter is put in the difficult position of having to choose whether or not to invalidate his or her vote on the other matters on the agenda.

We view our proposal as a natural progression from Commission Rule 14a-4(d), which expressly addresses this issue in the context of a person soliciting proxies for a minority of the board of directors of an issuer. Under Rule 14a-4(d), the person soliciting for a minority of the board must agree to vote for all of the registrant nominees other than those specified by such soliciting person. Our proposal applies the same concept – the soliciting person would be required to vote in favor of all non-contested matters.

B. Effects of the Proposed Rules on Intermediaries

We believe that the proposed mechanism for transmittal of the Notice through an intermediary is unnecessarily complex and may lead to confusion amongst both beneficial owners and intermediaries alike. We propose several changes to the Proposed Rules to simplify this process.

1. *Intermediaries should not be permitted to replace the Notice provided by the Issuer or other soliciting party.*

The Proposed Rules would permit an intermediary to replace the Notice prepared by the Issuer or third-party soliciting person with a Notice prepared by the intermediary. Presumably, this is to facilitate the delivery of voting instructions from the beneficial owner to the intermediary. Replacement of the Notice, however, may lead to confusion amongst beneficial owners as to who is providing the information on the Notice and unnecessarily complicate the delivery of proxy materials, especially in circumstances where multiple parties are soliciting proxies with respect to the same meeting. In addition, it could potentially lead to situations where an intermediary revised a shareholder communication in a manner contrary to the intent of the soliciting person, which could give rise to disputes.

Instead, we would propose that intermediaries be required to include along with the Notice they forward a supplemental instruction sheet (which may be generic to all Notices forwarded by a particular intermediary) describing the mechanism adopted by the intermediary for obtaining voting instructions from its customers. This is consistent with the intermediaries' current practice of forwarding voting instruction requests to beneficial owners. Our proposal is not meant to preclude an intermediary from soliciting voting instructions by telephone, e-mail or the Internet, all of which would be permitted under our proposal. However, we do believe that an intermediary should be required to deliver a printed instruction sheet along with the Notice in all cases. To ensure that beneficial owners holding through intermediaries are aware of the requirement that they vote through the intermediary, we suggest that the legend required on every Notice contain a statement explaining that shareholders holding their shares in "street name" should refer to the supplemental instruction sheet provided by the intermediary in order to cast their vote correctly.

2. *Intermediaries should not be required or permitted to post proxy materials on their websites.*

The Proposing Release states that an intermediary posting its voting instructions on its website would be required to post the issuer's proxy materials as well. We believe that it would be inappropriate for an intermediary to be required to post proxy materials directly on its website. As an initial matter, we do not understand why an intermediary should be responsible for maintaining an ongoing list of the issuer's soliciting materials. Under the Proposed Rules (as they are described in the Proposing Release),[7] an intermediary would need to update its website continually, as additional

[7] Although the Proposing Release describes the Proposed Rules as permitting an intermediary to maintain its own website, we do not believe the Proposed Rules, as drafted, accomplish this. Since we do not believe such stand-alone websites should be permitted in any case, we have not addressed this discrepancy in our technical comments in Section D of this letter.

soliciting materials are distributed. This could lead to circumstances where an intermediary fails to include all proxy material posted on the website associated with a particular proxy solicitation. As a result, we suggest that intermediaries choosing to post their requests for voting instructions on the Internet not be permitted to post proxy material directly, but rather be required to provide hyperlinks to the website of the issuer and any other parties conducting solicitations in respect of that issuer. This would appropriately place the burden for maintaining an updated website on the soliciting party.

3. *To expedite the delivery of proxy materials, an intermediary should be able to request that the issuer or other soliciting party furnish paper copies directly to non-objecting beneficial owners.*

In order to protect the anonymity of objecting beneficial owners ("OBOs"), the Proposed Rules require beneficial owners to make all requests for paper copies through their intermediary. While we agree that this procedure is necessary in the case of OBOs, in the case of non-objecting beneficial owners, we believe that intermediaries should be permitted to provide the soliciting person with the information necessary to permit direct delivery of the proxy materials to requesting shareholders, thereby expediting the delivery process.

