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MEMORANDUM

January 19, 1988

TO : Professional Staff  
Division of Corporation Finance

FROM: JoAnn Zuercher  
Betsy Murphy  
Office of Disclosure Policy

RE : Recent Amendments to the Proxy Rules

You should have received a copy of Release No. 34-25217 [52 FR 48977], issued by the Commission on December 21, 1987, to announce the adoption of amendments to the proxy rules to (i) eliminate the filing of preliminary proxy and information statements under certain circumstances and (ii) delete the limitation in Rule 14a-8 on inclusion of a shareholder proposal in the registrant's proxy material where the proponent delivers written proxy materials to holders of more than 25% of a class of the registrant's securities entitled to vote. Other less significant amendments to Rules 14a-3, 14a-8, 14c-3, Schedules 14A and 14C, the filing fee rules and Item 401 of Regulation S-K also are described in the Release.

The following outline explains how the proxy rules were affected by the principal amendments, the effective dates of the amendments, and certain impacts of the amendments on proxy screening and monitoring practices. A list of questions and answers which may prove helpful in resolving issues related to the new amendments is attached to this memo. (Attachment No. 1)

I. Significant Proxy Rule Changes

A. Rules 14a-6(a) and 14c-5(a)

These rules have been amended to state that a registrant should not file a proxy or information statement in preliminary form if the statement relates to an annual, or special meeting in lieu of an annual meeting, of shareholders at which the only matters to be acted upon are the election of directors, the election, approval, or ratification of auditors and/or a shareholder proposal included pursuant to Rule 14a-8. The exclusion from filing preliminary material does not apply if the registrant comments on or refers to a solicitation in opposition in connection with the annual meeting. Notes to the rules define "solicitation in opposition" as (a) any solicitation opposing a

proposal supported by the registrant; and (b) any solicitation supporting a proposal that the registrant does not expressly support, other than a shareholder proposal included in the registrant's proxy material or identified in the registrant's information statement. The notes clarify that the inclusion or identification of a shareholder proposal in the registrant's proxy or information statement does not, in and of itself, constitute a "solicitation in opposition," even if the registrant opposes the proposal and/or includes a statement in opposition. Rules 14a-11(e) and 14a-12, as well as Rule 14a-6(b), which relates to additional (2-day) material, are unchanged. Thus, material subject to these rules still must be filed in preliminary form.

B. Rules 14a-8(j) and 14c-5(g)

The filing fee rules have been amended to state that registrants should pay the \$125 fee at the time of filing preliminary material or at the time of filing definitive material if preliminary filing is not required. A new note to Rules 14a-6(c) and 14c-5(b) provides that if no fee is paid at the time of filing definitive material because a fee was paid previously in connection with the preliminary material, the cover letter should so state. The special fees for preliminary material involving proxy contests, mergers, acquisitions, etc. were not affected by the amendments.

C. Rule 14a-8(a)(1)

This rule sets forth the eligibility requirements for submission of a shareholder proposal. Paragraph (a)(1)(ii) of this rule has been deleted; it stated that proponents who delivered written proxy materials to holders of more than 25% a class of the registrant's securities entitled to vote would be ineligible to use the provisions of Rule 14a-8 for inclusion of the proposal in the registrant's proxy material. Other changes to Rule 14a-8(a)(1) require registrants to make requests for documentary support of a proponent's claim that he owns the requisite amount of the registrant's securities within 14 calendar days after receiving the shareholder proposal, and extend the period within which the proponent must respond to the request from 14 to 21 calendar days. The amended rule (new paragraphs (a)(1)(i) and (ii)) also specifies the types of documentation of ownership which may be given to satisfy the eligibility requirements.

II. Effective Dates

The amendments become effective February 1, 1988, except for the deletion of the 25% limitation contained in Rule 14a-8(a)(1)(ii), which became effective on December 29, 1987. The supplementary information section of the release (pages 4-5) includes a detailed explanation of how the effective dates will affect the operation of Rules 14a-6(a), 14a-8(a)(1), 14a-8(d), 14a-8(e), 14c-5(a) and Schedule 14C.

With respect to Rules 14a-6(a) and 14c-5(a), registrants filing proxy or information statements on or after February 1, 1988, should comply with the rules as amended. Please note, however, that registrants required under Rules 14a-6(a) or 14c-5(a), prior to amendment, to file preliminary material on or after January 22, 1988, may forego such filings if, under the terms of the amended rules, preliminary filing would not be required.

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**NON-PUBLIC**

January 19, 1988

Questions and Answers

1. Question: Under what circumstances will registrants file proxy and information statements in definitive form only?

Answer: When the statements are distributed in connection with an annual meeting, or special meeting in lieu of an annual meeting, of shareholders at which the only matters to be acted upon are the election of directors, the election, approval or ratification of auditors and/or shareholder proposals. (There are additional matters for investment companies.)

