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**The SEC Adopts Amendments to its Proxy Rules
to Foster Shareholder Communication**

October 1992

SUMMARY PAGE

White Paper

**The SEC Adopts Amendments to its Proxy Rules
to Foster Shareholder Communication**

This White Paper discusses the adoption by the Securities and Exchange Commission of revisions to its proxy rules and regulations intended to eliminate regulatory obstacles to the exchange of views and opinions by shareholders and others concerning management performance and initiatives presented for a vote of shareholders.

**The SEC Adopts Amendments to its Proxy Rules
to Foster Shareholder Communication**

On October 15, 1992, the Securities and Exchange Commission ("SEC") adopted amendments to its proxy rules and regulations in order to eliminate what it perceived as unnecessary regulatory obstacles to the exchange of views and opinions by shareholders and others concerning management performance and initiatives presented to shareholders for approval. The revised proxy rules became effective immediately upon their publication in the Federal Register on October 22, 1992.

To facilitate a smooth transition, registrants are only required to use the revised rules for a new proxy or information statement, form of proxy or periodic report under the Securities Exchange Act of 1934 ("Exchange Act") filed on or after November 23, 1992 (30 days after publication), and any request for a mailing or shareholder list received from a shareholder on or after that date.

Background

The SEC's adoption of the proxy rule amendments culminated a multi-year effort that was the subject of intense and sometimes passionate public comment and debate about the effectiveness of the proxy-voting process and its effect on the corporate governance system in this country. Since 1942, if a person held conversations with more than 10 shareholders regarding a matter submitted to the shareholders for approval, that person might have violated the federal proxy rules. The revised rules include a series of steps designed to enable shareholders to communicate with each other and the board of directors without unnecessary interference or costs.

The SEC first proposed to amend the proxy rules in June 1991, and the two proposing releases generated over 1700 comment letters from the public. In June 1992, the SEC responded to the comments and repropose revised rules.

Proxy Rule Amendments

Remove barriers for shareholders not seeking proxy authority. Under the revised proxy rules, if a shareholder is not seeking proxy authority and does not have any other special interest in the election, the shareholder will be exempt from the requirements of the proxy rules except the antifraud provisions. Shareholders will therefore be free to publish their views in the press or the media without prior SEC clearance. Small shareholders (*i.e.*, those with less than \$5 million invested in a company) will be completely free to communicate directly with one another. Shareholders with more than \$5 million invested in a

company must send a copy of any written materials that they disseminate to the SEC, including scripts for mass telephone solicitations, within three days of their first use under the cover of a new "Notice of Exempt Solicitation" form.

Oral communications, speeches in a public forum, press releases, published or broadcast opinions, statements, and advertisements appearing in the broadcast media, newspaper, magazine, or other bona fide publication disseminated on a regular basis, do not trigger the new notice requirement. A press release that has not been picked up by a news or wire service, however, has not been "published" according to the SEC, and therefore may not be disseminated without complying with the notice requirement.

Certain persons or their agents may not rely on the new exemption, most notably, the registrant or an affiliate or associate and any of their officers or directors acting on their behalf, as well as any nominee for whose election proxies are being solicited. In addition, any person soliciting in opposition to an extraordinary corporate transaction who intends to propose or has proposed an alternative transaction, or any person with a substantial interest in the subject matter who is likely to receive a substantial benefit beyond his pro rata interest as a shareholder likewise may not rely on the exemption. The exemption is also not available to any person who has reported beneficial ownership of the relevant securities on a Schedule 13D and has disclosed an intention, or merely reserved the right, to engage in a control transaction or contested solicitation for election. Notwithstanding the foregoing, officers and directors of the registrant may rely on the exemption provided that their exempt solicitations are not financed by the registrant, and they otherwise are not engaging in the registrant's solicitation.

A person conducting a solicitation in connection with a Rule 14a-8 shareholder proposal will not be deemed to have a substantial interest in the solicitation solely on the basis of sponsorship of the proposal. Therefore, any such person may rely on the exemption provided that the person does not seek proxy voting authority and is not otherwise ineligible. In this regard, the substantial interest test will be applied to the proponent on the basis of the subject matter of the proposal, not simply on the basis of the inclusion in the proxy statement according to the SEC.

Finally, any person who relies on the new exemption will be deemed to have made an irrevocable election to maintain the exempt status throughout the relevant soliciting period. Thus, in the SEC's view, a person who relies on the exemption could not undertake, with respect to the same meeting or solicitation, a regulated proxy solicitation regarding a matter that was the subject of the exempt solicitation without rendering the prior solicitation activity in violation of the full panoply of the proxy rules.

Shareholder announcement of voting decisions. The simple announcement by shareholders of how they intend to vote, whether or not coupled with the reasons for their voting decisions, that are generally published, broadcast or disseminated to the media are

not subject to the proxy rules under a newly-created safe harbor. In addition, all communications directed at beneficiaries or other persons with respect to whom the shareholder owes a fiduciary duty, or any communication made in response to an unsolicited request for additional information with respect to a prior exempt communication qualify for the safe harbor.