C. Internet Delivery of Proxy Materials by Non-Issuer Parties

Our greatest concern with the Proposed Rules arises in the circumstance of third-party (*i.e.*, non-issuer) proxy solicitation. While the goal of increasing shareholder participation in solicitations is laudable, we do not think that the Proposed Rules properly address the interplay between solicitations made through the Internet and shareholder proposals currently made under Rule 14a-8. The Proposed Rules would provide parties making proposals with many of the advantages of a Rule 14a-8 solicitation, but without the limitations imposed in that Rule. Soliciting parties would be able to present their position without a 500-word limit, make multiple proposals and make proposals not allowed under the Rule 14a-8 procedure, for example. In our view, this will cause many parties currently making proposals under Rule 14a-8 to gravitate towards electronic proxy solicitation, and cause others, whose proposals would currently be excluded under the Rule 14a-8 no-action process, to avail themselves of this method, thereby increasing dramatically the number of proxy contests. The resulting additional cost to issuers (and therefore, to their shareholders), as well as the increased burden imposed on the staff of the Commission (the "Staff") overseeing compliance of such proxy solicitations with Commission rules, could be very substantial. Our concern is most pronounced with respect to the "Internet-only" solicitations contemplated by the Proposed Rules, in which proxy contests could be conducted solely through a website, to which shareholders would be directed using a press release or other public statement. Such solicitations could be launched at minimal cost, at any time and virtually without notice. To counterbalance the risk, in our view, that such solicitations pose, we propose several modifications to the Proposed Rules.

The existing Rule 14a-8 procedure provides a low-cost mechanism for shareholders who do not have the means or the desire to undertake a "traditional" proxy contest to put a proposal before shareholders. To ensure that only appropriate proposals are submitted through the Rule 14a-8 framework, the Commission has instituted a number of limitations on Rule 14a-8 proposals, including requiring that such proposals be appropriate for shareholder action, that they not be particular to the proposing shareholder (*e.g.*, personal grievances), that they not be redundant with an existing proposal and that statements in support of such proposal not be materially false or misleading. Given the ease with which Rule 14a-8 can be accessed, the current rules also relax certain requirements that would otherwise be imposed on issuers in connection with a proxy contest. For example, the presence of a shareholder proposal in the registrant's proxy statement, even where the registrant has taken a position against the proposal, does not give rise to a "solicitation in opposition" for the purposes of Rule 14a-6. This relieves the issuer from preliminary filing requirements that would otherwise ensue from the shareholder proposal.

In addition, the deadlines for proposal submission under Rule 14a-8[8] provide a necessary opportunity for issuers to review a proposal and, if appropriate grounds exist, obtain "no action" relief permitting its omission from the issuer's proxy materials. Such deadlines also provide issuers with a relatively defined period of time during which they are required to address these matters. The virtually universal availability of Rule 14a-8 requires such a review period and standardized procedure as indispensable safeguards against abuse. The Commission, in enacting the rule, foresaw this hazard and implemented protections commensurate with the risk. The Proposed Rules provide none of these safeguards.

Moreover, the very nature of the filing requirements, which under the Proposed Rules would involve proponents filing their materials with the Commission, without any prior review, as a preliminary proxy statement or pre-solicitation material, would in our view result in the EDGAR system containing filings which in some instances are prepared by persons motivated by personal grievance or other inappropriate grounds. In the relatively few traditional proxy contests that presently occur each year, even when experienced counsel is involved on both sides, a substantial amount of time is spent (including by the Staff) ensuring that Rule 14a-9 is complied with. Inviting parties to engage in full-blown proxy contests without the necessary advice and sophistication, as we believe the Proposed Rules do, could result in the proliferation of materially false and misleading information being filed by third parties on EDGAR with respect to issuers, as well as cause a profound disruption of the present proxy solicitation process.

Our concern is grounded in the realization that, unlike a "traditional" proxy contest (*i.e.*, one where proxy materials are sent in physical form to shareholders),

---

[8] Rule 14a-8 requires that proposals be submitted on or before the date that is the anniversary of the date that was 120 days before the previous year's proxy statement was first released to shareholders by the issuer.

an electronic solicitation can be mounted with minimal effort and expense. While we recognize and appreciate that cost reduction is a primary goal of the Proposed Rules, it is indisputable in our view that the substantial investment of resources required to carry out a traditional proxy contest serves an important gatekeeper function, since it discourages those without a real stake in the outcome of a contest from undertaking activities that may inappropriately consume issuer resources, to the detriment of other shareholders. There is no evidence to suggest that Rule 14a-8 does not function well with respect to investors who have only a modest investment in the issuer, and this rule balances appropriately the ability of shareholders to make a proposal with the issuer's interest in not expending an inappropriate amount of its resources on its response to such proposal. The Proposed Rules tilt this balance, in our view, and are likely to result in a significant increase in the amount of time and money spent by issuers in dealing with these matters. Also, it is worth noting that a shareholder can, without being required to file a proxy statement, communicate broadly with other shareholders on a proposal, including by announcing the manner in which they intend to vote and the reasons therefor, so long as they are not otherwise engaged in a proxy solicitation. As a result, many of the shareholders who might avail themselves of Internet delivery of proxy statements will continue to have an effective means of reaching shareholders whether or not the Proposed Rules are available to these shareholders.

