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November 20, 2009

Ms. Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: Amendments to Rules Requiring Internet Availability of Proxy Materials  
File No. S7-22-09

Dear Ms. Murphy:

The Investment Company Institute<sup>1</sup> appreciates the opportunity to comment on the Commission's proposed changes to the proxy rules under the Securities Exchange Act of 1934 that are intended to improve the "notice and access" model for furnishing proxy materials to shareholders.<sup>2</sup>

In the past, the Institute has been strongly supportive of the concept of permitting issuers to make greater use of the Internet to furnish proxy materials to shareholders,<sup>3</sup> but critical of certain elements of the notice and access model the Commission has chosen to adopt.<sup>4</sup> We have a similar reaction to the proposed changes. We commend the Commission for seeking improvements in the model, and generally support the proposed changes. We are disappointed, however, that the proposal

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<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$11.45 trillion and serve almost 90 million shareholders.

<sup>2</sup> See *Amendments to Rules Requiring Internet Availability of Proxy Materials*, SEC Release Nos. 33-9073, 34-60825, and IC-28946, 74 Fed. Reg. 53954 (Oct. 21, 2009) (the "Release").

<sup>3</sup> See Letter from Elizabeth R. Krentzman, General Counsel, Investment Company Institute, to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, dated Feb. 13, 2006 (the "2006 ICI Letter"), available at <http://www.sec.gov/rules/proposed/s71005/ici021306.pdf>.

<sup>4</sup> See Letter from Elizabeth R. Krentzman, General Counsel, Investment Company Institute, to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, dated March 30, 2007 (commenting on the Commission's proposal to adopt rules relating to the universal Internet availability of proxy materials and noting that the notice and access model proposed "contains several features that were not part of the original proposal [that] substantially diminish, if not eliminate, the anticipated benefits of the model") (the "2007 ICI Letter"), available at <http://www.sec.gov/comments/s7-03-07/s70307-22.pdf>.

fails to rectify one of the largest impediments to a successful notice and access model for proxy solicitation – the mandatory separation of the proxy card from the notice. As a result, we believe that the Commission’s proposed amendments, while helpful on the margins, will ultimately fail to substantially increase shareholder participation in proxy solicitations where the notice and access model is used.

This is especially troubling to us, given that a decline in shareholder voting rates, particularly among retail investors, is likely to disproportionately affect investment companies. Investment companies have a much higher proportion of retail shareholders than most operating companies, and retail shareholders are far less likely than institutional investors to vote their proxies.<sup>5</sup> Decreased voting rates may require investment companies to engage in additional solicitations to achieve a quorum, at substantial additional cost. As a result, we have a significant interest in seeing the Commission adopt rules that would encourage greater shareholder participation in proxy solicitations and a notice and access model that would provide meaningful cost savings.

Our comments are explained in greater detail below.

## **I. Separation of the Proxy Card from the Notice**

As initially proposed, issuers could have furnished a proxy card together with the notice.<sup>6</sup> This approach was later abandoned, presumably on the theory that separating the mailing of the proxy card from the mailing of the notice would encourage shareholders to access and read the proxy materials before voting. As ultimately adopted, the rules mandate that if a proxy card is sent, it must be sent separately from, and at least ten days after, the notice.

As we pointed out in the 2007 ICI Letter, we believe it is unrealistic to expect that the separation of the proxy card from the notice will achieve the Commission’s goal of preventing uninformed voting. As a practical matter, it simply adds steps to the process and does not increase the likelihood that a shareholder who is disinclined to read proxy materials will do so. Moreover, it may cause confusion among shareholders who are inclined to vote, as evidenced by the reports of shareholders attempting to vote by returning a marked copy of a notice. Those shareholders likely expected a proxy card in the mailing, and were confused when they were unable to find one.

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<sup>5</sup> Based on our own research, we believe that, as of the end of 2008, retail shareholders held approximately two-thirds of the value of mutual fund shares, but only 40 percent of the value of operating company shares. The disparity is even greater for closed-end funds, for which retail investors own about 98 percent of the value of fund shares. See *Costs of Eliminating Discretionary Broker Voting on Uncontested Elections of Investment Company Directors*, ICI Research Report, Dec. 18, 2006, available at [http://members.ici.org/getPublicPDF.do?file=discret\\_broker\\_voting](http://members.ici.org/getPublicPDF.do?file=discret_broker_voting).

<sup>6</sup> See *Internet Availability of Proxy Materials*, SEC Release Nos. 34-52926 and IC-27182 (Dec. 8, 2005), 70 Fed. Reg. 74598 (Dec. 15, 2005).

Separating the proxy card and notice also adds costs that substantially reduce and may even eliminate the expected cost efficiencies of using the notice and access model.<sup>7</sup> The most obvious cost is postage. We understand that, in many cases, the postage cost of two small mailings (*i.e.*, the notice and the proxy card) is virtually equivalent to one bulk mailing (*i.e.*, the complete package of proxy materials). There are less obvious costs as well, including costs relating to the execution of the proxy. Since issuers cannot send a proxy card with the initial notice, they must provide a separate way for shareholders to execute a proxy, such as a secure electronic voting platform or a separate telephone number manned by a tabulating agent. Of course, if a proxy card could accompany the notice, shareholders would already be in possession of and able to execute the proxy card when they reviewed the proxy statement.