Access to shareholder lists. Under the revised rules, registrants retain the option to deliver the shareholder list or to mail soliciting materials on behalf of the soliciting shareholder, except where the registrant has commenced or has announced an intention to commence a solicitation relating to a roll-up transaction or a transaction subject to the SEC's going private rule. In such instances, the list or mailing option shifts to the requesting shareholder. Within five business days after receipt of a shareholder request for access to the list, the registrant must furnish the following information to the requesting shareholder: (i) notification as to whether the registrant has elected to mail the materials or to provide the list; (ii) the approximate number of record holders and beneficial holders, separated by type of holder and class (or any more limited group of such holders designated by the shareholder); and (iii) the estimated cost of mailing the materials.

The list information provided must be reasonably current and include the names, addresses, and security positions of record holders, including banks, brokers and similar intermediaries. In addition, the list must be furnished in the form requested by the shareholder to the extent that such form is available to the registrant without undue burden or expense, and the registrant must update the information on a daily basis or at the shortest other reasonable intervals until the record date. In return, the requesting shareholder must furnish the registrant with a certification identifying the proposal that will be the subject of the shareholder's communication or solicitation and attesting that the shareholder will not: (i) use the list information for any other purpose; nor (ii) disclose the list information to any other person other than to the extent necessary to effect the communication or solicitation.

Elimination of prior review of proxy materials. The SEC will no longer require persons engaged in a proxy solicitation to pre-file materials such as advertisements, fight letters and other communications prior to their use. Copies of such materials will be filed with the SEC when they are first used. The SEC will still require pre-clearance of documents required to be filed in the case of a person soliciting proxy voting authority, such as proxy statements and proxy cards.

"Red Herring" proxy statement. Under the revised rules, a person conducting a solicitation for proxy voting authority may distribute a filed preliminary proxy statement as soliciting material, so long as no form of proxy is provided prior to the furnishing of a definitive proxy statement. Therefore, a solicitation may commence on the basis of the preliminary proxy statement.

Immediate public access to preliminary proxy materials. This action brings into line the general procedures used with respect to public access to other materials filed with the SEC. Preliminary proxy materials pertaining to mergers and acquisitions or other transaction specified in Item 14 of Schedule 14A which have not been publicly announced, however, will remain confidential upon request. Such confidentially filed materials will not be reflected on the public reference room computer screens.

Bona fide nominee rules. Under the former proxy rules, an insurgent shareholder was not permitted to "round out" a less than full slate of director nominees by including the names of some management nominees on the insurgent's form of proxy. The revised rules allow an insurgent to vote as proxy in favor of those management nominees not specifically excluded by the insurgent shareholder, so long as shareholders are provided an opportunity to write the names of any such management nominees with respect to whom they wish to withhold voting authority from the proxy holder. The insurgent's proxy statement and form of proxy must refer shareholders to management's soliciting materials for the names, background and qualifications of the management's nominees. In addition, the insurgent shareholder will be required to include on the proposed form of proxy, as well as in the proxy statement, a legend to the effect that there is no assurance that any management nominees will serve as directors if the insurgent's nominees are elected.

Unbundling of related proposals. Proxy cards must provide a separate line item vote for each matter submitted for the approval of shareholders, although the adoption of one proposal may be conditioned upon the adoption of another in accordance with state law. According to the SEC, unbundling the proposals will nevertheless allow shareholders to communicate their views to the board of directors on each matter put to a vote. Registrants, however, may provide shareholders with the option to vote on the separate proposals as a package by marking a single box as "FOR," "AGAINST" or "ABSTAIN" with respect to all the separate proposals.

David R. King
Robert B. Murphy

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BUSINESS AND FINANCE

- "Corporate Transactions Involving Government Contractors" (Analysis, Vol. 57, March 16, 1992) Marcia G. Madsen of Morgan, Lewis & Bockius and David R. Johnson of Gibson, Dunn & Crutcher [MLB92-001041]
- "Financial Statements for Proposed or Consummated Acquisitions" (Course materials from 'The Role of the Lawyer in Advising on SEC Accounting Requirements' Seminar sponsored by the Law and Accounting Committee, Section on Corporation, Finance and Securities Law, D.C. Bar, May 20, 1992) Linda L. Griggs [MLB92-001040]
- "New Approaches to Providing Liquidity for Restricted Securities" (ML&B White Paper, July 1992) David R. King [MLB92-001066]
- "SEC Small Business Initiatives" (ML&B Paper, August 1992) Barbara J. Comly [MLB92-001097]
- "Title III of the Americans with Disabilities Act: A Survey of Documentation and Compliance Issues in Lease and Other Contractual Relationships" (ML&B White Paper, May 1992) Peter R. Pinney and Franklin H. Caplan [MLB92-001027]
- "Update: Compliance Officers' Supervisory Responsibilities" (Insights, Vol. 6, No. 7, July 1992, p. 37) Anne C. Flannery and Stuart M. Samoff [MLB92-001068]
- "U.S. Department of Justice and Federal Trade Commission Issue New Horizontal Merger Guidelines" (ML&B White Paper, April 1992) Caswell O. Hobbs [MLB92-001028]

SECURITIES

- "Arbitrage: Introduction, Historical Overview and General Considerations" (Speech outline at National Association of Bond Lawyers Conference, May 1992) Stephen A. Edwards [MLB92-001061]
- "New Approaches to Providing Liquidity for Restricted Securities" (ML&B White Paper, July 1992) David R. King [MLB92-001066]
- "1991 Survey of Disciplinary Actions by Self-Regulatory Organizations" (Securities News, Vol. II, No. 1, Summer 1992) Anne C. Flannery [MLB92-001065]

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