In our view, the rules ultimately adopted by the Commission should seek to encourage and reduce the costs of legitimate proxy contests, while deterring those solicitation activities that are either damaging or wasteful to issuers and to those shareholders not holding the same views as the soliciting party.

1. *The Proposed Rules should be amended to permit electronic solicitations, other than for the election of directors, only by shareholders holding a substantial amount of stock.*

The most straightforward way to provide the benefit of electronic delivery to third-party solicitations while minimizing the risk that issuers (and the Staff) will be inundated by full-fledged proxy contests relating to inappropriate matters or matters which have traditionally been dealt with under Rule 14a-8 is to limit the use of this delivery mechanism for solicitations, other than for the election of directors, to shareholders with a substantial economic stake in the outcome of the solicitation. While we recognize that this may in a few instances deter contests, we believe that this is outweighed by the cost that would ultimately be incurred by all shareholders if solicitations could be made by any person at any time.

The threshold we propose is $200,000 or 2% of the issuer's outstanding voting securities. Obviously, this is significantly higher than the $2,000 threshold that applies to Rule 14a-8 proposals, but this, in our view, is appropriate, in light of the much greater number of safeguards in place under Rule 14a-8 and the fact that Rule 14a-8 remains available to shareholders holding fewer shares. It is of note that our proposed figure is within, but at the low end, of the range of costs for a "traditional" proxy contest.

Under our suggested changes to the Proposed Rules, this threshold would ensure that the proxy solicitor has a significant economic commitment in the issuer. Such commitment, however, would not be in the form of an expenditure for printing and mailing proxy materials, but rather in an investment in the securities of the issuer.

In further recognition of the necessarily high threshold we propose, we would also suggest that groups of shareholders, acting in concert, be permitted to aggregate their shareholdings in order to meet the test. When several shareholders with aggregate shareholdings at a high threshold have identified a common interest in conducting a proxy contest, it is less likely that such a contest would be either inappropriate in its subject matter or result in unwarranted or wasteful consumption of the issuer's resources. Our concerns relating to solicitations launched by smaller shareholders are thereby mitigated in such a circumstance.

We also believe, given that Rule 14a-8 does not apply to contests for the election of directors, that even shareholders falling below our proposed threshold be permitted to use the electronic solicitation process with respect to board elections. While we still have concerns that this could lead to situations where issuers are forced to make significant expenditures in response to a proposal supported by few shareholders, we also believe that contests for the election of directors are generally less problematic than are solicitations conducted in respect of other matters. Since the election of a board is a matter typically dealt with at shareholders' meetings, our concerns regarding proposals that are motivated by personal grievance or relate to similarly improper subject matter are not present in the case of director elections.

2. *The rules should make clear that a "no-Notice" Internet-only solicitation alone does not amount to (i) "delivery" of proxy materials for the purposes of Rule 14a-4(c), (ii) a "contest" for the purposes of the discretionary voting rules of the NYSE or other SROs or (iii) a "solicitation in opposition" for the purposes of Rule 14a-6.*

A significant practical issue is raised by "no-Notice" Internet-only proxy solicitations, in that there is no means of determining the number of shareholders actually solicited in connection with the proposal. In theory, that number could be anywhere in a very large range, with a minimum equal to the number of shareholders who actually execute the electronic proxy card and a maximum equal to the number of shareholders who have accessed the proxy materials on the applicable website.

In light of the difficulty (if not impossibility) of determining the extent of the solicitation, we recommend that the rules as adopted make clear that a shareholder will not be deemed to have been "solicited" until and unless (i) a Notice is delivered to such shareholder in accordance with the proposed delivery rules or (ii) verifiable evidence of delivery is obtained in connection with electronic delivery of proxy materials. For the latter option, we would expect that such evidence would be available only after a shareholder identified himself or herself with a control ID number.

Discretionary authority to vote and Rule 14a-4(c) – Under the present Rule 14a-4(c), an issuer may exercise discretionary authority to vote on matters for which the issuer has not been given timely notice (as determined by advance notice by-laws or as otherwise provided in the rule), or, if timely notice is given, if the issuer describes the matter and explains in its proxy materials how it intends to exercise such discretion. An exception, however, applies if the proponent of the matter in question both (i) solicits proxies from the percentage of shareholders that would be required in order to approve the proposal and (ii) provides the issuer with statements to this effect. In such a situation, the issuer may not exercise its discretion with respect to the matter in question. Since a proponent conducting an "Internet-only" solicitation, unless the proponent has obtained evidence of delivery as discussed above, could not determine the number of solicited shareholders, we believe that the rules should make clear that a registrant could continue to exercise discretionary voting authority with respect to such solicitations (assuming, of course, that the registrant has complied with the other relevant provisions of Rule 14a-4(c)). Were this not the case, third-parties could utterly negate the purpose and effect of Rule 14a-4(c) simply by notifying the issuer in advance of its intention to solicit a sufficient number of shareholders, and launching an "Internet-only" solicitation, notwithstanding the number of shareholders actually accessing the website.