As a result of the decreased participation rates and lack of cost savings, many issuers, including Institute members, elect to avoid sending two mailings by sending the entire package of proxy materials along with the notice. This neither promotes the use of the Internet to communicate with shareholders nor achieves greater cost efficiencies in the furnishing of proxy materials – two of the Commission’s key goals with this rulemaking.

We strongly encourage the Commission to revisit its decision to require issuers to mail proxy cards in a separate and later mailing from the notice. We believe that allowing issuers to include proxy cards along with the notice in the initial mailing will substantially improve shareholder participation rates and, therefore, the use of the notice and access model by issuers.

## **II. Comments on Other Aspects of the Release**

### **1. Reducing the 40-Day Notice Mailing Requirement to 30 Days**

In connection with imposing a 10-day waiting period between sending the notice and sending the proxy card, the “notice and access” model now requires the notice to be sent to shareholders at least 40 calendar days in advance of the shareholder meeting date. The Release seeks comment on whether a 30-day deadline would be preferable.

As we pointed out in the 2007 ICI Letter, we believe the 40-day deadline increases the many practical challenges involved in coordinating the proxy solicitation process. For example, it makes it more difficult for issuers to obtain board approval of the proposed actions or prepare proxy materials in time to meet the mailing deadline. This difficulty may be exacerbated in cases where a fund must file the proxy materials with the SEC and allow 15 to 20 days to accommodate SEC review and comment, such as when a vote is solicited to approve an advisory contract. The 10-day extension also reduces

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<sup>7</sup> See Voluntary Model Adopting Release at 60, 72 Fed. Reg. at 4162 (“We expect that the reductions in printing and mailing costs and the potential decrease in the costs of proxy contests to be the most significant sources of economic benefit to investors of the amendments.”).

flexibility for issuers to respond to unexpected events that may necessitate last minute changes to the proxy materials.

Accordingly, we support a move to a 30-day deadline. We note also that this would be consistent with earlier guidance on the timing for delivering proxy materials.<sup>8</sup>

## **2. Permitting Issuers to Accompany the Notice with an Explanation of the Notice and Access Model**

The Commission proposes several changes designed to increase flexibility with respect to the contents of the notice. In particular, the revised rules would permit issuers and other soliciting persons to accompany the notice with an explanation of the notice and access model “in order to mitigate confusion” and better allow issuers and other soliciting persons to engage shareholders. We strongly support this part of the proposal. As we said in the 2006 ICI Letter, we believe that providing more flexibility with respect to the notice’s contents and the information that may accompany it will help attract shareholders’ attention and may promote greater participation in proxy voting.<sup>9</sup>

## **3. Technical Amendments for Registered Investment Companies**

The proposal includes technical amendments that would allow mutual funds to accompany a proxy notice with a summary prospectus. The Commission also proposes a conforming amendment to Rule 498(f)(2) under the Securities Act of 1933 that would provide that a summary prospectus need not be given greater prominence than an accompanying proxy notice.

We strongly support these amendments. The current rules allow funds to accompany a notice with a full statutory prospectus. Permitting funds to use a summary prospectus instead is a natural extension of the policies underlying both the summary prospectus rules and the proxy rules. We particularly appreciate the clarification to Rule 498(f)(2) regarding greater prominence. We believe that permitting a notice to be featured in such a combined mailing will increase the likelihood of shareholder responses.

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<sup>8</sup> See, e.g., *Timely Distribution of Proxy and Other Soliciting Material*, SEC Release No. 34-33768 (March 16, 2004), 59 Fed. Reg. 13517 (March 22, 1994) (noting that the New York Stock Exchange Listed Company Manual recommends that proxy materials be sent 30 calendar days before the meeting date, while the American Stock Exchange Company Guide recommends that the material be received by shareholders at least 20 calendar days in advance of the meeting date); see also 17 C.F.R. 240.14c-2(b) (requiring that information statements be sent to shareholders at least 20 calendar days before the meeting date).

<sup>9</sup> See 2006 ICI Letter, at page 6.

#### 4. Proxy Solicitation Costs

The Release seeks comment on whether the fees charged by proxy distribution service providers have affected the use rates of the notice and access model. Institute members who have employed the notice and access model have not found it to generate substantial cost savings. Part of the lack of savings may be attributed to high fees charged by proxy distribution service providers and the fact that fees charged for a notice and access solicitation do not appear to be significantly less than for a traditional solicitation. As we stated above, however, there are structural problems with the notice and access model that also lead to inefficiencies – most notably, the separation of the proxy card and notice. We believe this separation adds costs that substantially reduce and may even eliminate the benefits of using the notice and access model.

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We look forward to working with the Commission as it continues to examine a range of issues relating to the proxy solicitation process. If you have any questions about our recommendations in this letter, please feel free to contact me at (202) 326-5815 or Mara Shreck at (202) 326-5923.

Sincerely,

/s/

Robert C. Grohowski  
Senior Counsel

cc: The Honorable Mary L. Schapiro  
The Honorable Luis A. Aguilar  
The Honorable Kathleen L. Casey  
The Honorable Troy A. Paredes  
The Honorable Elisse B. Walter

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