M&A NOTES

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In what is apparently a case of first impression, a federal district court recently held that a stockholder opposing a merger can mail to the subject company's other stockholders a duplicate copy of the company's proxy card, together with instructions as to how to use the card to vote against the merger, without complying with the proxy rules of the Securities Exchange Act of 1934. This decision makes it possible for a stockholder that opposes a proposed merger or other transaction requiring stockholder approval to facilitate a vote by other stockholders against the transaction without complying with these proxy rules.

The recent case, MONY Group, Inc. v. Highfields Capital Management, 2004 WL 253330 (S.D.N.Y. Feb. 11, 2004), arose in connection with AXA Financial Inc.'s proposed acquisition of The MONY Group, Inc. On September 17, 2003, AXA and MONY announced the proposed $1.5 billion all-cash acquisition, which was subject to the approval of MONY's stockholders. MONY called a special meeting of its stockholders to approve the proposed transaction and sent proxy solicitation materials to its stockholders recommending that they vote in favor of it.

The proposed transaction was not well received by several large institutional stockholders of MONY that claimed, among other things, that the price of $31 per share was too low. Among the MONY stockholders opposing the transaction was Highfields Capital Management, a hedge fund. In reliance on Rule 14a-2(b)(1) promulgated under the Securities Exchange Act, Highfields proposed to mail to MONY's other stockholders (1) a letter stating its intention to vote against the proposed transaction and encouraging MONY's others stockholders to do the same, (2) a duplicate of the proxy card sent by MONY to its stockholders and (3) a separate page of instructions that referred to the proxy card and encouraged stockholders to use the proxy card to vote against the transaction and return it to the third party proxy solicitor retained by MONY to collect proxies on its behalf.

Upon learning of Highfields' proposed mailing, MONY sought a temporary restraining order to enjoin Highfields from mailing the duplicate proxy card and the related instructions to MONY's other stockholders. MONY contended that because the proposed mailing included the proxy card and related instructions, it constituted a proxy solicitation subject to the proxy rules of the Securities Exchange Act with which Highlands had not complied. These rules require that proxy solicitation materials of this type be filed with the SEC at least 10 days before the materials are first sent to stockholders and comply with the detailed disclosure requirements described in Schedule 14A of the Securities Exchange Act.

Specifically, MONY argued that to be exempt from the proxy rules of the Securities Exchange Act, the mailing of the proxy card and other solicitation materials to MONY stockholders had to fall within the exception set forth in Rule 14a-2(b)(1) and that it did not fall within the scope of the exception. Rule 14a-2(b)(1) provides that most of the proxy rules do not apply to the following solicitations (unless they are undertaken by a person that falls within certain specified categories which did not apply in this case):

> "Any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization."

On February 3, 2004, Judge Loretta Preska of the U.S. District Court for the Southern District of New York issued a temporary restraining order temporarily prohibiting Highfields from distributing the proposed proxy solicitation materials pending a ruling on MONY's related preliminary injunction motion. On February 11, 2004, Judge Richard S. Holwell, also of the U.S. District Court for the Southern District of New York, denied MONY's motion for a preliminary injunction, thereby permitting Highfields to send to MONY's other stockholders its proposed proxy solicitation materials, including a duplicate copy of MONY's proxy card and related instructions as to how to

use it to vote against the merger. In so ruling, Judge Holwell found that the mailing of the proxy card and related instructions comes within the exception set forth in Rule 14a-2(b)(1).

In reaching this decision, the court found that even though submitting to MONY's proxy solicitor a duplicate proxy card received from Highfields with a vote against the merger would have the effect of revoking a previously submitted proxy in favor of the transaction, the proxy card was not a "form of revocation" and therefore fell within the exception created by Rule 14a-2(b)(1). The court stated:

> "It is true that the proxy card may have the effect of a revocation in those cases where a shareholder has previously submitted a proxy, but that is not a necessary effect inherent in the card and does not transform management's proxy card into a form of revocation that places Highfields outside the ambit of the exception."

In reaching this conclusion, the court observed that its holding is consistent with the SEC staff's interpretation of Rule 14a-2(b)(1). Specifically, the SEC staff has taken the position that a person can rely on Rule 14a-2(b)(1) to provide stockholders of a company with a copy of management's proxy card for the purpose of facilitating the revocation of a previous proxy as long as the subsequent proxy card is returned directly to management and not to the soliciting party. The court also noted that it believes its holding is consistent with the SEC's policy rationale for Rule 14a-2(b)(1), which was "to correct a power imbalance between management and dissident shareholders" created by the then-existing proxy rules by "remov[ing] impediments to shareholder communications and the 'effective use of shareholder voting rights.'"

Both Judge Holwell and the SEC staff appear to have applied a results-oriented analysis in interpreting Rule 14a-2(b)(1). Reaching the conclusion that a management proxy card mailed to a company's stockholders with written instructions as to how to use the card to vote against a merger (which would have the effect of revoking any proxy card previously submitted to the company's proxy solicitor) does not constitute a "form of revocation" requires a formalistic, literal interpretation of the rule that risks elevating form over substance. One may argue with the wisdom of a rule that prohibits a stockholder opposing a matter to be voted upon by a company's stockholders from distributing to the stockholders the means to revoke a previously submitted proxy. However, the most reasonable reading of the term "form of revocation" should include an instrument which allows a stockholder to revoke a previous proxy.

This decision means that a stockholder opposing a merger or other matter to be voted upon by a company's stockholders can not only actively oppose the matter but also provide other stockholders with the means to vote against it (and to revoke a previously submitted, inconsistent proxy) without complying with the proxy rules of the Securities Exchange Act. Because an opposing stockholder does not have to comply with the disclosure requirements of the proxy rules, other stockholders deciding whether to vote against the matter in question may be forced to do so without complete information. In any event, in light of this decision, dissident stockholders should have greater certainty that this practice is permissible. Accordingly, more stockholders may adopt this practice to attempt to defeat proposals submitted to stockholders by the company or other stockholders, whether in the context of a merger or other matter requiring stockholder approval. Finally, this decision demonstrates that federal district courts are likely to defer to the SEC regarding the interpretation of complex, technical rules promulgated by the SEC.

Should you have any questions about the matters addressed in this issue of *M&A Notes*, please contact the following Kirkland & Ellis authors or the Kirkland & Ellis partner you normally contact.

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