The existence of a "contest" for the purposes of the rules of national securities exchanges and self-regulatory organizations (particularly NYSE Rule 452) – Under the rules of the NYSE, a broker, unless it has received voting instructions from the beneficial owner, may not give a proxy to vote stock in respect of any matter subject to a "contest". Our understanding (consistent with that expressed in the Proposing Release) is that the interpretative guidelines of the NYSE deem a "contest" to exist if 50% of shareholders have been the subject of a counter-solicitation. In addition to making clear in the new rules that an Internet-only solicitation does not qualify as a solicitation for the various Commission rules discussed herein, we further recommend that the Commission urge the NYSE, other national securities exchanges and self-regulatory organizations (collectively, "SROs") to make analogous clarifications in their rules. Otherwise, the danger exists that every Internet-only solicitation will give rise to a contest for the purposes of SRO rules, which in turn could cause significant approval problems at annual meetings, due to the effect of broker non-votes. Such a rule would also avoid a circumstance where a last-minute proxy contest (which would be permitted under the Proposed Rules, as long as it involves an "Internet-only" solicitation), unexpectedly creates a "contest" for broker voting purposes.[9]

[9] We note that NYSE Rule 452 states that brokers who have submitted a proxy before they are aware of a contest shall use their discretion in determining whether to revoke such proxy. While this would mitigate somewhat the impact of a true last-minute contest (assuming brokers largely determine not to revoke their proxies), significant problems could still be created by contests arising well after issuers have sent their proxy materials, but before executed proxies are sent by brokers.

Preliminary filing requirements for registrants commenting on "solicitations in opposition" – Commission Rule 14a-6 provides that a registrant commenting in its proxy materials on a solicitation in opposition must file those materials preliminarily with the Commission. The rule currently makes an exception for comments made with respect to shareholder proposals made under Rule 14a-8. Since, with respect to an "Internet-only" solicitation, a registrant will have no ability to determine the extent to which its shareholders have been or will be solicited (unlike a traditional proxy contest, where the extent of the solicitation is evident from the degree to which materials have been disseminated), we believe that, unless a proponent has provided evidence of a widespread solicitation effort (such as that discussed above with respect to discretionary voting under Rule 14a-4(c)), issuers should be permitted to comment upon such a solicitation without triggering the preliminary filing requirement that would otherwise result.

D. Technical Comments

In addition to the foregoing, we make the following technical comments on the Proposed Rules:

1. Although we do not believe that intermediaries should be permitted to create a substitute Notice (see comments in Section B.1, above), if this concept is adopted, Rule 14a-2(a)(1) should be amended to provide for this circumstance.

2. In Proposed Rule 14a-3(e)(2), "or Notice at Internet Availability of Proxy Materials" should be added after "proxy statement" in the lead-in and in clause (i).

3. The second sentence of Proposed Rule 14a-(3)(g)(1) should be amended to add ", together with the annual report to security holders if so required," after "Materials" and before "must." The same language should be added between "materials" and "must" in the last sentence of Rule 14a-3(g)(1).

4. In recognition that the Notice may include any language required by state law, we suggest inserting ", except for any notice or information required by state law," between "registrant" and "must" in the lead-in to Proposed Rule 14a-3(g)(4).

5. Both Proposed Rule 14b-1(b)(2) and 14b-2(b)(3) should be revised to incorporate, if retained in the final rules, the substitute intermediary notice contemplated by the Proposing Release.

6. To reflect the intention expressed in the Proposing Release that "business combination transactions" should include transactions where the consideration offered consists only of cash, Proposed Rule 14a-3(g)(9) should add "or to a transaction for which disclosure is required pursuant to Item 14 of §240.14a-101 of this chapter", following the word "chapter".

* * *

We appreciate the opportunity to comment to the Commission on the Proposed Rules, and would be pleased to discuss any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to Robert W. Reeder (212-558-3755) or Eric M. Krautheimer (212-558-4899) in our New York office, or Janet Geldzahler (202-956-7515) in our Washington D.C. office.

Very truly yours,

SULLIVAN & CROMWELL LLP