



Proxy 2010: A Season of Change for Your Business

February 3, 2010

Moderator

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Panelists

Jessica Cherry, Partner

Lucas F. Torres, Partner

Samuel Wolff, Partner

AKIN GUMP
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TAB 1



PROXY 2010:
A SEASON OF CHANGE FOR YOUR BUSINESS

February 3, 2010

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Introduction

- Executive compensation and corporate governance among the hottest topics in Washington today
- Confluence of factors fueled the momentum behind the current governmental initiatives
- SEC adopted and otherwise moving ahead with various reform initiatives designed to advance Federal policies
- Federal legislation moving slower than anticipated (due to health care reform, partial abatement of financial crisis, and political dynamics)

Key Participants

■ SEC

- 3 Democrats, 2 Republicans
- Decisions made by majority vote

■ U.S. Senate

- 58 Democrats, 2 Independents
- Need 60 votes to override filibuster
- Christopher Dodd (D-CT), Chairman, Senate Banking Committee (announced not running for re-election)
- Richard Shelby (R-AL), Ranking Member, Senate Banking Committee

■ U.S. House of Representatives

- 435 Members
- 258 Democrats, 177 Republicans
- No filibuster in House
- Barney Frank (D-MA), Chairman, House Financial Services Committee
- Spencer Bachus (R-AL), Ranking Member, House Financial Services Committee

■ Treasury Department

■ Institutional Investors

■ RiskMetrics

■ Public Companies

Topics to be Covered

- Developments affecting 2010 proxy season
 - SEC final rules
 - NYSE Rule 452: Discretionary voting
 - RiskMetrics' 2010 corporate governance policy updates
- SEC proposed rules: Proxy access
- Legislation
- Shareholder proposals
- Planning for the future

Three Major Compensation-related Changes in the Final Rules

- Discussion of compensation programs for all employees if they present a material risk to the company
- Changes to reporting of stock awards and option awards in the Summary Compensation Table and Director Compensation Table
- New disclosure of fees paid to compensation consultants when they played a role in determining or recommending executive and director compensation and also provided additional services to the company

Risk Disclosure

- Caused a stir when it came out in the Proposed Rules
- Looked like overhaul of CD&A to focus on all employee compensation rather than just named executive officers (“NEOs”)
- Risk discussion standard for disclosure: Compensation practices “may” have [any] material effect on the company

Risk Disclosure (cont'd)

- Final rules changed the standard
- No longer “may” have [any] material effect
- Instead: “Reasonably likely to have a material adverse effect”

Risk Disclosure Requirements

- If disclosure required:
 - No boilerplate
 - Need to discuss risk assessment related to company's individual program
 - Not part of CD&A
- If disclosure not required:
 - No affirmative statement required
 - But some discussion of risk with respect to NEOs a good idea

Changes to Summary Compensation Table/Director Compensation Table

- Under current rules equity awards reported based on amount expensed for financial statement reporting purposes
- Under new rules report full grant date fair value
- Viewed as better reflection of compensation committee decisions made during the year
- Note that one-time grants may result in more changes in NEOs
- For performance awards, report grant date fair value based on probable (target) outcome instead of based on maximum performance (but footnote maximum award)

Changes to Summary Compensation Table/Director Compensation Table (cont'd)

- What about past years?
- Go back and recalculate equity values
- No need to re-do NEO calculations

Compensation Consultant Conflicts of Interest

- Additional disclosure of fees paid to compensation consultants is required if compensation consultant plays a role in determining/recommending executive or director compensation and also provides additional services to the company
- Rule intended to facilitate investors' understanding of whether compensation consultant may have been influenced by a desire to retain other company engagements
- Dollar threshold = \$120,000
- Exception where the compensation consultant's role in recommending amount of executive or director compensation was limited to consulting on broad-based non-discriminatory plans

Effective Date Issues

- Rules effective February 28, 2010
- Applicable to companies with fiscal years ending on or after December 20, 2009
- If you file preliminary proxy before February 28, 2010, but will file definitive afterwards, new rules apply



Looking Ahead

- SEC is taking a harder line
- Be prepared to amend
- If you plan to omit performance targets, be prepared to back up your competitive harm claim

Developments Affecting 2010 Proxy Season – SEC Rules

- Changes to corporate governance disclosures
 - Director and nominee qualifications
 - Public company directorships
 - Legal Proceedings
 - Diversity
 - Board leadership structure
 - Board's role in risk oversight
 - Shareholder voting results
- New 8-K Item to report voting results

Director and Nominee Qualifications/Public Company Directorships/Legal Proceedings

- S-K Item 401(e)'s 5-year business experience disclosure augmented
 - For each director or nominee
 - Discuss specific experience, qualifications, attributes or skills that led company to conclude that this person should be a director, in light of the company's business and structure
 - If material, look back more than the 5 years
- Anyone who puts forth a nominee must comply
- Also added a 5-year look back on other directorships held at public companies – not just current positions
- Requirement in S-K Item 401(f) increased from 5 to 10 years for disclosure of legal proceedings material to an evaluation of the ability or integrity of any director or nominee

Board Diversity

- New disclosure requirements regarding nominating committee in S-K Item 407(c)
 - Disclose whether and, if so, how, a nominating committee considers diversity in identifying nominees
 - If the nominating committee has a policy with regard to the consideration of diversity in identifying nominees, disclose:
 - How it's implemented; and
 - How the board assesses its effectiveness
- “Diversity” not defined in the rule
 - Up to the company to define

Board Leadership Structure/Risk Oversight

- S-K Item 407(h) requires companies to disclose the leadership structure of the board
 - Separate or combined CEO and chairman
 - If combined, disclose whether they have a lead independent director, and what specific roles that the lead independent director plays
 - Why the company has determined that the leadership structure is appropriate for it
- Also requires disclosure of the extent of the board's role in risk oversight of the company, such as:
 - How board administers its oversight function; and
 - Effect that this has on the board's leadership structure

Form 8-K for Voting Results

- New Item 5.07 of Form 8-K requires prompt disclosure of voting results following a shareholders meeting with shareholders
- Old requirement from Item 4 of Form 10-Q and Form 10-K
- Four-business day filing window
- Required information:
 - Day of the meeting and whether annual or special meeting
 - If involved election of directors, the name of each director elected
 - Brief description of the other matters voted on
 - The number of votes cast for, against or withheld, and number of abstentions and broker non-votes; and
 - Specific tabulations with respect to each director nominee

Development Affecting 2010 Proxy Season – Discretionary Voting (NYSE Rule 452)

- SEC approved change to NYSE rule in July 2009; effective January 1, 2010
- Affects NYSE member brokers and public companies irrespective of listing
- Brokers may exercise discretion in voting for routine matters
- Prior to rule change, uncontested director elections were routine matter – allowing brokers to vote uninstructed shares
- Following rule change, these elections considered non-routine
- Broadridge Study: average, broker discretionary votes = 22% of votes cast
- Impact of rule change
 - Quorum requirements
 - Majority voting
 - Influence of institutional investors and proxy advisory organizations
 - Withhold vote campaigns
 - Decision whether to use e-proxy

Developments Affecting 2010 Proxy Season – RiskMetrics' 2010 Corporate Governance Policy Update

■ Summary of Key Changes in RiskMetrics' Policies

- If a management say on pay (MSOP) proposal is on the ballot, any compensation related concern will be applied only to that proposal
- If egregious practices exist, or if a company previously received a negative recommendation on an MSOP resolution relating to an ongoing issue, RiskMetrics also may recommend a withhold or against vote on compensation committee members, or in some cases, the entire board
- Problematic pay practices expanded to include practices that could incentivize excessive risk taking
- Identification of those problematic pay practices that will carry the most weight in determining whether to recommend a withhold or against vote
- Pay for performance analysis to consider alignment of CEO total direct compensation and total shareholder return over a period of at least five years
- Poison pills

Developments Affecting 2010 Proxy Season – RiskMetrics' 2010 Corporate Governance Policy Update (cont'd)

■ Problematic Pay Practices

- Revised to include compensation practices that could incentivize excessive risk-taking by management:
 - Guaranteed bonuses
 - Single performance metric used for short- and long-term plans
 - Lucrative severance packages
 - High pay opportunities relative to industry peers
 - Disproportionate supplemental pensions
 - Mega annual equity grants that provide unlimited upside with no downside risk
- Factors that may mitigate impact of risky incentives
 - Rigorous claw-back provisions
 - Robust stock ownership/holding guidelines

Developments Affecting 2010 Proxy Season – RiskMetrics' 2010 Corporate Governance Policy Update (cont'd)

■ Problematic Pay Practices (cont'd)

- The following factors carry greatest weight in RiskMetrics' evaluation of problematic pay practices and may result in negative vote recommendation on stand-alone basis:
 - Egregious employment contracts
 - Excessive perquisites
 - Excessive severance and/or change in control provisions
 - New CEO with overly generous new-hire package
 - Abnormally large bonus payouts without justifiable performance linkage or proper disclosure
 - Egregious pension/supplemental executive retirement plan payouts
 - Tax reimbursements
 - Dividends or dividend equivalents paid on unvested performance shares or units
 - Executives using company stock in hedging activities
 - Repricing or replacing of underwater stock options or SARs without prior shareholder approval

Developments Affecting 2010 Proxy Season – RiskMetrics' 2010 Corporate Governance Policy Update (cont'd)

■ Pay-for-performance

- If company's one- and three-year total shareholder returns are in bottom half of industry group and CEO has served for at least two fiscal years, RiskMetrics will consider following factors in evaluating pay-for-performance:
 - increase or decrease in CEO's pay, and magnitude of pay change
 - source of pay increase (i.e., performance- versus non-performance-based elements), and
 - alignment of CEO's total compensation with company's total shareholder returns measured over a period of at least five years, with particular focus on most recent three years

■ Poison Pill

SEC Proposed Rules - Proxy Access

- Status of proposed rules
 - Rule proposal published June 2009
 - Divided Commission (3-2)
 - Extended comment period recently ended
- Proposed Rule 14a-11
 - Provides proxy access to shareholders meeting certain requirements
 - Share ownership
 - Holding period
 - Nominate up to 25% of the board
 - May not seek change in control
 - Annual meeting at which directors are elected (or special meeting in lieu of annual meeting)
 - Nominees to meet independence requirements
 - Deadline for proposing nominees
- Litigation Challenge?
 - Federal legislation (discussed below) may negate litigation

Executive Compensation – Department of the Treasury

- Statement of Secretary Geithner (June 2009)
 - Reflects Administration concern with executive compensation, and relationship to risk
- Overarching Statement of Principles. E.g.,
 - Compensation should not encourage excessive risk-taking
 - Compensation should reflect time horizon of risks
 - Longer holding periods for stock awards
 - Administration supports:
 - Say-on-Pay
 - Independence of Compensation Committee members

Executive Compensation – Department of the Treasury (cont'd)

- Treasury Rules Applicable to TARP Recipients - instructive of Treasury's views. E.g.,
 - Say-on-Pay
 - Claw-backs based on inaccurate financials
 - Limit on luxury expenditures
 - Disclosure to Treasury of perks over \$25,000 per employee
 - Ban on tax gross-ups

Legislation: Executive Compensation – Federal Legislation (House)

- Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173)
- Passed House in December 2009 by vote of 223 to 202
 - No Republican support
- Executive Compensation
 - Say-on-Pay (non-binding)
 - Shareholder vote on golden parachutes (non-binding)
- Compensation Committee
 - Members must be independent
 - Imposed through listing rules
 - “Independent” means member cannot accept fees from company except for board and committee fees
- Compensation Consultants
 - Would have to meet independence standards to be established by SEC
 - Compensation committee must be provided authority to retain independent consultants, counsel and other advisors
 - Company to fund those expenses

Legislation: Executive Compensation – Federal Legislation (Senate)

- Dodd (D–CT) Senate draft bill (Restoring American Financial Stability Act of 2009) – released November 2009
 - Say-on-Pay
 - Shareholder vote on golden parachute policy
 - Compensation committee and advisors
 - Independence of compensation committee members
 - Compensation consultants, counsel or other advisor to the compensation committee must be independent (to be defined by SEC rules)
 - Compensation committee authority to retain consultants and counsel
 - Disclosure requirements with respect to use of compensation consultants
 - Company to fund consultants and counsel
- New disclosure requirements relating to executive compensation: relationship between compensation and performance
- Claw-back policy on accounting restatements
- Disclosure of policies on hedging by employees

Legislation: Proxy Access and Corporate Governance

- Dodd Senate draft bill (Restoring American Financial Stability Act of 2009) – released November 10, 2009
 - Would require SEC rules within 180 days permitting shareholder access to issuer proxy statement
 - Majority vote for election of directors
 - Disclosures regarding chairman/CEO structure
 - Classified boards – prohibited without shareholder approval
- Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173)
 - Passed House on December 12, 2009
 - Provides SEC with authority to adopt proxy access
- Senate bill requires proxy access, House bill authorizes

State Legislation: Proxy Access

- Delaware legislation on proxy access
 - Delaware general corporation law amended effective August 2009 (Section 112)
 - Authorizes a Delaware corporation to adopt bylaws that grant shareholder access to proxy
 - Bylaw can limit proxy access to a specified number or percentage of directors
 - Amendments do not give shareholders a direct right to proxy access
 - Relationship to SEC proposal

Legislation – Status

■ House

- H.R. 4173 passed House in December 2009
- Awaiting action in Senate
- Hearing on Jan. 22, 2010 (on compensation)

■ Senate

- Bipartisan negotiations
- Working group on executive compensation and corporate governance
- Dodd's decision not to seek re-election
- Richard Shelby (R-AL), Ranking Member
- Loss of Democratic supermajority in Senate
- Dodd/Shelby Joint Statement (12-23-09)

Shareholder Proposals

- Number of shareholder proposals in 2009
 - Say-on-Pay – 79
 - Board declassification – 71
 - Right to call special meeting – 63
 - Majority vote in director elections – 51
 - Independent board chair - 39
 - Rescind supermajority vote requirements – 17
- Level of support of proposals 2009
 - Rescind supermajority – 69%
 - Board declassification – 66%
 - Majority vote in director elections – 58%
 - Right to call special meetings – 51%
 - Say-on-Pay – 46%
 - Independent board chair – 37%

Source: RiskMetrics, 2009 Proxy Season Scorecard (as of November 15, 2009).

