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Milbank

Corporate Governance Group

Client Alert

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SEC AMENDS ITS “NOTICE AND ACCESS” RULE GOVERNING INTERNET POSTING OF PROXY MATERIALS

In a release published on February 22, 2010 (the “*Release*”),¹ the Securities and Exchange Commission (the “*SEC*”) announced amendments to its “Notice and Access” rule governing Internet-based posting of proxy materials. These procedures are embodied in Rule 14a-16 under the Securities Exchange Act of 1934.² According to the Release, the amendments are designed “to remove regulatory impediments that may be reducing shareholder response rates to proxy solicitations by permitting issuers and other soliciting persons to more effectively use the notice and access model.”

Adopted in 2007, the Notice and Access rule *requires* issuers and other soliciting persons to post their proxy materials on a web site and provide a Notice of Internet Availability of Proxy Materials (the “*Notice*”) to shareholders.³ In addition, the Notice and Access rule provides issuers and other soliciting persons with the *option* of sending shareholders *either* a full, hard-copy set of the proxy materials or only the Notice, in which case it is expected that the shareholders will log on to the web site designated in the Notice to review the materials and vote.⁴ Currently, if an issuer elects the Notice-only option, the Notice and Access rule specifies that the Notice must be sent to shareholders

¹See SEC Release Nos. 33-9108, 34-61560, IC-29131, dated February 22, 2010, which is available on the SEC’s web site at <http://www.sec.gov/rules/final/2010/33-9108.pdf>.

²The Notice and Access rule does not apply to solicitations in connection with business combination transactions.

³See our Client Alerts entitled “SEC Adopts New Rules Permitting Web Posting of Proxy Materials” (February 14, 2007) and “Update: SEC Adopts New Rules Requiring Issuers to Post Proxy Materials on Internet Web Sites” (September 5, 2007). As described below, in the case of issuers and other soliciting persons who elect to mail proxy materials to shareholders, the information required to be included in the Notice may be included instead in the proxy materials.

⁴It should be noted that (i) shareholders have the right to opt out of Notice-only delivery by requesting a full, hard-copy set of proxy materials and (ii) soliciting persons (*other than* issuers) may target the specific shareholders to whom they send a Notice and/or proxy materials rather than sending them to all shareholders.

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Corporate Governance Group, whose names and contact information are provided at the end of this alert.

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of record at least 40 calendar days before the shareholder meeting date and must, among other things, (i) indicate that proxy materials are available on the Internet and the means to access such materials, (ii) contain a prominent bold-face legend setting forth various information required by the rule, (iii) identify each matter for which a vote of shareholders is being solicited and (iv) set forth instructions on how to access and execute a proxy card.⁵

While the Release indicates that many issuers have experienced significant cost savings by opting for Notice-only distribution, the SEC also has observed a concomitant drop in shareholder voting. The SEC believes this has been caused by shareholder confusion over the form of the Notice itself, which shareholders apparently have been confusing with proxy cards. In response, the SEC is amending the Notice and Access rule to (i) provide additional flexibility regarding the format and content of the Notice, (ii) permit inclusion of explanatory materials regarding the process for reviewing proxy materials (whether on-line or by requesting hard copies) and voting, and (iii) revise the time frame for soliciting persons (other than issuers) to deliver a Notice when utilizing the Notice-only option.

Specifically, the amended rule simplifies the legend to be included on every Notice and, without prescribing specific language, requires that the Notice contain a statement to the effect that the Notice is not a form to be used for voting, as well as an explanation of the Notice and Access process and the issuer's (or other soliciting person's) reasons for adopting the Notice-only procedure. Concerned that boilerplate language can itself be a source of confusion for shareholders, the SEC has encouraged issuers and other soliciting persons to avoid developing boilerplate language in response to the new disclosure requirements. The Release also indicates that the Notice need not mirror the presentation required by Rule 14a-4 for proxy cards; rather, the revised rule merely requires that the Notice "clearly and impartially identify each separate matter intended to be acted on."

When providing these new disclosures, care must be taken that the language used in the Notice not be viewed as an attempt to persuade shareholders to vote in a particular manner or to change the method of delivery of the proxy materials, as doing so is expressly prohibited. While the Notice may contain the issuer's or other soliciting party's recommendation on how to vote, supporting statements and other forms of solicitation may be included only in, or after delivery of, the actual proxy materials.

The SEC also has revised the Notice and Access rule to ameliorate a compliance hurdle that apparently has discouraged soliciting persons, other than issuers, from using the Notice-only option. Under the current rule, a non-issuer that opts Notice-only distribution is required to distribute its Notice within 10 calendar days after the date on which the issuer first sends its Notice or proxy materials (as the case may be) to shareholders. Thus, because a Notice may be sent only when the related definitive proxy materials are available for posting, a non-issuer would have only those 10 calendar days in which to file its preliminary proxy materials with the SEC, wait for the SEC to provide comments (if any), respond to comments to the satisfaction of the SEC and then file definitive proxy materials before it may send its Notice and post the definitive materials on its designated web site. As amended, the rule will provide a more realistic time frame by requiring any soliciting person (other than the issuer) who wants to utilize the Notice-only model to first file its *preliminary* proxy materials within 10 calendar days after the issuer files its definitive proxy materials, and then send its Notice to shareholders no later than the date on which it files its definitive proxy materials with the SEC.

⁵If an issuer or other soliciting person elects to send an actual proxy card rather than relying on on-line or telephonic voting, such a proxy card cannot be made available for at least 10 days after the Notice is sent to shareholders and must be accompanied or preceded by the actual proxy materials.

Finally, the Release indicates that the SEC is continuing to consider other concerns raised by commenters on the Notice and Access and other proxy rules, and is preparing a concept release to seek public comment on issues relating to “the mechanics by which proxies are voted and the way in which information is conveyed to shareholders.”

Except as described above, the procedures under the current Notice and Access rule remain in effect. The amendments take effect on March 29, 2010.

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Corporate Governance Group, whose names and contact information are provided below.

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