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COMMENT LETTER

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ICI Comment Letter on SEC Proposal to Require Issuers to Make Proxy Materials Available on the Internet (pdf)

ICI DRAFT - 3/30/2007 March 30, 2007 Ms. Nancy M. Morris Secretary U.S. Securities and Exchange Commission 100 F Street, N.E. Washington, D.C. 20549-9303 Re: Universal Internet Availability of Proxy Materials File No. S7-03-07 Dear Ms. Morris: The Investment Company Institute1 strongly supports the Commission's ongoing efforts to facilitate greater use of electronic media to better serve investors' information needs and preferences. We are particularly pleased that, after careful study, the Commission staff is developing a new regulatory approach that will improve the usefulness of mutual fund disclosure by taking greater advantage of technology.2 We have concerns, however, with the Commission's "notice and access" model for proxy materials. The voluntary model that the Commission adopted3 differs from the Commission's initial proposal in several important respects. These changes reduce the model's benefits, increase its costs, and create practical difficulties. As a result, a number of Institute members have indicated that they will not use the model for proxy solicitations. Based on this feedback, we strongly recommend that the Commission not adopt its current proposal to make the "notice and access" model mandatory.4 1 The Investment Company Institute is the national association of U.S. investment companies. More information about the Institute is available at the end of this letter. 2 See, e.g., Keynote Address at 2007 Mutual Funds and Investment Management Conference, by Andrew J. Donohue, Director, Division of Investment Management, U.S. Securities and Exchange Commission, Palm Desert, CA (March 26, 2007). 3 See Internet Availability of Proxy Materials, SEC Release Nos. 34-55146 and IC-27671 (Jan. 22, 2007), 72 Fed. Reg. 4148 (Jan. 29, 2007) ("Voluntary Model Adopting Release"). 4 See Universal Internet Availability of Proxy Materials, SEC Release Nos. 34-55147 and IC-27672 (Jan. 22, 2007), 72 Fed. Reg. 4176 (Jan. 29, 2007) ("Mandatory Model Proposing Release"). Ms. Nancy M. Morris March 30, 2007 Page 2 of 7 Our concerns, which are discussed below, focus on the perspective of investment companies as issuers of voting securities. Features of the "Notice and Access" Proposal that Present Practical Difficulties The "notice and access" model contains several features that were not part of the original proposal. These changes substantially diminish, if not eliminate, the anticipated benefits of the model. Separation of the Proxy Card From the Notice The most significant change from the original proposal is the requirement that if a proxy card is sent, it must be sent separately from, and at least 10 days after, the notice.5 We do not believe that this approach will further the Commission's goal of preventing uninformed voting.6 It is unrealistic to expect that the separation of the proxy card from the notice will cause shareholders who are not otherwise inclined to read proxy materials to do so. Moreover, separating the proxy card from the