Shareholder Proposals (cont'd)

- SEC Staff Legal Bulletin 14E (Oct. 27, 2009)
 - 14a-8(i)(7) – exclusion for ordinary business operations
 - Previously, companies could omit proposals involving internal risk assessment
 - Shareholder proposals that relate to an evaluation of risk no longer necessarily excludable as ordinary business operations – e.g., a proposal focusing on board oversight of risk management
 - Companies generally may not exclude as ordinary business proposals dealing with CEO succession planning
- SEC proposed rule change regarding director elections (33-9046, May 20, 2009)
 - Shareholder proposal rule currently allows omission of proposals relating to nominations or elections
 - SEC proposes to change rule
 - Shareholder proposals to amend governing documents concerning director nomination procedures would be allowed
 - To provide a different basis for shareholder access
 - Possibility of adoption of this rule change separately from proxy access

Shareholder Proposals (cont'd)

- RiskMetrics' position on shareholder proposals
 - Board declassification – almost always recommends votes for proposal to declassify
 - Say-on-Pay – recommends vote for these proposals
 - Independent board chair – recommends votes “for” these proposals (with exceptions)
 - Pill – recommends vote “for” proposals requesting companies to submit pills to a shareholder vote

Planning for the Future

■ Immediate Action Items

- Risk oversight and the board
- Risk management and compensation
- Compensation consultants
- Board composition and leadership structure
- D&O questionnaire
- Diversity policy
- Named Executive Officers
- Transfer agent and reporting of voting results

Planning for the Future – (cont'd)

- Proxy related considerations for 2010
 - Director election process under siege
 - Risk management
 - Pay practices under fire
 - Shareholder engagement

TAB 2

KERRY E. BERCHEM, Partner
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Practice Areas: **Corporate**
Corporate Restructuring
Corporate Finance and Securities
Corporate Governance
Mergers and Acquisitions
Insurance



Kerry E. Berchem, co-head of the firm's corporate practice and member of the firm's management committee, advises companies, including insurance and reinsurance companies, and financial services clients, including distressed, private equity and hedge funds, in (i) mergers, acquisitions and private equity investments; (ii) capital markets transactions; (iii) corporate governance matters and (iv) reorganizations and recapitalizations.

As noted by *Chambers USA*, displaying "great business judgment," Kerry Berchem is recommended as "go-to counsel" on corporate matters. For ancillary advice outside of the M&A realm, one client stated: "She always finds the right person for the right issue." Her "unparalleled commitment to clients," was particularly noted by sources.

Ms. Berchem's representative engagements include serving as counsel to—

- a publicly traded reinsurance and insurance company in connection with its proposed \$912 million all-stock acquisition and, following the execution of definitive documentation, defended hostile takeover efforts
- a special committee of the board of directors of a household appliance company in connection with a \$915 million equity issuance to a majority stockholder, the funds of which were used by the company to fund a strategic acquisition
- a special committee of the board of directors of a minerals company in connection with its \$1 billion merger with a strategic buyer
- a sovereign wealth fund in connection with a \$1.35 billion investment in the management company of a portfolio of private equity funds
- the official committee of unsecured creditors of a glass container corporation and the subsequent representation of the company in connection with a \$350 million leveraged recapitalization
- the official committee of unsecured creditors of a telecom company and subsequent representation of the company in connection a \$207 million merger with a strategic buyer
- a Cayman Island reinsurance company in connection with its formation, its initial \$250 million capitalization and its \$212 million initial public offering and concurrent \$50 million private placement
- a Bermuda reinsurance company in connection with its formation, its initial \$600 million capitalization, its \$192 million initial public offering, its \$100 million 144A debt offering and its \$500 million universal shelf registration statement.

In 2006, 2007 and 2008, Ms. Berchem was named in *Chambers USA: America's Leading Lawyers for Business* as a leading lawyer in the area of corporate/M&A.

Bar Admissions

Connecticut
New York

Education

J.D. Tulane University Law
School, cum laude, 1991
B.A. Yale University, 1988

JESSICA CHERRY, Partner
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Practice Areas: **Employee Benefits/Executive
Compensation (ERISA)
Labor and Employment
Tax**

Jessica Cherry advises clients on the design of executive compensation arrangements, including employment agreements and severance agreements, and drafts equity incentive plans and non-qualified deferred compensation plans designed to comply with Section 409A of the Internal Revenue Code. Ms. Cherry also has extensive experience advising clients regarding the SEC's executive officer and director compensation disclosure rules including the "compensation, discussion and analysis" and related tabular disclosure.

Prior to joining Akin Gump, Ms. Cherry was an associate in the global equity services department of Baker & McKenzie, where she advised clients on the implementation of international stock plans.

Ms. Cherry received her B.A. magna cum laude in 1987 from Tufts University and her J.D. in 1999 from the University of Southern California, where she was a notes editor of the *Southern California Law Review*. She is a member of the California and New York Bars.



Bar Admissions

California
New York

Education

J.D. University of Southern
California Law Center, 1999
B.A. Tufts University,
magna cum laude, 1987

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Practice Areas: Corporate

Lucas Torres has extensive experience in all aspects of domestic and international capital markets transactions, with a particular familiarity in financings by utility and other energy companies. Mr. Torres represents one of the largest investor-owned utility systems in the United States in a wide range of corporate finance and securities matters and has experience acting as issuer's or designated underwriters' counsel for a number of other large domestic utility and telecommunications systems. His practice involves providing advice to clients on a wide range of corporate, finance and securities matters, including corporate and financial restructuring issues. Significant representations include—

- issuers in both public and private offerings of more than \$3.5 billion of common equity and secured and unsecured long-term debt securities, including senior notes and first mortgage bonds
- the lessee and parent guarantor of over \$1 billion of 144A pass through trust certificates relating to the financing of the sale and leaseback of a coal-fired power plant
- conduit borrowers, underwriters and remarketing agents in the issuance, refunding and remarketing of more than \$2.0 billion of pollution control and other tax-exempt debt, including credit-enhanced auction rate securities and variable rate demand bonds
- conduit borrowers in the restructuring of over \$500 million of auction rate bonds in response to disruptions in the auction market
- borrowers in connection with the refinancing and restructuring of over \$3.0 billion of syndicated bank facilities
- underwriters and initial purchasers of more than \$2.5 billion of secured, unsecured and convertible debt securities and common equity, including over \$750 million of utility stranded cost securitization bonds
- public companies on SEC reporting and other public disclosure issues, Sarbanes-Oxley compliance and other federal securities law matters.

Mr. Torres has also represented energy companies in mergers and acquisitions, including asset swaps and sales, and related financings; underwriters in offerings in the United States of debt of foreign energy companies; and issuers in public offerings of telecom debt.

Mr. Torres received his B.S. from Yale University in 1986 and his J.D. from Columbia Law School in 1991. He is a member of the New York Bar.



Bar Admissions
New York

Education
J.D. Columbia University
School of Law, 1991
B.S. Yale University, 1986

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Practice Areas: **Corporate**
 Corporate Finance and Securities

Samuel Wolff practices in the areas of securities law and corporate finance and has over 25 years of experience in the field. Mr. Wolff represents issuers and market participants in domestic and cross-border securities transactions, including public, private, offshore and secondary offerings, exchange offers and resale transactions. He regularly advises issuers and market participants with respect to trading issues and disclosure and securities compliance matters arising under the federal securities laws. His experience includes matters relating to Section 16 and 13(d), periodic reports, stock repurchase programs, insider trading compliance, Rule 10b5-1 plans, corporate governance, executive compensation, shareholder proposals, listing issues, 1940 Act and broker-dealer status issues and securities law aspects of equity derivative transactions. Mr. Wolff has also represented clients in enforcement proceedings before the SEC.

Mr. Wolff's recent experience includes the following transactions and other matters:

- \$ 1.5 billion guaranteed senior note 144A and offshore offering (2009)
- € 600 million dual tranche Euro-equity offering and listing on Euronext (2008)
- € 950 million senior note Euro-offering with cross-guarantee structure (2007)
- \$ 900 million accelerated stock repurchase plan for US public company (NYSE) (2007)
- \$ 600 million accelerated stock purchase plan for US public company (NYSE) (2006)
- Advise foreign stock exchange regarding issues under SEC Regulation S (2008)
- Represent European executive of public company (NYSE) in enforcement proceeding before SEC (2005-2006)

Prior to joining Akin Gump, Mr. Wolff was a member of the SEC staff, where he served for three years in the Division of Corporation Finance. He was a member of the Chief Counsel's Office of the Division of Corporation Finance and later, as deputy chief of the Office of International Corporate Finance, served as the co-draftsperson of the SEC's Rule 144A and Regulation S rulemaking proposals. He recently completed a four-year term as a member of the National Adjudicatory Council of FINRA.

Mr. Wolff is co-author of the following legal treatises and books:

- Securities and Federal Corporate Law (multivolume treatise)
- International Capital Markets and Securities Regulation (multivolume treatise)
- Going Public and the Public Corporation (multivolume treatise)
- Emerging Trends in Securities Law (18 books in an annual series)
- Going Public Handbook



Bar Admissions
District of Columbia

Education
S.J.D. University of Wisconsin Law School, 1995
LL.M. Georgetown University Law Center, 1983
J.D. Georgetown University Law Center, 1982
A.B. Brown University, magna cum laude, 1979

In addition to the books and treatises on securities law he has co-authored, Mr. Wolff has authored several law review articles and other publications, including—

- “Post-SOX Trends in Delistings and Deregistration,” Vol. 9.1 Richmond Journal of Global Law & Bus. (forthcoming 2009)
- Federal Government Takes AIM at Executive Compensation, 31 *Sec. & Fed. Corp. L. Rep.*, No. 9 (Sept. 2009).
- "Recent SEC Initiatives Regarding Cross-Border Securities Regulation," 30 *Sec. & Fed. Corp. L. Rep.* (December 2008) and 30 *Sec. & Fed. Corp. L. Rep.* (July 2008)
- "The New Executive Compensation Rules," 28 *Sec. & Fed. Corp. L. Rep.* (Nov./Dec. 2006)
- "Section 16 in Transactional Practice," 32 *Sec. Reg. L. J.* (2004)
- "Implementation of International Disclosure Standards," 22 *U. Pa. J. Int'l Econ. L.* 91 (2001)
- "Recent Developments in International Securities Regulation," 23 *Denv. J. Int'l L. & Pol.* (1995)
- "Offshore Distributions Under the Securities Act of 1933," 23 *Law & Pol. Int'l Bus.* (1991-1992)
- “Securities Regulation in the European Community,” 20 *Denv. J. L. & Pol.* (1991)
- “Trust Indenture Act Reform,” 17 *Sec. Reg. L. J.* 303 (Fall 1989)

Mr. Wolff’s presentations to bar and industry groups include the following—

- “International Securities Regulation and International Financial Reporting Standards,” New York State Bar Association, International Banking, Securities and Financial Transactions Committee of the International Law and Practice Section, New York City, February 24, 2009
- *Developments in US Securities Regulation and Impact on International Capital Markets*, International Law and Practice Section, Committee on International Banking, Securities and Financial Transactions, NY State Bar Association, New York City (2007)
- *US Securities Law and Capital Markets Transactions*, Presentation to a securities exchange in a Northern European country (2006)
- *Handling Corporate Crises*, Washington Metropolitan Area Corporate Counsel Association (2003)
- *Handling Corporate Crises*, American Corporate Counsel Association, Baltimore Chapter (2003)
- *International Securities Law – Disclosure Issues, Symposium on International Securities Law*, University of Pennsylvania Institute for Law and Economics, Philadelphia, PA (2001)
- *Glass-Steagall Act Reform*, Panel Discussion sponsored by Federal Commission on Securities Markets, Moscow, Russia (1999)
- *Developments in Private and Cross-Border Financing*, Presentation to American College of Investment Counsel, Private Placement Forum, Chicago, Illinois (1997)

Mr. Wolff has been listed in multiple editions of Legal Media Group’s “Guide to the World’s Leading Capital Markets Lawyers” and Who’ Who Legal’s “The International Who’s Who of Capital Markets Lawyers”

Mr. Wolff received his A.B. magna cum laude from Brown University in 1979. He earned his J.D. in 1982 and his LL.M. in securities regulation in 1983 from the Georgetown University Law Center. He received his S.J.D. in 1995 from the University of Wisconsin Law School for his work involving international securities regulation. He was a post-doctoral fellow (in absentia) at Yale University and has studied at the London School of Economics.

TAB 3

CORPORATE ALERT

RISKMETRICS 2010 CORPORATE GOVERNANCE POLICY UPDATES

On November 19, 2009, RiskMetrics Group, a leading proxy advisory firm, released its “U.S. Corporate Governance Policy, 2010 Updates” and its “2010 Corporate Governance Policy Updates and Process, Frequently Asked Questions on U.S. Compensation”¹ (collectively, the “2010 policy updates”). Generally, the 2010 policy updates are applicable to shareholder meetings occurring on or after February 1, 2010 (the “2010 proxy season”). This alert highlights significant executive compensation and corporate governance policy updates applicable to publicly traded U.S. companies.