2. Question: Are there any exceptions to the above?

Answer: Yes. The exclusion from filing in preliminary form does not apply if the registrant comments on or refers to a solicitation in opposition in connection with the forthcoming meeting in its material. (Solicitation in opposition is defined as any solicitation opposing a proposal supported by the registrant and any solicitation supporting a proposal that the registrant does not expressly support, other than a shareholder proposal included in a registrant's proxy material.)

Ex. 1: At the registrant's annual meeting, shareholders will act upon the election of directors, selection of auditors, and an anti-greenmail proposal submitted by a shareholder. The anti-greenmail proposal is included in the registrant's proxy material along with the registrant's statement in opposition. Before the registrant files its proxy material, the shareholder proponent begins its own solicitation in support of the anti-greenmail proposal. The registrant comments on the proponent's solicitation in the proxy statement. The registrant should file only in definitive form because its comments are limited to a solicitation in opposition associated with a shareholder proposal included in its proxy material.

Ex. 2: At the registrant's annual meeting, shareholders will act upon the same matters as in Ex. 1. The proponent of the anti-greenmail proposal did not submit it for inclusion in the registrant's proxy material, however. The proponent conducts an independent solicitation in support of the proposal and the registrant comments on the solicitation in its proxy statement. The registrant should file in preliminary form because it has commented on a solicitation in opposition not associated with a proposal included in its proxy material.

Ex. 3: At the registrant's annual meeting, shareholders will act upon the election of directors, selection of auditors and both an anti-greenmail and South African divestiture proposal. The anti-greenmail proposal is included in the registrant's proxy as a shareholder proposal but the South African proposal is not. (The South African proposal will be submitted for vote at the meeting.) The registrant comments in its materials on the proponent's independent solicitation of votes on both proposals. The registrant should file in preliminary form because it has commented on a solicitation in opposition not associated with a shareholder proposal included in its proxy material.

3. Question: Is the exclusion from filing in preliminary form optional?

Answer: No. If the proxy or information statement deals only with the matters triggering the exclusion, the registrant should file in definitive form only.

4. Question: If, under the new rules, neither submission nor inclusion of a shareholder proposal in the registrant's proxy material triggers a requirement to file in preliminary form, how will the staff handle questions and disputes about the inclusion and characterization of shareholder proposals?

Answer: As in the past, the Office of Chief Counsel will continue to review shareholder proposals in accordance with established Rule 14a-8 procedures. This review is independent of the review, if any, of the preliminary proxy material.

5. Question: Where a registrant does comment on or refer to a solicitation in support of a shareholder proposal included in the registrant's proxy material, will the shareholder proponent have any means to protest misleading or false statements by the registrant (in view of the fact that the registrant will not be required to file in preliminary form)?

Answer: Yes. Where the registrant opposes a shareholder proposal included in its proxy material or comments on or refers to a solicitation in support of that proposal, such comments or references will be considered a part of the registrant's statement in opposition even if they appear elsewhere in the registrant's materials. (See Release No. 34-25217, at 11, n.29.) Rule 14a-8(e) requires a registrant to forward a copy of its statement in opposition to the shareholder proponent and this will include any relevant statements made outside the formal statement in opposition.

6. Question: Is definitive material more likely to be selected for review under the new rules?

Answer: No. The exclusion affects only filing requirements and will not affect disclosure requirements or change the likelihood of review. As under current practice, definitive material still will be subject to being selected for review and may be reviewed when full review of a Form 10-K is undertaken, material deficiencies in definitive materials come to the staff's attention, or an opposing solicitation is commenced after definitive material is filed.

7. Question: If a registrant qualified for the exclusion from filing preliminary material and then decided to distribute additional soliciting material relating to the same matters, may the registrant file the additional material in definitive form only?

Answer: No. Rule 14a-6(b), which requires copies of any additional soliciting material to be filed in preliminary form at least two business days prior to furnishing such material to shareholders, has not been affected by the amendments.

*Reverse 14a-6(a)  
which refers  
to "soliciting"*

8. Question: If a registrant solicits written consents for the election of directors but there will be no annual meeting, can the proxy material be filed in definitive form only?

Answer: No. The exclusion does not apply unless an annual meeting, or special meeting in lieu of an annual meeting, will be convened.

9. Question: If a limited partnership that is not required to hold annual meetings solicits votes/consents on the election of a new general partner, does the exclusion from preliminary filing apply?

Answer: Although the staff generally treats the election of a general partner as the functional equivalent of the election of a director, reliance on the exclusion is precluded because no annual (or special meeting in lieu of an annual meeting) meeting will be held.