notice has significant negative practical implications, as discussed below. Reduction in Shareholder Voting Rates; Multiple Mailings The Commission recognizes that using the model may reduce shareholder voting participation.7 The Institute agrees. In this regard, we believe that separating the proxy card from the notice is likely to exacerbate this problem. Shareholder voting participation is a particular concern for investment companies. Our members are likely to be disproportionately affected because they 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.8 Decreased voting rates may require investment companies to engage in additional solicitations to achieve a quorum, at substantial additional cost.9 5 As initially proposed, issuers could furnish the proxy card together with the notice. See Internet Availability of Proxy Materials, SEC Release Nos. 34-52926 and IC-27182 (Dec. 8, 2005), 70 Fed. Reg. 74598 (Dec. 15, 2005) ("Voluntary Model Proposing Release"). 6 See Voluntary Model Adopting Release at 24, 72 Fed. Reg. at 4153. 7 See Mandatory Model Proposing Release at 38, 72 Fed. Reg. at 4184. 8 Retail shareholders hold approximately 64 percent of the value of mutual fund shares, but only 48 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. 9 This concern is heightened by a pending New York Stock Exchange proposal to eliminate discretionary broker voting for uncontested elections of directors. See NYSE File No. SR-2006-92; see also Report and Recommendations of the Proxy Working Group to the New York Stock Exchange (June 5, 2006). Institute research suggests that typical proxy solicitation Ms. Nancy M. Morris March 30, 2007 Page 3 of 7 Institute members have indicated that, although mailing a proxy card is technically optional under the Commission's model, doing so is a practical necessity to encourage sufficient voter response. 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). Thus, sending two mailings substantially reduces, and is likely to eliminate, the expected cost efficiencies of using the model.10 We recognize that, under the Commission's proposal to mandate use of the model, issuers could avoid sending two mailings by sending the entire package of proxy materials along with the notice.11 This result will substantially undermine the Commission's goals of promoting increased use of the Internet to communicate with shareholders and of achieving greater cost efficiencies in the furnishing of proxy materials. Implications for Preparing Proxy Materials 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, rather than 30 calendar days, as originally proposed. Previous guidance on the timing for delivering proxy materials suggested that 20 to 30 days before a meeting is sufficient.12 Institute members have indicated that the new timing requirement is likely to increase the many practical challenges involved in coordinating the proxy solicitation process. For example, the requirement may make it more difficult for issuers to obtain board approval of the proposed actions or 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 costs for uncontested director elections would more than double under the NYSE proposal because of the need for multiple solicitations. See Costs of Eliminating Discretionary Broker Voting on Uncontested Elections of Investment Company Directors, ICI Research Report, Dec. 18, 2006. 10 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."). 11 If, contrary to our recommendation, the Commission determines to make the model mandatory, the Commission should permit issuers that choose to send the full set of materials with the notice to incorporate the notice into the proxy statement, rather than including the notice as a separate page. 12 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). Ms. Nancy M. Morris March 30, 2007 Page 4 of 7 and comment, such as when a vote is solicited to approve an advisory contract. The 10-day extension also reduces flexibility for issuers to respond to unexpected events that may necessitate last minute changes to the proxy materials. New Means to Execute and Accept Proxies The separation of the mailing of the proxy card and the notice may add other new costs, because the model requires issuers to provide shareholders with a method of executing a proxy at the time they are reviewing the proxy statement on the Internet. 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. Not all issuers currently use such methods for accepting proxies. Of course, if a proxy card could accompany the notice, as initially proposed, shareholders would already be in possession of and able to execute the proxy card when they reviewed the proxy statement. Technical Restrictions for Websites To address concerns about the possible misuse of shareholders' personal information, and in particular the use of shareholders' email addresses for purposes other than proxy communications, the "notice and access" model requires that proxy materials be posted on an issuer's website in a manner that does not infringe on the anonymity of a shareholder accessing that website.13 In particular, a website may not use "cookies" or other software that might collect information about a person who accesses proxy materials on a website. This restriction is problematic and, we believe, unnecessary. As a preliminary matter, the "notice and access" model already prohibits issuers from using email addresses obtained when a shareholder requests proxy materials for any other purposes.14 Federal and state laws also require investment companies and other financial institutions to protect the privacy and integrity of shareholders' nonpublic personal information.15 We believe these and other existing privacy laws and regulations address the concerns the Commission has enumerated. In addition, the prohibition on "cookies" is highly problematic, because virtually all websites use cookies to provide interactive features. Fund websites, for example, use cookies to allow shareholders to monitor their investments' performance, manage their accounts, and access shareholder communications. Once these cookies are installed on a shareholder's computer, a typical website will recognize them when a user tries to access proxy materials on the site. To avoid recognizing cookies in areas where proxy materials are posted while maintaining existing shareholder services, most investment 13 See Voluntary Model Adopting Release at 22-23, 72 Fed. Reg. 4153. 14 See Rule 14a-16(k)(2) [17 CFR 240.14a-16(k)(2)], adopted in the Voluntary Model Adopting Release. 15 See, e.g., Title V of the Gramm-Leach-Bliley and SEC Regulation S-P; California Financial Information Privacy Act, California Financial Code, Section 4050 et seq. Ms. Nancy M. Morris March 30, 2007 Page 5 of 7 company issuers will need to substantially restructure their websites, at considerable cost. Alternatively, an issuer could create a separate website for proxy materials alone. This approach may be less costly, but could confuse

shareholders, who would understandably expect to find proxy materials on an investment company's main website. Additional Cost Considerations As the Commission recognizes, use of the "notice and access" model will cause issuers to incur various costs in addition to those discussed above. The model will, among other things, require issuers to develop proxy materials in electronic formats convenient for both printing and viewing online; maintain those materials on a website and make them available in paper upon request for a year after the conclusion of the meeting to which they relate;16 maintain records of shareholders who permanently elect to receive a paper or email copy of proxy materials; and bear the cost of their intermediaries to do many of the same tasks. Although some of the costs associated with use of the model are inevitable with the move to electronic availability of proxy materials, we encourage the Commission to carefully weigh these costs against the corresponding benefits before proceeding with a mandatory model. Possible ERISA Considerations As discussed in the Institute's 2006 comment letter, special considerations may arise for issuers (including a large number of funds) whose shares are held by self-directed defined contribution retirement plans.17 The Department of Labor ("DOL") requires plans covered by Section 404(c) of ERISA to provide participants and beneficiaries with materials relating to the exercise of voting rights passed through to them.18 DOL regulations governing electronic disclosure of materials required by ERISA are not necessarily consistent with the "notice and access" model.19 As a result, affected issuers 16 The Commission explained that this requirement was necessary because "the proxy statement contains a portion of the total package of annual disclosure for public companies," and many companies incorporate proxy statement information by reference into the Form 10-K. Voluntary Model Adopting Release at 30, 72 Fed. Reg. at 4155. This is not the case for investment company issuers. If the Commission does require mandatory use of the "notice and access" model, it should exempt investment company issuers from this requirement. 17 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. 18 See 29 C.F.R. §§ 2550.404c-1(b)(2)(i)(B)(1)(ix) and (d)(2)(ii)(E)(4)(vii). Under DOL's rules, plans are permitted, but not required, to pass through voting rights with respect to funds available as investment options. The rules require plans to pass through voting rights with respect to employer stock. 19 See 29 C.F.R.§ 2520.104b-1. For example, under DOL's disclosure rules, affirmative consent is required to furnish documents through electronic media, unless a plan participant has access to a computer at his or her workstation and is required to access the computer as an integral part of his or her duties. A former employee or beneficiary of a deceased employee would generally be required to consent to receive documents required by ERISA electronically. Ms. Nancy M. Morris March 30, 2007 Page 6 of 7 (including investment companies) may feel compelled to make sufficient paper copies of proxy materials available to plan sponsors for their participants and beneficiaries. The Process for Advancing Internet Communications Based on the concerns expressed above, we strongly recommend that the Commission evaluate issuers' experiences with the voluntary model before making the model mandatory. In other rulemakings involving new and innovative approaches to communicating with and providing information to mutual fund shareholders, the Commission has taken great care, through a variety of methods, to ensure that its initiatives are based on a sound understanding of the likely impact on those affected. We urge a similarly deliberate and considered process here.20 The voluntary "notice and access" model provides an opportunity for such consideration. While many Institute members have suggested that they will not use it, understanding better the reasons why issuers choose not to use the model would itself be valuable. To the extent other types of issuers use the model, their experiences will enable the Commission to gather information on, among other things, the impact of the model on shareholder voting rates and the