I. EXECUTIVE COMPENSATION EVALUATION

RiskMetrics announced an integrated executive compensation evaluation policy derived from three existing RiskMetrics policies.² The executive compensation evaluation policy consists of pay for performance, problematic pay practices and board communication and responsiveness.

In general, if a company has a management say on pay (MSOP) proposal on the ballot, any compensation-related recommendations will be applied to that proposal. In the event RiskMetrics identifies egregious practices or if a company previously received a negative recommendation on an MSOP resolution related to an ongoing issue, RiskMetrics also may recommend a withhold or against vote with respect to the compensation committee members, or in some cases, the entire board.

Pay for Performance. In prior years, RiskMetrics’ policy recommended withhold or against votes for compensation committee members if the chief executive officer (CEO) had been with the company for at least the last two completed fiscal years and there was a year-over-year increase in the total compensation³ paid to the CEO at the same time that the company’s one-year and three-year total shareholder returns were in the bottom half of its industry group. Commencing with the 2010 proxy season, if a company’s one-year and three-year total shareholder returns are in the bottom half of its industry group and its CEO has served for at least two fiscal years, RiskMetrics will consider the following factors in evaluating pay-for-performance—

- whether the CEO’s pay increased or decreased, and the magnitude of the pay change
- the source of pay increase (i.e., performance- versus non-performance-based elements⁴)

¹ Available at <http://www.riskmetrics.com/sites/default/files/RMG2010USPolicyUpdates.pdf> and http://www.riskmetrics.com/policy/2010_compensation_FAQ, respectively.

² The three existing policies are the pay for performance policy, poor pay practices policy and guidelines adopted in 2007 for management say on pay proposals.

³ “Total compensation” is defined as the sum of base salary, bonus, non-equity incentives, grant date full value of stock awards and options, target value of performance shares/units, change in pension value and nonqualified deferred compensation earnings and all other compensation.

⁴ For purposes of RiskMetrics’ analysis, neither standard non-qualified stock options nor performance-accelerated grants constitute performance-based awards.

- the alignment of the CEO's total compensation with the company's total shareholder returns measured over a period of at least five years, with particular focus on the most recent three years.

If RiskMetrics determines that a pay-for-performance disconnect exists, it may recommend a vote against an MSOP proposal and/or the election of directors (generally limited to compensation committee members). If a significant portion of the CEO's misaligned pay is attributable to equity awards, and there is an equity plan on the ballot in which the CEO participates, RiskMetrics may vote recommend a vote against the equity plan.

Problematic Pay Practices. In prior years, if RiskMetrics determined that a company had problematic pay practices, it would recommend withhold or against votes on compensation committee members, the CEO and, potentially, the entire board of directors. Commencing with the 2010 proxy season, if RiskMetrics identifies problematic pay practices, RiskMetrics generally will recommend (i) against an MSOP proposal, (ii) in egregious situations, if no MSOP is on the ballot or if the board failed to respond to concerns raised in prior MSOP evaluations, against or withhold on compensation committee members or, in rare cases where the full board is deemed responsible, the entire board of directors (including the CEO) and/or (iii) against an equity-based incentive plan proposal if the major contributor to a pay-for-performance misalignment is excessive non-performance-based equity awards.

RiskMetrics has identified practices that are particularly contrary to a performance-based pay philosophy and, consequently, carry the greatest weight in RiskMetrics' evaluation of poor pay practices. In certain instances, these practices may result in a negative vote recommendation on a stand-alone basis. These practices include—

- Egregious employment contracts—
 - contracts containing multiyear guarantees for salary increases, non-performance-based bonuses and equity compensation.
- Excessive perquisites—
 - perquisites for former and/or retired executives, including lifetime benefits, car allowances, personal use of aircraft or other inappropriate arrangements
 - extraordinary relocation benefits for current executives, including home buyouts.
- Excessive severance and/or change in control provisions—
 - change-in-control payments exceeding three times base salary and target bonus
 - change in control payments without job loss or substantial diminution of duties
 - new or materially amended agreements that provide for “modified single triggers” that permit an executive to voluntarily leave for any reason and still receive the severance package
 - new or materially amended agreements that provide for an excise tax gross-up, including a modified gross-up.
- New CEO with overly generous new-hire package—
 - excessive “make whole” provisions without sufficient rational
 - any problematic pay practices.
- Abnormally large bonus payouts without justifiable performance linkage or proper disclosure—
 - including performance metrics that are changed, canceled or replaced during the performance period without adequate explanation of the action and link to performance.
- Egregious pension/supplemental executive retirement plan payouts—
 - including additional years of service not worked that result in significant additional benefits, without sufficient justification, and long-term equity awards in the pension calculation.

- Tax reimbursements—
 - Reimbursement of income taxes on perquisites or other payments, including, without limitation, personal use of corporate aircraft, executive life insurance, or bonus.
- Dividends—
 - Dividends or dividend equivalents paid on unvested performance shares or units.
- Hedging activities—
 - Executives using company stock in hedging activities, such as “cashless” collars, forward sales, equity swaps or other similar arrangements.
- Repricing of options—
 - Repricing or replacing of underwater stock options or stock appreciation rights without prior shareholder approval, including cash buyouts and voluntary surrender or subsequent regrant of underwater options.

RiskMetrics also has added a separate assessment of policies and practices that may incentivize excessive risk-taking. These practices include—

- guaranteed bonuses
- a single performance metric used for short- and long-term plans
- lucrative severance packages
- high pay opportunities relative to industry peers
- disproportionate supplemental pensions
- mega annual equity grants that provide unlimited upside with no downside risk.

Rigorous claw-back provisions and robust stock ownership/holding requirements potentially may mitigate the impact of incentives RiskMetrics views as risky.

II. POISON PILLS.

In prior years, RiskMetrics generally recommended withhold or against votes on all nominees (except new nominees who are considered on a case-by-case basis) if a board adopted or renewed a poison pill without shareholder approval, did not commit to put a pill to a shareholder vote within 12 months of adoption or renege on a commitment to put it to a vote, and had not previously received a withhold recommendation. RiskMetrics’ policy was to only make the recommendation once. In its 2010 policy updates, RiskMetrics has established separate processes for making vote recommendations, which depend on whether the poison pill adopted is a short-term or a long-term pill.⁵ The revised policy described below will apply to all companies adopting or renewing poison pills after November 19, 2009.

Poison Pill with Term of More than 12 Months (Long-Term Pill)

RiskMetrics will recommend a withhold or against vote on all nominees of the board of directors (except new nominees who are considered on a case-by-case basis), if the board adopts a long-term pill or renews any existing pill (including a short-term pill) without shareholder approval, or makes a material, adverse change to an existing poison pill without shareholder approval.

A company’s commitment or policy to put a newly adopted pill to a binding shareholder vote may offset an adverse vote recommendation. In addition, RiskMetrics will review companies with classified boards every year, and companies with annually elected boards at least once every three years. RiskMetrics will recommend withhold or against votes on all nominees during the period of time that a company maintains a non-shareholder-approved poison pill, which could lead to multiple withhold/against recommendations.

⁵ RiskMetrics also has adopted a separate policy regarding poison pills adopted by a company to protect its net operating loss.

Poison Pill with Term of 12 Months or Less (Short-Term Pill)

RiskMetrics will vote on a “case-by-case basis” on all nominees if the board adopts a short-term pill without shareholder approval, taking into account the following factors—

- the date of the pill’s adoption relative to the date of the next meeting of shareholders
- the issuer’s rationale
- the issuer’s governance structure and practices, including whether it has a classified board
- the issuer’s track record of accountability to shareholders.

III. DIRECTOR INDEPENDENCE

Inside Director. In its 2010 policy updates, RiskMetrics changed one of the criteria for “Inside Director” from “non-employee officer of the company if among the five most highly paid” to “among the five most highly paid individuals (excluding interim CEO).” As a result, a director that is among the five most highly paid individuals at a company will be deemed an Inside Director, regardless of whether the director is an officer.

Professional Services. In its 2010 policy updates, RiskMetrics noted that, while it changed the characterization of professional services from “advisory in nature” to “advisory in nature, generally involve access to sensitive company information or to strategic decision-making, and typically having a commission- or fee-based payment structure,” the latter is in line with how RiskMetrics has previously applied the policy.

Material Transactions. In its 2010 policy updates, RiskMetrics bifurcated the materiality test for transactional relationships. NYSE- and AMEX-listed companies will now be subject to an NYSE-based test of the greater of \$1 million or 2 percent of the recipient’s gross annual revenues. NASDAQ companies and other companies that do not follow the NYSE or AMEX listing standards will continue to be subject to a NASDAQ-based test of the greater of \$200,000 or 5 percent of the recipient’s gross annual revenues. In addition, RiskMetrics has clarified that materiality for transactional relationships will be examined: (i) if the director (or an immediate family member) has the transactional relationship; or (ii) if the director (or an immediate family member) is a partner in, a controlling shareholder, or an executive officer of, an organization that has the transactional relationship.

IV. ELECTION OF DIRECTORS

RiskMetrics clarified its language under the election of directors policy to reflect that it will consider a potential adverse vote recommendation at the board, committee or individual level, on an exceptional basis if a director has had significant involvement with a failed company and/or where a director has in the past appeared not to have acted in the best interests of all shareholders.

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CORPORATE ALERT

TOP 10 TOPICS FOR DIRECTORS IN 2010

Having survived the worst economic crisis since the Great Depression, most companies are breathing a sigh of relief and cautiously looking forward to a brighter future in 2010. Here is our list of hot topics that directors of public companies will be focusing on in the coming year:

1. Addressing challenges to the director election process resulting from regulatory changes and increased shareholder activism.
2. Overseeing enterprise-wide risk management, which includes all facets of a company's risk profile, including operational, financial, strategic, compliance and reputational risks.
3. Setting appropriate executive compensation in the midst of increased regulatory scrutiny and continuing public outcry over excessive pay packages.
4. Overseeing the development of longer-range corporate strategy as the day-to-day challenges of the financial crisis and recession subside.
5. Ensuring appropriate board composition and leadership structure.
6. Seizing M&A opportunities as the credit markets continue to thaw.
7. Shoring up takeover defenses where depressed share prices have made companies vulnerable to hostile bids.
8. Ensuring that an effective succession plan is in place.
9. Cultivating shareholder relations while investors push for more board transparency and accountability.
10. Monitoring legislative developments and preparing for more government regulation.

DISCUSSION

1. Director Election Process Under Siege

Directors will find it harder to get elected in 2010. The elimination of broker discretionary voting in director elections and increasing shareholder activism will pose major challenges for director elections in the coming year.

Elimination of Broker Discretionary Voting. Commencing January 1, 2010, brokers will no longer be permitted to use their discretion in voting for directors in uncontested elections where the brokers have not received specific instructions from their clients on how to vote the shares.

Because brokers typically have cast discretionary votes in favor of management's nominees in uncontested elections, the rule change is expected to have a major impact on public companies. The rule change, which amends New York Stock Exchange Rule 452, applies to all brokers that are NYSE member firms and, therefore, will affect all public companies regardless of the stock exchange on which a company's stock is listed.

Shareholder Activism. Shareholder activists will likely maintain, if not increase, their efforts to unseat directors next year. In 2009, proxy fight activity reached record heights, with 140 proxy fights commenced, compared to 125 in 2008.¹ Dissidents won at least one board seat in 25 of the 50 contests that went all the way to a shareholder vote and obtained settlements that included at least one board seat in 26 other contests.² Also, as discussed more fully below, "just vote no" campaigns in which shareholders are urged to withhold votes from the company's director candidates will be more popular than ever next year due to the elimination of broker discretionary voting.

Proposed Changes to SEC Proxy Rules. In October, SEC commissioners announced that they were postponing, at least until early 2010, a final vote on a controversial proposal that would give shareholders the right to have their director candidates included in company proxy statements. The proposal would allow a shareholder (or group of shareholders) who owns at least 1 percent of a public company that is a large accelerated filer (or 3 or 5 percent for smaller companies) and who has held the shares for at least one year, to use the company's proxy materials for the nomination of up to 25 percent of the company's board of directors. While postponement of the SEC's decision means that proxy access rules will not be in effect for the main part of the 2010 proxy season,³ the SEC is nevertheless expected to adopt some form of proxy access in 2010. Consequently, most companies will need to begin addressing the rule changes by the fall of 2010 as they gear up for the 2011 proxy season. During 2009, Delaware amended its corporation law to expressly allow (but not require) companies to adopt bylaw provisions giving shareholders the right to have their nominees included in the company's proxy statement. However, almost all companies are adopting a "wait and see" approach to final SEC action before making any proxy-access related changes to their bylaws.

In addition to its proxy access proposal, the SEC is proposing a rule change that would facilitate "just vote no" campaigns by allowing activists to distribute to shareholders duplicate copies of management's proxy card without having to comply with most of the SEC's other proxy rules. If the amendment is adopted, activists will have a relatively cheap and easy way to get shareholders to change their vote without having to request another proxy card from management. In December 2009, the SEC announced that it was postponing a vote on this proposal until the SEC takes up the proxy access proposal, and, thus, it is not clear whether or when this proposed rule change would become effective.