10. Question: If a registrant files preliminary proxy material (because a matter additional to those triggering the exclusion from preliminary filing will be acted upon at its annual meeting), and then decides to delete the additional matter, can the registrant re-file its material in definitive form only?

Answer: Yes; however, the registrant should advise the Staff of its intent to rely upon the exclusion, and to the extent the Staff already has prepared comments relevant to the registrant's discussion of the remaining matters, the definitive filing should be responsive to those comments.

11. Question: Have the amendments affected Rule 14a-11, which contains special provisions for election contests, or Rule 14a-12, which governs solicitations prior to furnishing required statements?

Answer: No.

12. Question: How have the time periods in Rules 14a-8(d) and (e) been changed to conform to the new amendments?

Answer: Rule 14a-8(d) currently requires that the registrant notify the Commission and the proponent of its assertion that a proposal may be omitted at least 60 calendar days prior to the date of filing preliminary material. This rule has been amended to require registrants to notify the Commission and the proponent of such assertion at least 80 calendar days prior to the date of filing definitive material. Rule 14a-8(e) currently requires registrants to forward copies of their statements in opposition to proponents at least 10 days prior to the date of filing preliminary material. The amended rule requires registrants to forward their statements in opposition to proponents at least 30 days prior to the date of filing definitive material.

13. Question: Why was the 25% limitation deleted from Rule 14a-8(a)(1)(ii)?

Answer: In view of increased shareholder activism, the Commission deleted the 25% rule to permit shareholder proposals included in registrants' proxy material to be accompanied by more widespread independent solicitations. Such independent solicitations may increase shareholder participation and may broaden the opportunities for shareholders to receive information on corporate governance issues.

14. Question: Did the amendments affect the filing and disclosure requirements imposed upon proponents who undertake independent solicitations?

Answer: No.

15. Question: Prior to amendment, under Rule 14a-8(a)(1)(ii), if a registrant included a shareholder proposal in its proxy material and the proponent thereafter delivered written proxy materials to holders of more than 25% of a class of the registrant's outstanding voting securities, the registrant was not required to include any proposals submitted by that proponent in its proxy materials for any meeting held in the following two calendar years. Assuming that a registrant included

a shareholder proposal in its proxy materials in 1987 and the proponent exceeded the 25% limit, may the registrant exclude another proposal from the same proponent in 1988 on the basis of the old rule?

Answer: No. Rule 14a-8(a)(1)(ii) has been deleted and will no longer serve as a valid basis for the exclusion of shareholder proposals.

16. Question: What types of documentation constitute adequate proof of ownership under Rule 14a-8(a)(1)?

Answer: Rule 14a-8(a)(1) has been amended to codify the Division's interpretive position that a written statement by a record owner(s) or independent third party(s), (such as a depository or broker-dealer) that holds and has held the proponent's securities in street name for the relevant time period is appropriate documentation of a proponent's claim of beneficial ownership. The amended rule also states that a registrant must accept a copy of ownership reports or amendments to such reports filed by the proponent with the Commission that indicate the proponent's beneficial ownership as of or prior to the date on which the relevant period commences if supported by a copy of all subsequent amendments reporting a change in ownership and the proponent's affidavit that he has continued beneficial ownership throughout the one year period and as of the date of the affidavit. The registrant is required to accept Schedules 13D and 13G, Forms 13F, 3 and 4 for these purposes. Regardless of the form of documentation utilized, the proponent must submit a written statement that he intends to continue beneficial ownership through the meeting date.

Re:  
File No:  
Date Received:

Dear :

This is to advise you that we have received copies of the preliminary proxy or information statement submitted on behalf of the above registrant. It appears, however, that a filing was neither required nor permitted under the provisions of the applicable proxy or information statement rule, Rule 14a-6(a) or 14c-5(a). (See Release No. 34-25217 (December 21, 1987) [52 FR 48977]). The amended rules state that a proxy or information statement shall not be filed in preliminary form if it relates to an annual (or special meeting in lieu of annual) meeting of shareholders at which the only matters to be acted upon are the election of directors, the election, approval or ratification of auditors and/or a shareholder proposal included pursuant to Rule 14a-8.

The exclusion from filing preliminary material does not apply if the registrant comments on or refers to a solicitation in opposition in connection with the annual meeting. A note to the rule defines "solicitation in opposition." Another note states that a registrant filing material in preliminary form, only because it has commented on or referred to an opposing solicitation, should indicate that fact in a transmittal letter when filing the preliminary material with the Commission.

The record of the Commission will indicate that the material was rejected and accordingly we will not process the preliminary proxy or information statement. Unless otherwise requested, any filing fee paid in connection with such statement will be retained and applied to the fee required to be submitted with the definitive materials. (See Rule 14a-6(j) or 14c-5(g)). If you have any questions regarding the above, please contact the undersigned at 202 272-

, Sincerely,