

UPDATE: SEC ADOPTS NEW RULES *REQUIRING* ISSUERS TO POST PROXY MATERIALS ON INTERNET WEB SITES

On July 26, 2007, the Securities and Exchange Commission adopted amendments to its proxy rules to require issuers (and other soliciting persons) to post their proxy materials (but *not* including proxy materials relating to a business combination transaction) on an Internet Web site (other than the SEC's EDGAR website) and to provide stockholders with a notice of the Internet availability of these materials¹. Currently, the proxy rules make such Internet Web site posting optional on the part of issuers. The new rules also provide stockholders with the ability to choose the means by which they access proxy materials. "Large accelerated filers"² must comply with the newly-adopted rules in connection with proxy solicitations commencing on or after January 1, 2008, while all other issuers (as well as non-issuer who wishes to solicit proxies) must comply on or after January 1, 2009.

Although the new proxy access rules will require all issuers to post their proxy materials on an Intranet Web site³, issuers will be provided with two different options for providing "hard copies" of their proxy materials: the "notice only" option and the "full set delivery" option. An issuer does not have to choose one option or the other as the exclusive means for providing proxy materials to stockholders. Rather, an issuer may use the "notice only" option to provide proxy materials to some stockholders and the "full set delivery" option to provide proxy materials to other stockholders.

The "notice only" option requires an issuer to post its proxy materials on an Internet Web site and send stockholders a Notice of Internet Availability of Proxy Materials (the "Notice") to inform them of the electronic availability of the proxy materials at least 40 calendar days prior to the date of the stockholders' meeting (or the date when actions will be taken by written consent in lieu of a meeting). In addition, an issuer utilizing the "notice only" approach is required to provide paper or e-mail copies of proxy materials at no charge to any stockholder requesting such copies. The 40-day period is included to insure that

¹ See SEC Release No. 34-56135, dated July 26, 2007, available at the SEC's website at <http://www.sec.gov/rules/final/2007/34-56135.pdf>. The final rules further amend the rules adopted by the SEC on January 22, 2007. With respect to the January 22nd rules, see (i) SEC Release No. 34-55146, dated January 22, 2007, available at the SEC's website at <http://www.sec.gov/rules/final/2007/34-55146.pdf> as well as (ii) our prior Client Alert entitled, "SEC Adopts New Rules Permitting Web Posting of Proxy Materials" dated February 14, 2007.

² As such term is defined under Rule 12b-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

³ It should be noted that issuers are not required to establish an Internet voting platform and may continue to use a combination of traditional proxy cards as well as an electronic voting platform, a toll-free telephone number for voting or a printable or downloadable proxy card on the Web site.

stockholders have adequate time to access the Web site, or otherwise obtain hard copies of the proxy materials, for review in advance of the stockholders' meeting.

Under the "notice only" option, the Notice must be written in plain English and contain the following information:

- A prominent, bold-faced legend containing only information specified by the new rules⁴ or other information required by state law;
- The date, time, and location of the meeting (or the earliest date on which corporate action by written consent in lieu of a meeting will be taken);
- A clear and impartial identification of each matter to be acted on and the issuer's recommendations regarding those matters;
- A list of the materials available on the specified Internet Web site;
- A toll-free telephone number, e-mail address and an Internet Web site address where the stockholder can request a copy of the proxy materials;
- Any control or identification numbers that the stockholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not allow a stockholder to execute a proxy without having access to the proxy statement; and
- Information about attending the stockholders' meeting and voting in person.

Under the "notice only" option, an issuer is prohibited from sending a proxy card until 10 calendar days or more after the date the issuer sends the Notice to the stockholder, unless the proxy card is accompanied or preceded by a copy of the proxy statement.

The "full set delivery" option contains procedures substantially similar to the traditional method of providing paper proxy materials. In addition to sending proxy materials to stockholders under the traditional method, this option requires an issuer to send a Notice

⁴ The final rules require the bold-faced legend to contain the following information:

"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].

- This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.
- The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].
- If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."

accompanied by a full set of proxy materials⁵ or incorporate all the information required to be contained in the Notice into the proxy statement and proxy card⁶. In accordance with the final rules, the proxy materials must also be posted on an Internet Web site no later than the date the Notice is first sent to stockholders⁷. The information required in the Notice (or proxy materials if no separate Notice is sent to stockholders) is required to include much, but not all, of the information requirements under the "notice only" option – one difference being that the issuer does not need to provide instructions in the Notice regarding how stockholders can request paper or email copies of the proxy materials (because under the "full set delivery" option, the issuer would have already provided those stockholders with a copy of the proxy materials in its initial distribution).

It is important to note that these new rules also require a soliciting person, other than the issuer, to utilize the new "notice and access" approach, with a few procedural modifications to account for the fact that such soliciting person is not the issuer. The initial Notice must be sent by a soliciting person by the *later of* (i) 40 calendar days before the stockholder meeting date and (ii) 10 calendar days after the issuer first sends out its proxy materials or Notice to stockholders. Moreover, soliciting persons – other than (and unlike) issuers – may target specific stockholders from whom they wish to solicit proxies without the need for making their proxy materials available to all stockholders.

Finally, the new rules place a great deal of responsibility on nominee owners of shares (banks, brokers and other intermediaries) for facilitating access by beneficial owners to proxy materials. Nominees will be required to prepare their own Notices for distribution to the beneficial owners. It is important to note that these Notices (in the case of issuers utilizing the "notice only" option) must be delivered at least 40 calendar days prior to the meeting date, which will in turn require issuers to get out their Notices to the nominees even earlier so that the nominees can comply with their 40-calendar day Notice requirements. In addition, beneficial owners will be advised in the nominees' Notices that e-mail or paper copies of the proxy materials may be obtained (if so desired) *from the nominee* rather than from the issuer.

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⁵ A "full set" of proxy materials would contain a proxy statement or information statement, an annual report if one is required by Rule 14a-3(b) or Rule 14c-3(a) of the Exchange Act, and a proxy card, or in the case of a beneficial owner, a request for voting instructions, if proxies are being solicited.

⁶ Because a full set of proxy materials will already have been provided along with the required Notice by issuers utilizing the "full set delivery" approach, these issuers will not be required to abide by the 40-day deadline for delivery of the Notice, in contrast with the "notice only" issuers.

⁷ See SEC Release No. 34-56135, dated July 26, 2007, available at the SEC's website at <http://www.sec.gov/rules/final/2007/34-56135.pdf>.

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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In addition, if you would like copies of our other Client Alerts or the SEC releases discussed herein related to the proxy materials access rules, please contact any of the attorneys listed above. You can also obtain this and our other Client Alerts by visiting our website at <http://www.milbank.com> and choosing the "Client Alerts & Newsletters" link under "Newsroom / Events."

September 5, 2007

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