What Boards Should be Doing Now. For the 2010 proxy season, boards of all public companies will need to understand and assess the likely effect that the elimination of broker discretionary voting will have on their companies. Among other things, boards will need to—

- *Calculate the Broker Discretionary Vote.* Boards and management of many companies are currently working with their legal advisors and proxy solicitation firms to calculate the likely effect that the loss of the broker vote will have on their particular company, based on the composition of the company's shareholder base and the turnout at prior annual meetings. A study by Broadridge on the 2009 proxy season⁴ shows the significant impact that broker discretionary voting has on most companies. On average, broker discretionary votes represented almost 22 percent of the votes cast at annual meetings. At smaller companies with 1,000 to 4,999 beneficial shareholders, 48 percent of the shares voted were discretionary votes by brokers.⁵ One way to estimate the potential effect of the loss of the broker discretionary vote is to look at the voting results from the

most recent annual meeting at which brokers did not have discretion to vote on a matter (such as approval of an equity compensation plan) and subtract the broker non-votes from the votes cast “for” directors.

- *Consider Effect on Majority Voting.* Companies with majority voting for the election of directors will find it more difficult to achieve that threshold in 2010. A significant number of companies, including over two-thirds of S&P 500 companies and 46 percent of Russell 1000 companies, have some form of majority voting, which typically requires that a nominee receive a majority of the votes cast in order to be elected and that an incumbent director up for re-election resign or offer to resign if the director does not receive a majority of the votes cast.⁶ Because brokers typically cast discretionary votes in favor of management’s nominees, the elimination of broker discretionary voting will make it more difficult for a nominee to achieve a majority vote.
- *Assess Vulnerability to “Vote No” Campaign.* The elimination of broker discretionary voting will likely increase the impact and frequency of “vote no” campaigns. Regardless of whether a company has plurality or majority voting, the company can be targeted with a “just vote no” campaign in which shareholders are urged to withhold their votes from the entire board or selected nominees in an uncontested election. Without the inclusion of broker discretionary votes in favor of management nominees, “vote no” campaigns waged by activist shareholders will have a greater influence on director elections, as there will be fewer votes cast “for” the company’s nominees to outweigh those votes that are “withheld” or voted “against” such nominees.

Of course, if a company has plurality voting, directors in an uncontested election will still be elected so long as they receive *any* votes. Nevertheless, a successful “vote no” campaign that results in a high withhold vote can send a clear message of shareholder discontent to the board. For companies that have a majority voting standard, opposition votes from a majority of the shares that are voted can result in the targeted directors having to tender their resignations.

Although we will likely see an increase in “vote no” campaigns in 2010, it should be remembered that directors at most companies receive overwhelming support each year. A study by RiskMetrics Group of voting results on over 12,000 directors at S&P 500 and Russell 3000 companies in 2009 showed that the average votes withheld or cast against board members was just 7.2 percent.⁷ While that number is up from 5.1 percent in 2008 and 4.9 percent in 2007, it is clear that most directors have little to fear. The trends do, however, indicate that more and more directors will be facing opposition. During the 2009 proxy season, 93 directors at 50 companies received fewer than 50 percent of the votes cast in uncontested elections, almost three times the 32 board members at 17 companies who failed to earn majority support in 2008.⁸ In addition, one out of every 10 unopposed candidates in 2009 had at least 20 percent of shares voted against them or withheld, which is nearly double the rate for 2008.⁹

Surprisingly, none of the directors who failed to obtain a majority vote has resigned, as the director either serves at a company with pure plurality voting or at a company with a “plurality plus resignation” policy where the board did not accept the resignation.¹⁰ It will be interesting to see whether these companies are targeted with additional shareholder activism in the coming year.

- *Decide Whether to Use E-proxy.* The elimination of broker discretionary voting may further discourage companies from taking advantage of the SEC’s e-proxy rules because of the dramatic decline in voting by retail investors of those companies using e-proxy. The response rate of shares voted by retail shareholders during the 2009 proxy season of companies using the notice-only method of e-proxy was *half* that of retail shareholders of companies that delivered full sets of their proxy materials in paper form.¹¹

In response to the low retail turnout at companies using e-proxy, the SEC has proposed rule changes that are designed to reduce shareholder confusion regarding e-proxy. The rule changes, which may go into effect for the 2010 proxy season, will give companies more flexibility in the formulation of the notices and also allow explanatory materials to accompany the notice. It remains to be seen, however, whether these changes will increase retail participation.

- *Understand Institutional Investor Base and Proxy Advisor Policies.* The influence of institutional investors will likely increase as a result of the elimination of broker discretionary voting, as institutional shareholders are more likely than are retail investors to vote their shares. Consequently, boards should be sensitive to the “hot buttons” that are likely to trigger the wrath of major institutional investors. Also, since institutional investors often follow the advice of proxy advisory firms, these firms will gain more clout. In recent years, proxy advisory firms, such as RiskMetrics Group, have increasingly recommended that their clients withhold votes or vote against director nominees of companies that do not abide by the advisory firm’s corporate governance policies. Because advisory firms can often sway a significant portion of a company’s votes, directors need to understand these firms’ policies and the types of director actions that can result in a negative recommendation. RiskMetrics, for example, will recommend a withhold vote for a wide variety of reasons, including poor pay practices, service by a director on too many boards, a board’s refusal to implement a shareholder proposal that received majority support and a board’s adoption of a poison pill without shareholder approval.
- *Plan for Additional Time and Expenses and “Get Out the Vote” Efforts.* The rule change will increase the cost of the annual meeting for companies that abandon the less-expensive option of e-proxy. Also, many companies will find that they need to spend more time and effort wooing shareholder votes, especially those of retail investors, to ensure a successful meeting. Companies with heavy retail concentrations, in particular, should consider allowing additional time between the date of mailing proxy materials and the annual meeting date to allow for additional follow-up mailings and telephone solicitations to get out the vote. Recent studies show that few retail shareholders understand the proxy voting process,¹² and companies will need to spend time and effort educating retail shareholders on the importance of their vote.
- *Make Sure Quorum is Obtainable.* Many companies, particularly those with large retail investor bases, rely on broker discretionary votes to reach a quorum. Consequently, companies should make sure that they have at least one “routine” matter on the agenda (such as ratification of auditors), so that brokers can cast votes that can be counted for purposes of determining a quorum.
- *Monitor Proxy Access.* Boards of all public companies will need to monitor developments regarding proxy access during 2010. The SEC is expected to adopt some version of proxy access in 2010. Assuming proxy access is adopted, the new rules could potentially apply to annual meetings held in the latter part of 2010 and, in any event, are expected to be in effect for 2011.

2. Risk Management

Risk management took center stage in most boardrooms during 2009 and will continue to be a high priority for directors in 2010. In the wake of the financial crisis, the board’s role in overseeing risk management is drawing the attention of shareholders, regulators and Congress. In December 2009, the SEC adopted rule changes requiring companies to describe in their proxy statements the board’s role in risk oversight, as well as how a company’s compensation policies may affect risk-taking by employees where those risks are reasonably likely to have a material adverse effect on the company. In addition, pending legislation in Congress would require public companies to establish risk committees

composed of independent directors that would be responsible for the establishment and evaluation of risk management practices.

Shareholders are also focused on risk management, and directors at many companies have been targeted with shareholder lawsuits claiming that directors failed to adequately foresee or steer their companies through the financial crisis. Directors of Delaware corporations, however, can take great comfort in a 2009 decision by the Delaware Chancery Court dismissing shareholder claims that Citigroup's directors breached their fiduciary duties by failing to properly monitor and manage the risks associated with Citigroup's exposure to the subprime mortgage crisis.¹³

Under Delaware law, directors have a duty of oversight that requires them to implement and oversee the operation of reasonable information and reporting systems or controls designed to inform them of material risks. However, directors will not be held liable for breach of this oversight duty unless they acted in bad faith by either completely failing to implement any such system or, having implemented such a system, consciously failing to monitor or oversee its operations or warnings it provides.¹⁴ In dismissing the claims against the Citigroup directors, the court clarified that this duty of oversight is not designed to subject directors to personal liability for failure to predict the future and to properly evaluate business risk. The mere fact that a company takes on business risk and suffers losses—even catastrophic losses—does not establish bad faith. In reaching its decision, the court distinguished between oversight liability with respect to business risks and oversight liability with respect to a company's legal compliance systems, noting another 2009 Delaware court decision that allowed a case against several AIG directors to proceed where it was claimed that the defendants failed to properly monitor alleged pervasive fraudulent and criminal conduct by AIG employees.¹⁵

While it is clear that Delaware courts will not second-guess directors in assessing and taking business risks on behalf of the enterprise, directors should, nevertheless, remain vigilant in monitoring their company's business risks. In addition to heightened shareholder and regulatory scrutiny, recent events have demonstrated that more diligent risk management is not merely a "best" practice but also a necessary practice to ensure survival of the enterprise.

Proper oversight of risk management encompasses not just the legal and financial risks that audit committees have traditionally overseen but also the full panoply of risks that a company may face. Enterprise risk management (ERM) is the current buzzword applied to a top-down holistic approach to risk management. It addresses all of an enterprise's risks—including operational, financial, strategic, compliance and reputational risks—under one umbrella, in contrast to the more traditional "silo" approach in which each operating function or division tackled risk independently. ERM is not focused simply on risk reduction. Rather, it encompasses an assessment of both upside and downside risks and, thus, helps inform the strategic planning process. There are several frameworks available to assist companies in implementing ERM.¹⁶ In addition, two leading organizations recently issued helpful guidance for boards of directors to steer them through their risk oversight duties.¹⁷

Regardless of a company's stage in implementing an enterprise-wide risk management framework, boards of directors of all companies should be evaluating the adequacy of their risk management oversight procedures in light of the lessons learned from the financial crisis and with an eye towards the new SEC disclosure requirements. Among other things, directors should address—

- *Director education.* All directors need to have a good understanding of their company's business and the major risks it faces. Without a good grasp of both the upside and downside risks, directors cannot properly oversee the company's strategic direction. Indeed, as part of its oversight function, a board needs to be satisfied that the company's risk appetite, that is, the amount of risk the company is willing to accept in pursuit of stakeholder value, is appropriate for the company.¹⁸ Depending on the particular risks that a company

faces, the company may need to beef up its board by adding members with expertise in particular areas of concern. If a company has not yet adopted an enterprise-wide approach to risk management, the independent auditors or an outside consultant can provide the board with a basic overview.

- *Oversight structure.* The board should evaluate the manner in which it oversees risk management. Depending on how large it is and how well it functions, a board may decide to retain overall authority for risk management oversight at the board level.

At many companies, primary oversight responsibility for risk management is delegated to the audit committee. NYSE listing standards require audit committees of NYSE-listed companies to discuss the company's guidelines and policies regarding risk assessment and risk management, as well as the company's major financial risks and the steps management has taken to monitor and control those risks.¹⁹ Under the NYSE rules, however, the audit committee is not required to be the sole body responsible for risk management and assessment. If other mechanisms are used, the audit committee should review such processes "in a general manner."²⁰ Of course, audit committees are often already burdened with a host of other responsibilities. Consequently, the boards of some companies have set up separate risk management committees, although only 6 percent of public companies (primarily in the insurance and financial services industries) currently have stand-alone risk committees.²¹ Legislation is currently pending in Congress that would require any listed company to have a separate risk committee, composed of independent directors, although the prospects for passage of this legislation are uncertain.²² In view of the new SEC disclosure requirements regarding risk-taking and executive compensation, many boards will assign to their compensation committees oversight of risk management related to compensation policies.

Even if primary oversight for monitoring risk management is delegated to a committee, the entire board needs to remain engaged in the risk management process and be informed of material risks that can affect the company's strategic plans. Indeed, given the wide spectrum of risks that most companies face and the myriad board decisions that are permeated by risk considerations, many directors believe that risk management oversight should rest with the entire board. Also, if primary oversight responsibility for particular risks is assigned to different committees, collaboration among the committees is essential to ensure a complete and consistent approach to risk management oversight.

The new SEC disclosure rules also require companies to disclose how the board's role in risk oversight affects the board's leadership structure. Consequently, a board will need to address, for example, the interplay between its risk oversight function and its decision to combine or separate the positions of CEO and chairman of the board.

- *Reporting processes.* Directors need to ensure that they are getting the information they need to understand the company's risks, as well as management's assessment of those risks. They also may want to meet privately with the company's principal risk officer and the internal and outside auditors to discuss risk management issues. In the adopting release for the new disclosure requirements, the SEC suggested that companies disclose in their proxy statements whether the officers responsible for risk management report directly to the board or to a board committee or how information is otherwise received from such persons. If risk oversight is delegated among several committees, their activities and the sharing of information needs to be coordinated. Also, the board should re-examine how often risk management matters are discussed at board meetings.
- *Risk management review.* The board (or the responsible committee) should review with management the adequacy of the company's risk management practices. In particular, the board needs to probe whether the

company's risk management processes appropriately identify, assess and manage the company's risks to ensure that the risk exposures are consistent with the company's appetite for risk.

- *Compensation policies.* As we discuss more fully below, the board (or the responsible committee) should evaluate its compensation policies in light of the company's risk appetite to ensure that employees are not being rewarded for excessive risk-taking.

3. Pay Practices Under Fire

It seems like everyone is taking shots at executive compensation. The media, investors, regulators, legislators, activists and proxy advisory firms are all intensely scrutinizing company pay practices. Shareholders are also increasingly holding directors (especially those serving on compensation committees) accountable for what are perceived to be poor pay practices. Pay concerns contributed to more than 10 percent of votes being withheld from directors at 50 companies during 2009, and at two companies a majority of votes were withheld from compensation committee members.²³ And in December, Goldman Sachs responded to shareholder objections over its plans to pay large cash bonuses to top executives by substituting stock awards with five-year vesting periods and agreeing to give shareholders a "say on pay" at next year's annual meeting.²⁴

We highlight below some of the challenges directors will be facing in crafting executive compensation in 2010.