number of shareholder requests for paper copies of proxy materials.21 All of this information will provide the Commission 20 For example, in its recent proposal to allow mutual funds to voluntarily furnish risk/return summary information in XBRL-tagged form as an exhibit to their registration statements, the Commission explained that the program was "intended to help us evaluate the usefulness to investors, third-party analysts, registrants, the Commission, and the marketplace" of data tagging for mutual fund information. Extension of Interactive Data Voluntary Reporting Program on the EDGAR System to Include Mutual Fund Risk/Return Summary Information, SEC Release Nos. 33-8781 and IC-27697 (Feb. 6, 2007), 72 Fed. Reg. 6676 (Feb. 12, 2007) ("XBRL Proposing Release"). We strongly supported that proposal, and we believe the Commission's process – using a voluntary program to gauge the utility of a new approach to all of its intended audiences – is appropriate. Similarly, the Commission's 1998 "fund profile" rule and the forthcoming fund disclosure reform proposal modeled on that rule already have a solid foundation. See Proposed New Disclosure Option for Open-End Management Investment Companies, SEC Release Nos. 33-7399 and IC-22529 (Feb. 27, 1997), 62 Fed. Reg. 10943, 10944 (March 10, 1997). Before even proposing the profile rule, substantial research, including focus groups and investor surveys, and a pilot program, were conducted on behalf of the SEC to assess the validity of the profile concept and content. See Investment Company Institute, The Profile Prospectus: An Assessment by Mutual Fund Shareholders (May 1996), available at http://www.ici.org/pdf/rpt_profprspctus.pdf. Today, there is consensus that existing fund disclosure documents are not effectively informing investors, that there are specific items of information that shareholders need and desire in order to make investment decisions, and that this information ought to be provided in a way or ways that are most useful to shareholders. See XBRL Proposing Release at notes 26-30 and accompanying text. 21 As the Commission acknowledges, its estimate that only 19 percent of shareholders will request paper copies of proxy materials "reflects the diverse estimates suggested by the available data." Mandatory Model Proposing Release at 27, 72 Fed. Reg. at 4182. The difficulty of estimating the request rate for paper materials is a significant concern for investment company issuers. Institute members tell us that, absent data on likely paper request rates, they would be reluctant to drastically reduce the number of copies they print, because the cost of printing extra copies on demand, in a three-day window, is likely to exceed the cost of over-printing in a single bulk order. Ms. Nancy M. Morris March 30, 2007 Page 7 of 7 with a more substantial basis for determining whether and how to require Internet availability of proxy materials in the future. * * * For all of the reasons set forth above, the Commission should not make the "notice and access" model mandatory at this time. Instead, the Commission should take the opportunity to understand the experiences of issuers that use the voluntary program, as well as the considerations of those who choose not to, before deciding to make the model mandatory. The Institute appreciates the opportunity to comment on this proposal. If you have any questions about our comments or would like any additional information, please contact me at 202/326- 5815, Bob Grohowski at 202/371-5430, Frances Stadler at 202/326-5822 or Mara Shreck at 202/326- 5923. Sincerely, /s/ Elizabeth R. Krentzman General Counsel cc: The Honorable Christopher Cox, Chairman The Honorable Paul S. Atkins The Honorable Roel C. Campos The Honorable Annette L. Nazareth The Honorable Kathleen L. Casey Eric R. Sirri, Director Division of Market Regulation Andrew J. Donohue, Director Division of Investment Management About the Investment Company Institute The Investment Company Institute's membership include 8,839 open-end investment companies (mutual funds), 658 closed-end investment companies, 363 exchange-traded funds, and 4 sponsors of unit investment trusts. Mutual fund members of the ICI have total assets of approximately $10.445 trillion (representing 98 percent of all assets of US mutual funds); these funds serve approximately 93.9 million shareholders in more than 53.8 million households.