Enhanced Proxy Statement Disclosures. New SEC disclosure rules that go into effect on February 28, 2010, will require companies to add disclosure in their proxy statements about certain pay practices, including—

- *Risk Analysis.* Companies will have to explain how their compensation policies and practices for employees affect the company's risk and management of risk if the risks arising from those policies and practices are reasonably likely to have a material adverse effect on the company. In determining whether disclosure is required, companies can consider offsetting steps or controls that are designed to limit risks. Accordingly, in light of the new disclosure, compensation committees should review the company's compensation policies for all employees to determine whether the risks arising from those policies are likely to materially affect the company, and, if so, whether any changes should be made or other actions taken to mitigate or manage those risks.

Depending on the company, some pay practices that might encourage excessive risk-taking include compensation arrangements in which a high portion of annual pay is incentive-based, short vesting periods for equity awards, performance goals that significantly exceed past performance targets and steep payout curves where a very high threshold performance level must be met to earn a payout.²⁵ RiskMetrics has also recently added risk assessment to its evaluation of a company's pay practices. Some pay practices that RiskMetrics believes might encourage excessive risk-taking include guaranteed bonuses, use of a single performance metric for both short- and long-term plans, lucrative severance packages, high pay opportunities relative to industry peers, disproportionate supplemental pensions and "mega" annual equity grants that provide unlimited upside with no downside risk.²⁶ Some mitigating factors that RiskMetrics will consider include "vigorous" clawback provisions and "robust" stock ownership/holding guidelines.²⁷

- *Compensation Consultant Conflict of Interests.* The role of compensation consultants is increasingly under fire, largely due to concerns regarding conflicts of interest. Many believe a consultant's integrity could be jeopardized when the consultant is hired to do work for a company's compensation committee as well as its management or when management's consultant provides advice on executive compensation as well as additional services and the board does not have its own consultant. Because of these concerns, the SEC will now require companies to disclose, in certain circumstances, fees paid to compensation consultants that played

a role in determining or recommending the amount or form of executive or director compensation if they provided more than \$120,000 of additional services to the company during the company's fiscal year. In addition, when the compensation consultant provides executive compensation advice to the compensation committee, as well as additional services to the company, companies will have to disclose whether the engagement to provide additional services was made, or recommended by, management and whether the board or compensation committee approved the other services.²⁸ In addition to the SEC's new disclosure rules, legislation is pending in Congress that would require the independence of compensation committees and their consultants and advisors.²⁹ In light of the new disclosure requirements, the board or compensation committee should review the company's current practices regarding the use of compensation consultants and determine whether any changes should be made.

Tougher SEC Review of Proxy Statements. Companies will no longer get a "free pass" for failing to comply with the SEC disclosure rules regarding executive compensation. In the past, the SEC had often allowed companies to agree to reflect SEC staff comments regarding executive compensation and CD&A in future filings. The SEC staff recently announced, however, that companies should be prepared to amend their filings if the SEC raises material comments and finds their disclosure deficient.³⁰ The SEC staff also recently identified two topics on which companies should focus their attention in the coming year:

- *Analysis.* The SEC wants to see better explanation of *why* executive officers were compensated as they were. For example, it is not sufficient for a company to state that its compensation committee used tally sheets or other tools in making compensation decisions. Instead, the company should discuss how the committee used these tools to determine compensation amounts and structures and explain why it reached its decisions. If a committee's pay determinations were simply subjective decisions, the company should say that. If a company based its decision on qualitative factors, these factors should be specifically identified, and the company should explain how these qualitative inputs were ultimately translated into objective pay determinations.
- *Performance Targets.* Many companies seek to avoid disclosure of material performance targets because they believe the disclosure will likely cause the company competitive harm. Absent highly unusual circumstances, however, the staff does not believe that disclosure of performance targets will result in competitive harm *after* the company has disclosed the amounts, especially where the performance targets are tied to companywide financial results that are publicly disclosed. If a company does decide to omit a performance target where disclosure would cause competitive harm, it must disclose with meaningful specificity how difficult or likely it would be for the company or executive to achieve the target.

Say on Pay. It looks like say on pay is here to stay. Shareholder proposals calling for an annual shareholder advisory vote on executive compensation were the hottest item on corporate ballots in 2009, with 76 proposals going to a vote.³¹ Support averaged 45.6 percent, up 4 percent over 2008, and 22 proposals received majority support, which is double the number of proposals receiving majority votes in 2008.³² Even if a company has not been targeted with a shareholder proposal on the subject, pending say on pay legislation in Congress is considered likely to pass, although not in time for the 2010 proxy season.³³

In addition to the pending legislation that would affect all public companies, legislation has already passed that requires financial institutions receiving TARP money to provide shareholders with an annual nonbinding say on pay vote.³⁴ In 2009, over 300 financial institutions receiving payments under TARP held say on pay votes at shareholder meetings. In addition, at least 25 companies have now agreed, either voluntarily or in response to a shareholder proposal, to give shareholders an annual say on pay.³⁵ Significantly, shareholder support for company pay programs has been quite high,

with an average of 89.75 percent of votes cast in favor of the company's executive compensation programs.³⁶ No company to date has received a majority vote against its compensation programs.³⁷

Further, recent guidelines announced by RiskMetrics appear to be designed to encourage boards of directors to give shareholders a say on pay. As discussed below, if a company has what RiskMetrics considers to be "problematic" pay practices, RiskMetrics will generally recommend a vote against a management proposal asking shareholders to approve the company's compensation practices rather than withhold votes from compensation committee members.

Rather than agreeing to an annual vote on say on pay, some companies are taking slightly different approaches to appease shareholders. These approaches include gathering shareholder views on director and executive compensation by submitting a survey to shareholders (Schering-Plough, Lockheed Martin, Northrop Grumman) and agreeing to give shareholders a biennial (Prudential, Pfizer) or triennial (Microsoft) say on pay, rather than an annual vote.³⁸

Other Legislative Initiatives. Congress is currently considering several bills aimed at many of the same executive compensation practices that activists are attacking with shareholder proposals.³⁹ Although the timing of any such legislation is unknown, companies should monitor legislative developments and be prepared for legislation to pass in 2010 that will affect executive compensation in some manner. The primary legislative initiatives addressing executive compensation include (1) mandatory say on pay for all public companies, (2) a shareholder vote on golden parachutes triggered by a change of control, (3) compensation committee and compensation consultant and advisor independence and (4) policies requiring clawback of incentive-based compensation for noncompliance with financial reporting requirements.

Proxy Advisor Policies. Directors also need to be aware of the positions of proxy advisory firms regarding pay practices. If RiskMetrics determines that there is a disconnect between a company's performance and the CEO's pay under RiskMetrics' criteria, it may recommend against a management proposal asking shareholders to approve the company's compensation practices and, in certain situations, may recommend withholding votes from compensation committee members. Also, if a company has what RiskMetrics considers to be "problematic" pay practices, RiskMetrics will generally recommend a vote against a management say on pay proposal and will generally recommend withholding votes from compensation committee members (or, in some cases, the entire board) in egregious situations or when a say on pay proposal is not on the ballot.⁴⁰ Certain pay practices that RiskMetrics considers to be most problematic and that could result in negative recommendations in the absence of mitigating factors, include—

- egregious employment contracts, including contracts that contain multiyear guarantees for salary increases, non-performance-based bonuses and equity compensation
- abnormally large bonus payouts without justifiable performance linkage or proper disclosure
- excessive or overly generous perquisites, including perquisites for former or retired executives
- excessive severance and/or change in control provisions, including single trigger change in control provisions or payments exceeding three times base salary and bonus
- tax reimbursements and excise tax gross-ups.⁴¹

In light of the impact that a negative voting recommendation can have on directors, particularly with the loss of broker discretionary voting, compensation committees should identify any of the company's compensation practices that RiskMetrics frowns upon and determine whether the practice is still appropriate.

Clearly from the breadth of these areas of focus, directors need to spend some time carefully reviewing their company's pay practices and related disclosures. Among other things, directors should—

- make sure their proxy disclosure clearly justifies the company's pay policies and decisions
- ensure that pay practices do not encourage excessive risk-taking
- review how compensation consultants are used
- consider reaching out to major shareholders to understand their pay concerns and explain the company's positions
- consider limiting or eliminating those compensation practices that typically raise shareholder ire, including tax gross-ups, excessive perquisites, single trigger change of control provisions and excessive severance packages
- monitor legislative and regulatory developments.

4. Strategic Planning Challenges in 2010

One of the most important functions of the board of directors is oversight of the development and implementation of corporate strategy. During the past year, most companies have had their hands full simply dealing with the day-to-day fallout from the financial crisis and recession. As the crisis wanes and the economy continues to improve, management can begin to focus on the prospects for growth and the company's longer-term strategic planning.

In developing these plans, management and boards will need to carefully assess whether the unprecedented events of the past two years require fundamental changes to the company's strategic direction. Although the credit markets are thawing and the economy is slowly recovering, we will not see a return to the loose lending standards and easy money that marked the earlier part of this decade. Rather, in the new world order, it is clear that risk will be priced higher, leverage will be less tolerated, government regulation will be more pervasive and the American consumer, who had accounted for 70 percent of U.S. gross domestic product, will spend less. One study predicts that once a "new normal" sets in after the end of the recession, American consumers will spend at about 86 percent of their pre-recession levels.⁴² Mounting federal deficits will also mark the new economic landscape. Even after record-setting shortfalls in both 2008 and 2009, the Obama administration is forecasting that deficits over the next 10 years will total \$9.05 trillion, an amount approaching the \$12 trillion current national debt that it took the country more than 200 years to accumulate.⁴³ Another element in the equation for the "new normal" is the unprecedented governmental support of so many parts of the financial sector, and gauging when and how the government will extricate itself from these markets. And, as the last two years have so clearly demonstrated, an increasingly interconnected world economy will have profound implications for all companies. In light of these developments, it is not surprising that many economists foresee lower average economic growth rates for the United States and the world going forward.

Companies need to take a hard look at the lasting impact that these events will have on the viability of their business models and begin the difficult process of making necessary adjustments. While management has the primary responsibility for developing corporate strategy, it will be critical for the board of directors to take an active role in probing the adequacy of management's plans. This is a process that management and boards will have to revisit often in response to the dynamics of the marketplace.

5. Leadership Structure and Board Composition

In view of new SEC disclosure requirements, boards of public companies will need to take a close look at their leadership structure and the background and qualifications of board members. New SEC rules that go into effect on February 28, 2010, will require companies to disclose in their proxy statements—

- whether the company separates or combines the positions of CEO and chairman of the board

- if the positions are combined, whether the company has a lead independent director and the specific role that such director plays in the board's leadership
- why the company has determined that its leadership structure is appropriate for the company
- the effect that the board's role in risk oversight has on the board's leadership structure
- the particular experience, qualifications and attributes that qualify incumbent directors and nominees to serve on the board
- whether diversity is a factor in identifying director nominees, and, if so, how the diversity policy is implemented and its effectiveness is assessed.

In preparation for the 2010 proxy season, the board (or appropriate committee, such as the nominating and corporate governance committee) should be addressing the type of disclosure that will be required and determining whether any changes are advisable before disclosures are made. Among other things, the board or appropriate committee should consider—

- *Independent Chair.* Boards of companies that have combined the positions of CEO and chairman should evaluate whether to separate the roles, and boards of companies that have separated them should consider whether the chair should be independent. Boards are being pressured by a variety of sources to establish independent chairs. Although the SEC stated in the adopting release that the new disclosure requirement is not intended to influence a company regarding its leadership structure, at least one commentator has skeptically noted that the new rule appears to be another case of “therapeutic disclosure” designed to drive companies towards separating the positions.⁴⁴ Legislation has been proposed in Congress that would require listed companies to have an independent, non-executive director serve as chairman, while other proposed legislation would simply require disclosures similar to the SEC mandate.⁴⁵ Also, shareholder proposals calling for an independent chairman averaged 36.9 percent support at the 34 companies where the proposal was on the ballot in 2009, up from average approval of 29.3 percent at 28 meetings last season, and a binding proposal at Bank of America's 2009 annual meeting received a majority vote, requiring CEO Ken Lewis to step down from the chairman position.⁴⁶

Despite pressures to separate the positions, a board should carefully evaluate the optimum leadership structure for its particular company. Various studies comparing the effect on company performance of the two leadership structures are inconclusive.⁴⁷ Moreover, only a fraction of U.S. public companies separate the CEO and board chair and even fewer have an independent chair. Thirty-seven percent of S&P 500 companies have separated the positions,⁴⁸ and less than half of these companies have an independent chair.⁴⁹ Consequently, only 16 percent of all S&P 500 companies have an independent chair.⁵⁰ In almost all instances where the chairman is separate but not independent, a current or former executive of the company fills the chairman's seat.⁵¹

- *Lead or Presiding Director.* In lieu of, or in addition to, separating the positions of CEO and chairman, many companies have established a lead or presiding independent director, who, among other things, helps set board agendas, runs executive sessions of the independent directors and serves as a liaison between the independent directors and management. NYSE-listed companies are required to have a non-management director preside over executive sessions of the non-management directors, but the same director is not required to preside at all such sessions.⁵² Ninety-five percent of S&P 500 companies have designated a lead or presiding director,⁵³ and almost all S&P 500 companies that do not have an independent chairman have a lead or presiding director.⁵⁴

At 89 percent of these companies, a single individual fills the role, while at the other 11 percent, the role is rotated among independent directors at each board meeting.⁵⁵

- *Responsibilities of Lead Director.* Companies that have a lead director but a combined CEO/chairman should review the responsibilities assigned to the lead director in view of the new required disclosure about the role that such a director plays in the board's leadership structure.⁵⁶ The company's corporate governance guidelines may need to be updated or revised to reflect the lead director's role.
- *Director Qualifications.* In view of the new SEC requirement to disclose the particular experience, skills and attributes that qualify incumbent directors and nominees to serve on the board, companies will likely need to gather additional information from their directors. In addition, the nominating committee should assess whether the board has the appropriate mix of experience and skills to address the company's business needs and challenges and whether the company's corporate governance guidelines need to be revised to reflect the desired board composition.
- *Diversity.* Companies will also need to disclose in their proxy statements whether—and, if so, how—the nominating committee or board considers diversity in identifying director nominees. If there is a diversity policy, the company must disclose how the policy is implemented and how the nominating committee or board assesses its effectiveness. The new SEC disclosure rules do not define diversity, and the SEC expressly noted that some companies may view diversity expansively to include differences of viewpoint, professional experience, skills, education and other attributes that contribute to board heterogeneity, while others may focus on race, gender or national origin.

Many companies already state in their corporate governance guidelines that they seek a variety of skills and attributes in determining board makeup. Some companies also expressly mention gender, race and nationality.⁵⁷ Eighty-nine percent of S&P 500 companies now have at least one woman director,⁵⁸ although women comprise only about 15 percent of all directors serving on S&P 500 company boards.⁵⁹ Minority representation accounts for 10 percent of these boards.⁶⁰

Since the new SEC disclosure requirements give companies broad leeway in defining diversity, the nominating committee or board should carefully consider those qualities or attributes that are most appropriate for the company, given its particular circumstances. If diversity is a factor in determining board makeup, the company's corporate governance guidelines and, if appropriate, nominating committee charter should reflect the qualities and attributes that the company seeks. In deciding how to implement a diversity policy, the nominating committee or board should be wary of setting specific quotas that it may not be able to meet due to a shortage of viable candidates who also possess other qualities or attributes that the company considers important.

6. The Return of M&A

After an abysmal 2009, M&A is poised for a comeback. For the nine months ended September 30, 2009, U.S. M&A activity totaled just \$601.2 billion, down 46 percent from the prior year's comparable period.⁶¹ Similarly, on a global basis, M&A activity totaled just \$1.46 trillion through the first nine months of 2009, a 38 percent decline from 2008 levels.⁶² In 2007, at the peak of the merger boom, full-year M&A hit \$4.28 trillion.⁶³ Even though the stock market has rebounded sharply from the lows of 2008, deal-making has continued to suffer due to uncertainty about the economy, companies' desire to hoard cash and lack of available credit. The leveraged loan market, however, is beginning to show signs of life, with several large acquisitions by financial buyers being announced in the past month.

With credit markets gradually improving, M&A activity should rebound during 2010. There is a tremendous amount of strategic capital waiting to be deployed. Companies currently have the most cash on hand as a percentage of total assets since 1951,⁶⁴ and CEOs are more willing to put the cash to work now that the economic outlook is less uncertain. A recent study by Ernst & Young of nearly 500 senior executives around the world shows that 33 percent of companies are likely or highly likely to make an acquisition during the next 12 months.⁶⁵ Private equity firms, forced to sit on the sidelines for most of 2009 due to the lack of available leverage, are feeling increasing pressure to deploy the estimated \$400 billion they have amassed.⁶⁶ While they wait for the LBO market to improve, private equity shops have been stepping up their investments in distressed companies, making more minority investments and shoring up their portfolio companies. In recent weeks, PE firms have even announced several billion-dollar LBOs, although with less leverage and more stringent financing terms than for deals in the years leading up to the financial crisis.⁶⁷

As management and boards continue to sharpen their strategic focus, we expect to see more companies shedding underperforming or noncore assets, while other companies will be seeking growth opportunities that may not be available organically in the current economy.⁶⁸ To be sure, we will not see a return to anywhere near the giddy highs of 2007, but, with the current attractive valuations, companies should be poised to seize opportunities as the credit markets continue to loosen.

Even if the rest of the M&A market does not rebound, acquisitions of distressed companies should remain strong. Through the first 10 months of 2009, bankruptcy deals totaled \$255 billion, compared to \$43.3 billion during the same period last year.⁶⁹ With the pace of bankruptcy filings showing no signs of slowing,⁷⁰ companies with cash and private equity firms will find plenty of opportunities to pursue Section 363 asset sales and other distressed transactions.

7. Shoring Up Takeover Defenses

The flip side of increasing M&A activity is that many companies will find themselves at risk of becoming targets of unwanted suitors. Although the stock market has rebounded from the lows of 2008, stock prices for many companies are still below historical averages, making the companies attractive takeover targets. Also, many companies in recent years have dismantled their takeover defenses, often in response to shareholder activism, leaving them vulnerable to takeover threats. In this environment, directors need to carefully assess the adequacy of their company's takeover defenses. Four defenses that are receiving a lot of attention are: poison pills, classified boards, denial of shareholders' right to call special meetings and advance notice bylaws.

Poison Pill. The use of poison pills as a takeover defense has been falling out of favor for several years, but many companies are now having a change of heart regarding this potent defense, as evidenced by the 60 companies that adopted new poison pills in 2009.⁷¹ We highlight below some considerations that boards should take into account when deciding whether to adopt a poison pill:

- *RiskMetrics' Position.* For those boards considering adopting a poison pill, directors need to be aware of guidelines established by RiskMetrics Group, which continues to take a strong position against poison pills. RiskMetrics' 2010 policy updates actually strengthen its stance with respect to "long-term" poison pills. Previously, a board that adopted a pill with a term of more than 12 months could avoid a negative recommendation from RiskMetrics by committing to submit the pill to shareholders for ratification within 12 months of its adoption. Now, however, RiskMetrics will generally recommend a withhold/against vote for all directors of a company that, without shareholder approval, adopts a poison pill with a term of more than 12 months or renews any existing pill regardless of the pill's length.⁷² A board's commitment to put a newly adopted pill to a binding shareholder vote may only potentially offset an adverse vote recommendation. And for those companies that adopt, rather than renew, a pill with a duration of 12 months or less without

shareholder approval, RiskMetrics will evaluate directors on a case-by-case basis.⁷³ Further, companies that unilaterally adopt a poison pill will be subject to reviews at least once every three years (or every year for companies with classified boards), beginning the first year after the adoption and extending until the pill has expired or been redeemed. This new policy will apply to companies adopting or renewing poison pills after November 19, 2009.⁷⁴ RiskMetrics also expects companies to include certain shareholder-friendly provisions in their poison pills.⁷⁵ Although directors should be aware of RiskMetrics' position on poison pills, they need to remain focused on what is in the best interests of the company's shareholders.

- *On-the-Shelf Poison Pills.* One alternative that has become increasingly popular among companies is to have a poison pill "on the shelf." In this situation, a board reviews and approves a form of poison pill that would be ready for adoption on short notice in response to a potential threat. The board then re-reviews the poison pill at reasonable intervals to ensure that its terms are appropriate in light of potential threats and current market practices. Taking this "on-the-shelf" approach has several advantages. First, it gives the board more time for a thoughtful and effective evaluation of the poison pill in the absence of a pending threat. Also, having previously reviewed the poison pill, it enables the board to react quickly in response to an activist attack. Further, because there is no public disclosure requirement to merely having a poison pill "on the shelf," the board is not pressured to include the shareholder-friendly provisions recommended by RiskMetrics, but, instead, can ensure that the poison pill is sufficiently potent to adequately protect the company.
- *Derivative Positions/Beneficial Ownership.* As investors have significantly increased their use of derivative, swap and other transactions, often accumulating large positions in a company without having to disclose these positions publicly, some companies have adopted or amended poison pill language to cover these derivative positions when calculating an investor's ownership under the poison pill. Companies should be cautious when considering this type of language in a poison pill because including derivative positions in the calculation of beneficial ownership under a poison pill is an emerging concept and has not been addressed by the Delaware courts.⁷⁶ In addition, the lack of public disclosure on derivative positions could make it difficult for companies to monitor when a shareholder has triggered the pill, and the possibility of inadvertent triggers could increase.
- *NOL Poison Pills.* In addition to deterring hostile takeovers, an increasing number of companies have adopted poison pills to preserve their net operating loss carryforwards (NOLs). Due to the recession, more and more companies are accumulating NOLs that, if preserved, can be used in future years to reduce income tax liability. However, the benefit of NOLs decreases significantly or is eliminated if there is an "ownership change" of the company.⁷⁷ To prevent losing the benefit of NOLs, an increasing number of companies are adopting poison pills with a low triggering threshold, typically just under 5 percent, to deter stockholders from increasing their ownership and triggering an "ownership change." As of November 2009, 41 U.S. companies had adopted a poison pill—or amended an existing pill to decrease the triggering threshold—to preserve the company's ability to use its NOLs. This number reflects a significant increase, with only 12 companies adopting an NOL poison pill in 2008 and five companies adopting such a pill in 2007. RiskMetrics' policy does give companies some leeway regarding NOL poison pills by reviewing them on a case-by-case basis.⁷⁸

Classified Boards. The classified board is a traditional takeover defense where directors are divided into separate classes and only a fraction of directors (typically one-third) are up for election each year. RiskMetrics and several other proxy advisory firms view classified boards unfavorably and almost always recommend voting for a proposal to declassify a company's board, so all directors are elected annually. During 2009, activist shareholders placed 63 proposals to repeal classified boards on company ballots and received strong shareholder support, with an average of

65.6 percent of votes cast supporting board declassification.⁷⁹ Also, in response to pressure from activists, management submitted 29 declassification proposals to shareholders in 2009.⁸⁰ Largely due to pressure from activists, the number of companies with staggered boards has decreased significantly over the past few years, with only 34 percent of companies in the S&P 500 retaining a classified board.⁸¹ And this percentage could change dramatically if current legislation passes that would either ban classified boards or permit classified boards only with shareholder approval or ratification.⁸²

Companies with classified boards should think carefully before succumbing to shareholder pressures to declassify the board, particularly in the current economic environment in which many companies are vulnerable to bottom-fishing offers. A classified board provides a company with additional leverage against a potential hostile acquiror because the acquiror is unable to gain control of a majority of the board at a single annual meeting. A classified board also strengthens the deterrent effect of a poison pill because an acquiror cannot replace a majority of the board at a single election and then redeem the pill. Further, under Delaware law, if a board is classified, directors can only be removed “for cause,” which has proven difficult to demonstrate, making it a fairly unrealistic option for activists desiring to remove directors.

Denial of Shareholders’ Right to Call a Special Meeting. Most public companies have provisions in their charters that deny shareholders the right to call a special meeting, or they may give shareholders this right, but provide that only a high percentage of shareholders may call a special meeting. But all this could change as more and more activists put pressure on companies to give shareholders this right. In 2009, 61 shareholder proposals seeking a shareholder right to call special meetings made it on company ballots, receiving average support of 50.8 percent,⁸³ a substantial increase from the 23 proposals in 2008 that received average support of 46.6 percent.⁸⁴ For those companies that currently give shareholders the right, you may not be off the hook. Activists are targeting not only companies that currently deny shareholders the right to call a special meeting, but also companies that actually give shareholders the right—but require a higher stock ownership threshold than desired by activists, who typically seek a 10 percent threshold. Many such companies have tried to exclude these proposals from their proxy statements, arguing that they have “substantially complied” with the proposal, but the SEC has rejected this argument because of the difference in the stock ownership threshold.⁸⁵ A strategy that companies may want to consider if faced with this shareholder proposal is to include in the company’s proxy statement a company proposal giving shareholders the right to call a special meeting, but at a higher stock ownership threshold. The company may then be able to exclude the shareholder proposal with the smaller percentage threshold on the basis that it conflicts with the company proposal.⁸⁶ This tactic could be particularly helpful if the company is at risk of an against/withhold recommendation for all director nominees from RiskMetrics for failure to act on a shareholder proposal that received approval of a majority of shares cast for the previous two years.⁸⁷

Advance Notice Bylaws. Another takeover defense that directors should carefully review, is the company’s advance notice bylaws,⁸⁸ particularly in light of two 2008 Delaware court cases narrowly interpreting their effect.⁸⁹ These decisions highlight how important it is that advance notice bylaw provisions clearly and accurately reflect the company’s intent by, among other things, clearly applying to all proposals to be made at shareholder meetings, whether or not the shareholder wishes to have the proposal included in the company’s proxy statement pursuant to Rule 14a-8.⁹⁰

In addition, companies should consider requiring shareholders who attempt to present proposals or nominate directors at a shareholder meeting to provide the company with additional information about any hedging or similar arrangements that have the effect of increasing or decreasing the shareholder’s economic or voting power, any arrangements between the proponent and others concerning the proposal, and the proponent’s relationship with the company and any significant shareholders. Companies should also consider requiring that this information be updated as of the record date and as of 10 days preceding the meeting. Requiring this information from shareholder proponents gives the

company and shareholders valuable insight into the proponent's motives and will help the company and shareholders evaluate the proposal. Although collecting this information is helpful, companies need to be careful that the provision is not so onerous that it could be found to be invalid.⁹¹

Finally, if the SEC adopts final rules on proxy access, all companies will need to revisit their advance notice bylaws and possibly adopt new proxy access-related bylaws in 2010.

Other Considerations. As discussed more fully below, companies considering adopting a majority vote standard for the election of directors should think twice. With the elimination of broker discretionary voting in uncontested director elections in 2010, achieving the required majority vote for directors may become more problematic, particularly for those companies with a large retail shareholder base that often allows the broker to vote their shares. Legislation is currently pending that would require all listed companies to apply majority voting in uncontested elections of directors.⁹²

In today's environment, it is critical for boards to be prepared to handle a potential takeover threat. Boards should be fully aware of their company's defense profile, as well as any vulnerabilities the company may have. Boards should also be monitoring the company's shareholder base and any unusual trading activity. They should also have in place a designated response team and plan of action if a threat arises.

8. Succession Planning

Evaluating and selecting a company's CEO is one of a board's most significant responsibilities. Replacing the CEO, whether due to a planned retirement, forced resignation or sudden departure, is critical to the future of the company. And boards are finally starting to take notice. According to the 2009 Spencer Stuart Board Index, 45 percent of boards surveyed cited CEO succession planning as an issue requiring significant board focus, an increase from 19 percent in 2008.⁹³ But even with this increased focus, many boards still do not devote enough time and attention to succession planning. A recent survey by PricewaterhouseCoopers revealed that 39 percent of directors surveyed are not satisfied with their company's succession plan and 53 percent indicated they would like to spend more time on succession planning this next year.⁹⁴ And in today's tough economic environment, it would probably be wise for all boards to do so.

Shareholders will also be calling on companies to address succession planning. In November 2009, the SEC announced that it will now require companies to include in their proxy statements shareholder proposals seeking disclosure about a company's CEO succession planning policies.⁹⁵ Previously, the SEC had allowed companies to exclude these proposals.⁹⁶

With the importance placed on CEO succession, it is surprising how many boards fail to have an effective plan in place. Boards often push CEO succession planning to the back burner, perhaps because the current CEO is performing well, so they think succession planning can wait, or because it involves uncomfortable conversations with the current CEO, or because much of a board's time is spent addressing more pressing day-to-day obligations. Whatever the reason, boards need to devote sufficient time and attention to establishing a credible succession plan, so the company has viable candidates ready to step up if given the opportunity.

Bank of America is just one recent example of a company that struggled to find a successor to its CEO, who announced plans to step down at the end of the year. With no succession plan in place, the company searched for months to find a willing successor capable of effectively handling the company's financial and legal challenges.⁹⁷

The situation at Bank of America can be contrasted sharply with the situation McDonalds faced in 2004. McDonalds had to replace two CEOs within a period of eight months: one who died unexpectedly and one who stepped down a few months into his tenure after being diagnosed with cancer.⁹⁸ In both circumstances, McDonald's board was able to instill confidence in shareholders and analysts by immediately announcing a successor who was well-qualified and able to lead the company effectively through the transition.

So what should boards be doing? First of all, directors should periodically have in-depth discussions on CEO succession, preferably quarterly but at least once a year. In these discussions, directors should consider several factors, including the company's strategy (e.g., is the company going through a turnaround or an expansion?), the industry and particular challenges facing the company. This discussion should help give boards a better understanding of the leadership talent and skills necessary for the position. Once this is understood, the board should identify potential candidates, both internal and external. Boards should not wait for a CEO vacancy to get to know the candidates and their strengths and weaknesses. If the candidates are internal, the board should take a proactive role in grooming candidates for the position by ensuring they have the right leadership skills and are receiving necessary training for the CEO role.

To minimize the disruption of a CEO's departure, boards should also have a process in place that details the procedures and governance response necessary once a CEO has announced his or her departure. The departure of a CEO has a significant impact on an organization's operations, culture and morale, and the failure to have an effective plan to handle the situation can damage the company's credibility and erode shareholder value.

9. Cultivating Shareholder Relations

With shareholders, regulators and legislatures all calling for more transparency and accountability for public company boards, it is critical that directors understand who their company's shareholders are and what they care about. Cultivating good shareholder relations will be all the more important in 2010 with proxy access and say on pay looming on the horizon for 2011.

The 2010 proxy season is expected to be another banner year for shareholder activism. Popular proposals for 2010 will likely mirror those for 2009, in which the most common proposals included say on pay (76 proposals with support averaging 45.6 percent), calls to eliminate classified boards (63 proposals with support averaging 65.6 percent) and proposals to give shareholders the right to call special meetings (61 proposals with support averaging 50.8 percent).⁹⁹

Companies will also see an increase in shareholder proposals relating to risk management and CEO succession as a result of a recent change in SEC guidance on whether companies must include these types of shareholder proposals in their proxy statements. An SEC rule allows companies to exclude shareholder proposals that simply relate to the "ordinary business" of the company. Previously, the SEC had generally allowed companies to rely on this rule to exclude proposals that would require a company to engage in an internal assessment of risks and liabilities that the company faces as a result of its operations. Going forward, however, the SEC will not allow companies to exclude a proposal relating to internal risk assessment if it "transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote."¹⁰⁰ The SEC expressly noted that a proposal focusing on the board's role in the oversight of risk management may be just such a proposal. As noted above, the SEC also will no longer allow companies to exclude from their proxy statements shareholder proposals focused on CEO succession planning. The SEC's new policy will also likely result in more shareholder proposals concerning social policy and environmental matters making their way onto company ballots.

While the 2010 proxy season is expected to see an increase in shareholder proposals, effective communications between companies and their shareholders could help minimize the number of these proposals that actually go to a vote. In 2009, more than a third of proposals were omitted or withdrawn,¹⁰¹ with management and shareholders often coming to an agreement after an open dialogue on the proposal. Most shareholders prefer to have meaningful discussions with management rather than fighting it out at an annual meeting. Such a willingness to communicate with shareholders shows that the board and management are responsive to shareholder concerns.

Rather than waiting for shareholders to contact them, many companies are proactively taking the initiative to develop stronger relations with their investor base. In a 2009 survey of S&P 500 companies, two-thirds of survey respondents reported that their management or boards had reached out to shareholders to solicit their input.¹⁰² Forty-four percent reported that the contacts were initiated with large institutional investors and/or top 50 shareholders to discuss proxy recommendations and/or governance matters, while other communications with large shareholders focused on business performance and strategy.¹⁰³ In addition to cultivating relationships with major investors, companies need to make sure that they are effectively communicating their business strategies to the marketplace, and they should also be taking advantage of the power of the Internet by making sure their Web sites are up-to-date and fully communicating the company's message. In addition, companies should be actively monitoring shareholder concerns and opinions that are expressed through blogs and other shareholder forums and proactively responding to any shareholder issues before they escalate.

10. Monitoring Legislative and Regulatory Developments

As is apparent from our discussion of the other topics in this alert, boards will need to stay abreast of pending legislation and government regulations dealing with executive compensation and corporate governance. Whether it relates to say on pay, majority voting, classified boards, compensation consultants or proxy access, the effects of any final laws or regulations in these areas will be felt by all public companies.

Many companies may have already had to deal with these reform initiatives as a result of pressure from shareholders or proxy advisory firms. However, to the extent companies can sit back and let the game play out, they probably should do so. It is almost guaranteed that companies will soon be subject to additional legislation and regulations on corporate governance, but until Congress and the SEC flesh these out, it is difficult to determine how far they will go and what changes will be necessary. A company that implements major changes now in areas such as proxy access or say on pay may find that its efforts fall short of, or conflict with, the final legislation or rule. That being said, it is highly likely that some form of proxy access and say on pay will be adopted next year, and, in shaping their actions, boards should be mindful of the increasing voice that shareholders may have.

In addition to executive compensation and corporate governance matters, the SEC is expected to fix problems with the proxy system's "plumbing" next year. The SEC plans to issue a concept release in the next few months seeking input on, among other things: ways to address the voting rate by retail investors; ways to ensure accuracy in vote tabulation; whether votes are cast by those with an economic interest in the shares; and whether rules are needed to ensure that proxy advisory firms base their research and recommendations on accurate and reliable information and provide adequate disclosure of any conflicts of interest they may have in providing voting recommendations.¹⁰⁴ This last topic will be particularly welcomed by many companies, who believe that proxy advisory firms wield too much power. For example, a recent study revealed that there is little or no correlation between a company's corporate governance rating and the company's performance and that recommendations made by different proxy advisory firms vary substantially.¹⁰⁵ Further, concerns have been raised about potential conflicts of interests relating to consulting done by proxy advisory firms.¹⁰⁶

In addition to corporate governance and executive compensation reform, boards will also need to monitor other major legislative initiatives that could significantly impact companies, including health care, energy policy and financial industry reform:

- *Health Care Reform.* Health care reform continues to monopolize the news as Republicans and Democrats battle out what should be included in the health care reform bill. Whatever legislation, if any, that ultimately emerges from Congress will undoubtedly affect not only the health care industry, but also all employers and the manner in which they provide health care to employees.
- *Energy Policy Reform.* Despite recent skepticism over some of the scientific data on global warming and difficulties in obtaining a binding global pact at the Copenhagen summit, Congress is still feeling pressure to adopt some form of climate change legislation. On December 7, the EPA declared that greenhouse gas (GHG) emissions are pollutants that pose a danger to the public health and, therefore, can be regulated under the Clean Air Act. The EPA action, which sets the stage for potential regulation of GHG emissions pursuant to existing laws, is seen by many as a tactic to pressure Congress into adopting comprehensive climate change legislation that would cap national carbon emissions and include some form of cap-and-trade program. If a company’s management and board have not already done so, they need to develop a comprehensive strategy for addressing climate change issues, including climate change risks and any opportunities that climate change may present to the company.
- *Financial Industry Reform.* Current pending legislation seeks to reform the entire U.S. financial regulatory structure, including reforming regulatory agencies, financial institutions, financial products and bank capital requirements. Further, proposed legislation would also increase the regulation of private equity and hedge funds. Although financial institutions will be most affected, such reform is also likely to affect other companies by restricting available credit, increasing borrowing costs and increasing costs for derivative contracts.

It is critical that directors stay abreast of the various legislative and governmental initiatives and the changes being proposed. The impact these reform initiatives will have on companies will vary significantly depending on the company and the industry. Boards need to determine how pending legislation and regulation could affect their companies, so they can begin strategizing on how to deal with the challenges the company might face in the future. If the challenges are significant enough, boards may want to consider launching or stepping up their lobbying efforts in hopes of influencing the direction of the legislation.

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¹ See sharkrepellent.net, “Proxy Fight Trend Analysis” and “Proxy Fights 2009” (as of December 8, 2009).

² *Id.*

³ The proposed rules require shareholders to submit their director nominees to the company at least 120 days in advance of the anniversary of the date the company mailed its prior year’s proxy statement. Consequently, even if the rules are adopted in early 2010 and go into effect 60 days after publication in the *Federal Register*, they will not have an effect on companies that hold their annual meetings in the spring of 2010.

⁴ See Broadridge, 2009 Proxy Season: Key Statistics & Performance Ratings: July 2009.

⁵ *Id.*

⁶ See A. Barrett and B. Young, “Majority Voting for Director Elections: Not Yet Standard,” *Corporate Governance Advisor* Vol. 17, No. 1 (Jan./Feb. 2009) (citing 2008 study by The Corporate Library showing that 49 percent of S&P 500 companies have a true majority voting standard requiring a nominee to receive at least a majority of the votes cast in order to be elected, and another 18 percent of S&P 500 companies have a “plurality plus resignation” standard providing that a director is elected based on a plurality of the votes cast, but the director must tender a resignation if the director does not receive a majority of the votes cast with respect to his or her election. At Russell 1000 companies, 33 percent have true majority voting and 13 percent have plurality plus resignation policies.)

⁷ T. Allen, “A Closer Look at High Withhold Votes,” RiskMetrics Group (Oct. 2, 2009), available at http://blog.riskmetrics.com/2009/10/a_closer_look_at_high_withhold.html.

⁸ *Id.*

⁹ Proxy Governance, Inc. News Release “Shareholder Votes Opposing Director Nominees Show Sharp Increase in 2009 Proxy Season” (Sept. 19, 2009) (9.8 percent of unopposed director nominees had at least 20 percent of shares voted against them or withheld, up from 5.5 percent in 2008). See also Georgeson, 2009 Annual Corporate Governance Review, available at <http://www.georgesonshareholder.com/usa/acgr09.php> (at S&P 1500 companies, 1,027 directors at 378 companies had 15 percent or greater votes withheld or cast against them, 786 directors had withhold/against votes of 20 percent or greater, 469 directors of 30 percent or greater, 223 directors of 40 percent or greater, and 79 directors of 50 percent or greater).

¹⁰ See J. S. Lublin, “Directors Lose Elections, But Not Seats,” *The Wall Street Journal* (Sept. 28, 2009); Georgeson, *supra*.

¹¹ See Broadridge Notice & Access, Statistical Overview of Use with Beneficial Shareholders (as of June 30, 2009) (for the 12 months ended June 30, 2009, 15.28 percent of shares held by retail shareholders who received notice only were voted, compared to 31.95 percent of shares held by retail shareholders at companies that did not use notice and access).

¹² See Investor Attitude Survey referenced in the SEC release approving the amendment to NYSE Rule 452, SEC Rel. No. 34-60215 (July 1, 2009), at p. 25, n. 91, available at <http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf>.

¹³ *In re Citigroup Shareholder Derivative Litigation*, 2009 WL 481906 (Del. Ch. Feb. 24, 2009).

¹⁴ *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

¹⁵ *American International Group, Inc. Consolidated Derivative Litigation*, 2009 WL 366613 (Del. Ch. 2009).

¹⁶ See, e.g., the ERM framework adopted by the Committee of Sponsoring Organizations of the Treadway Commission (COSO), available at http://www.coso.org/documents/COSO_ERM_ExecutiveSummary.pdf. See also The Conference Board, “Emerging Governance Practices in Enterprise Risk Management” (Feb. 2007).

¹⁷ COSO, “Effective Enterprise Risk Oversight, The Role of the Board of Directors 2009,” available at www.coso.org; National Association of Corporate Directors, Blue Ribbon Commission Report on Risk Governance: Balancing Risk and Reward (2009).

¹⁸ See COSO, “Effective Enterprise Risk Oversight, The Role of the Board of Directors 2009,” *supra*.

¹⁹ NYSE Listed Company Manual §303A.07(c)(iii)(D) and related Commentary.

²⁰ Commentary to NYSE Listed Company Manual §303A.07(c)(iii)(D).

²¹ Directorship, “Risk Oversight: Faster, Higher, Stronger” (Sept. 4, 2009), available at <http://www.directorship.com/risk-oversight-faster-higher-stronger/>.

²² Both S. 1074 (Shareholder Bill of Rights Act of 2009), which was introduced by Sen. Charles Schumer in May 2009, and H.R. 3272 (Corporate Governance Reform Act of 2009), which was introduced by Rep. Keith

Ellison in July 2009, call for all public companies to have a separate risk committee. A discussion draft of Sen. Christopher Dodd's bill (the "Draft Dodd Bill") that was released in November 2009 would require risk committees only for certain financial institutions and systemically important companies, and the Corporate and Financial Institution Compensation Fairness Act of 2009, as contained in H.R. 4173 (The Wall Street Reform and Consumer Protection Act of 2009), which passed the House of Representatives in December 2009, does not require risk committees.

²³ RiskMetrics Group, Postseason Report (October 2009), p. 10.

²⁴ S. Craig, "Goldman Blinks on Bonuses," *The Wall Street Journal* (Dec. 14, 2009).

²⁵ See Frederic W. Cook, "A Compensation Committee Framework for Conducting Executive Compensation Risk Assessments," *Corporate Governance Advisor* Vol. 1, No. 1 (Jan.-Feb. 2009).

²⁶ RiskMetrics Group, U.S. Corporate Governance Policy 2010 Updates (Nov. 19, 2009), p. 26.

²⁷ *Id.*

²⁸ See SEC Release No. 33-9089, 34-61175 "Proxy Disclosure Enhancements" (Dec. 16, 2009). The SEC included exceptions to the disclosure requirement for certain services that are not believed to raise significant conflicts of interest concerns, including services involving only broad-based nondiscriminatory plans or the provision of information, such as surveys, that are not customized for the company or are customized based on parameters that are not developed by the consultant.

²⁹ See the Draft Dodd Bill and H.R. 4173.

³⁰ Speech by Shelley Parratt, Deputy Director, Division of Corporation Finance "Executive Compensation Disclosure: Observations on the 2009 Proxy Season and Expectations for 2010." (Nov. 9, 2009).

³¹ RiskMetrics Group, 2009 Proxy Season Scorecard (Results as of December 1, 2009).

³² *Id.* See also RiskMetrics Group, Postseason Report (October 2009), p. 4.

³³ Almost all of the current bills, as well as the Draft Dodd Bill, include some form of say on pay provision.

³⁴ American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.

³⁵ RiskMetrics Group, Postseason Report (October 2009), p. 12. In addition, in December, Goldman Sachs agreed to give shareholders a say on pay.

³⁶ *Id.*

³⁷ *Id.* See also Georgeson, *supra*, at p. 4.

³⁸ Posting of Broc Romanek to TheCorporateCounsel.net "Say-on-Pay: Prudential Becomes First to Adopt Biennial Model" (Oct. 15, 2009), available at <http://www.thecorporatecounsel.net/Blog/2009/10/more-executive-pay-surveys-a-comparison.html>. See also Brad Smith and John Seethoff, "Microsoft's Board Adopts New 'Say-on-Pay' Policy (Sept. 18, 2009), available at <http://microsoftontheissues.com/cs/blogs/mscorp/archive/2009/09/18/microsoft-s-board-adopts-new-say-on-pay-policy.aspx>.

³⁹ See the Draft Dodd Bill and H.R. 4173.

⁴⁰ RiskMetrics Group, U.S. Corporate Governance Policy 2010 Updates (Nov. 19, 2009), pp. 25-26.

⁴¹ *Id.*

⁴² AlixPartners LLP, "Americans Expect Their 'New Normal' Spending Levels to be 86% of Pre-Recession Levels" (2009), available at <http://www.alixpartners.com/en/MediaCenter/PressReleases/tabid/58/language/en-US/ItemId/4/Default.aspx>. It is believed that the phrase "the new normal" was coined by Mohamed El-Erian of PIMCO.

⁴³ M. Crutsinger, AP News, "Federal Budget Deficit for November Hits \$120.3 B" (Dec. 10, 2009).

⁴⁴ ProfessorBainbridge.com, "Should the CEO also be the Chairman of the Board?" (August 4, 2009), available at <http://www.professorbainbridge.com/professorbainbridge.com/2009/08/should-the-ceo-also-be-the-chairman-of-the-board.html>.

⁴⁵ Each of H.R. 2861 (Shareholder Empowerment Act of 2009), which was introduced by Rep. Gary Peters in June 2009, H.R. 3272 and S. 1074 would require companies to have independent chairs, while the Draft Dodd Bill would require companies to disclose the rationale for separating (or not separating) the positions of chairman and CEO in their annual proxy statements.

⁴⁶ RiskMetrics Group, 2009 Proxy Season Scorecard (Results as of December 1, 2009).

⁴⁷ See J. Coates, “Protecting Shareholders and Enhancing Public Confidence Through Corporate Governance” (July 30, 2009), available at <http://blogs.law.harvard.edu/corpgov/2009/07/30/protecting-shareholders-and-enhancing-...>

⁴⁸ Spencer Stuart, 2009 Spencer Stuart Board Index (2009).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*, see also Hewitt Associates LLC, “Analysis of 2009 Proxy Season,” MarkeTrends 2009-04 (Sept. 30, 2009).

⁵² Commentary to NYSE Listed Company Manual Section 303A.03. Effective January 1, 2010, the NYSE rules will be amended to clarify that NYSE-listed companies may hold executive sessions of only the independent directors, rather than all nonmanagement directors.

⁵³ Spencer Stuart, *supra*.

⁵⁴ *Id.* (94 percent of companies that do not have an independent chairman have a lead or presiding director.)

⁵⁵ *Id.*

⁵⁶ For a discussion of various responsibilities that may be assigned to the lead director, see Spencer Stuart, “A Closer Look at Lead and Presiding Directors.”

⁵⁷ For example, the nominating committee charter for The Coca-Cola Company provides that “diversity of race, ethnicity, gender and age are important factors in evaluating candidates for Board membership.” Similar disclosure is included in the company’s corporate governance guidelines.

⁵⁸ Spencer Stuart, 2009 Spencer Stuart Board Index (2009).

⁵⁹ See Catalyst Census of Women Board Directors in Fortune 500 (2008), cited in comment letter submitted to SEC by Catalyst (Sept. 15, 2009). The Spencer Stuart Board Index reports that women comprise 16 percent of independent directors at S&P 500 companies. Spencer Stuart, *supra*.

⁶⁰ *Id.* RiskMetrics will support requests for reports on the company’s efforts to diversify the board with respect to race and gender, unless the board composition is already reasonably inclusive relative to its peers, and the board already reports on its nominating procedures and gender and racial minority initiatives within the board and the company. RiskMetrics Group, “U.S. Corporate Governance 2010 Policy Updates” (Nov. 19, 2009). RiskMetrics determines on a case-by-case basis whether to support shareholder proposals asking companies to increase representation of women and minorities on boards, considering such factors as: the current makeup of the board and its executive officers; how the board’s composition compares to that of the company’s industry peers; whether the board has an established process for improving board diversity, has an independent nominating committee and uses an outside search firm; whether the company has a recent history of controversies, fines or litigation regarding equal employment practices; and whether the proposal includes an overly prescriptive request to amend nominating committee charter language. *Id.* Studies on the effect of gender and racial diversity on a company’s financial performance are mixed. See D. Rhode and A. Packel, “Diversity on Corporate Boards” (2009) (review of studies on board diversity concluded that “the empirical research on the effect of board diversity on firm performance is inconclusive, as the results are highly dependent on methodology”).

⁶¹ Thomson Reuters, “Mergers & Acquisitions Review, Third Quarter 2009.”

⁶² *Id.*

⁶³ *Id.*

⁶⁴ P. Barker, “Maximizing Your Strategic Advantage: M&A in the ‘New Normal,’” Barclays Capital Governance and Leadership Summit (Oct. 15, 2009).

⁶⁵ Ernst & Young, “One Third of Global Businesses Actively Seeking M&A Targets in Next 12 Months” PR Newswire (Nov. 11, 2009).

⁶⁶ O. Smiddy, “Private Equity Holds Its Cash ... And Waits,” *The Wall Street Journal* (Aug. 19, 2009). An Ernst & Young report released in December 2009 notes that private equity firms have about \$400 billion at their disposal. See A. Sorkin, “Looking Ahead to 2010’s Deal Landscape,” *The New York Times DealBook* (Dec. 14, 2009), citing report by Ernst & Young Transaction Advisory Services.

⁶⁷ J. McCracken, “Blackstone Unit Agrees to Purchase Birds Eye,” *The Wall Street Journal* (Nov. 20, 2009); P. Lattman, “In Today’s LBO Arena, Much Sweat, More Equity,” *The Wall Street Journal* (Oct. 9, 2009).

⁶⁸ See Ernst & Young, *supra*.

⁶⁹ Dealscape, “Deal Economy 2010: No Bankruptcy Slowdown” (Nov. 18, 2009).

⁷⁰ “Bankruptcy Filings Surge,” *The Chicago Tribune* (Nov. 27, 2009).

⁷¹ Based on original poison pill adoptions through November 30, 2009, available at https://www.sharkrepellent.net/request?an=dt_runVolume&rnd=215447&pf=pf.

⁷² RiskMetrics Group, U.S. Corporate Governance Policy 2010 Updates (Nov. 19, 2009), pp. 6-7.

⁷³ *Id.* RiskMetrics will take into account additional factors, including the date of the pill’s adoption relative to the next shareholder meeting, the disclosed rationale for the pill, the company’s governance structure and its track record of accountability.

⁷⁴ *Id.* at p. 7.

⁷⁵ RiskMetrics expects poison pills to have the following attributes: (1) 20 percent or higher flip-in or flip-over; (2) a term of no more than three years; (3) no dead-hand, slow-hand, no-hand or similar features; and (4) a shareholder redemption feature whereby if the board refuses to redeem the pill 90 days after an offer is announced, holders of 10 percent of the shares may call a special meeting or seek a written consent to vote on rescinding the poison pill.

⁷⁶ In a recent Delaware case, plaintiffs argued that a poison pill’s language dealing with derivatives was so indefinite that there was no objective way to determine how the plan operated or when the rights would be triggered. In a ruling from the bench, the judge denied plaintiff’s motion for injunctive relief, concluding only that the language was not “fatally vague” on its face and that factual evidence or expert testimony would be needed regarding how investors in the real world would react to the language. The parties settled before trial. *In re Atmel Corp. Shareholders Litig.*, C.A. No. 4161-CC (Del. Ch. May 19, 2009).

⁷⁷ The regulations under Section 382 of the Code are complex, but in general, an “ownership change” can occur if a stockholder owning at least five percent of the outstanding common stock increases its stake to more than 50 percentage points higher than the lowest percentage of the company’s outstanding common stock it held within the prior three-year period.

⁷⁸ RiskMetrics Group, U.S. Corporate Governance Policy 2010 Updates (Nov. 19, 2009), pp. 16-17. In reviewing NOL poison pills, RiskMetrics will take into account the value of the NOLs, the ownership threshold, the term, whether it contains protection mechanisms and the company’s existing governance structure and responsiveness to shareholders.

⁷⁹ RiskMetrics Group, 2009 Proxy Season Scorecard (Results as of December 1, 2009).

⁸⁰ Georgeson, *supra*, at p. 42.

⁸¹ Gregory T. Carrott, “The Case For and Against Staggered Boards,” *Directorship* (Sept. 22, 2009), available at <http://www.directorship.com/against-staggered-boards/>.

⁸² S. 1074 bans public companies from having a classified board. The Draft Dodd Bill permits public companies to have classified boards, but only with shareholder approval or ratification.

⁸³ RiskMetrics Group, 2009 Proxy Season Scorecard (Results as of December 1, 2009).

⁸⁴ *Id.*

⁸⁵ Rule 14a-8 under the Securities Exchange Act allows companies to exclude shareholder proposals if the company has already substantially implemented the proposal.

⁸⁶ Rule 14a-8 under the Securities Exchange Act allows companies to exclude a shareholder proposal if the proposal directly conflicts with one of the company’s own proposals to be submitted to shareholders at the same meeting.

⁸⁷ RiskMetrics will recommend that shareholders vote against, or withhold votes from, all nominees of the board of directors if the board failed to act on a shareholder proposal that received approval of the majority of shares cast for the previous two consecutive years. RiskMetrics Group, U.S. Proxy Voting Guidelines Concise Summary (Jan. 15, 2009), p. 3.

⁸⁸ The advance notice bylaw requires a shareholder to provide the company with advance notice (such as 60 to 90 days) of any shareholder business or director nominations that the shareholder wants to address at a shareholder meeting. Advance notice bylaws typically require a shareholder to provide the company with information on the shareholder proposal, director nominees (if any) and beneficial ownership.

⁸⁹ *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 2008 WL 660556 (Del. Ch. March 13, 2008), *aff’d*, CA No. 3447 (Del. Supr. Ct. May 13, 2008); *Levitt Corp. v. Office Depot, Inc.*, C.A. No. 3622-VCN (April 14, 2008).

⁹⁰ To address some of the issues raised by these cases, the advance notice bylaw provision should: (i) clearly apply to any shareholder proposal, regardless of whether the shareholder is bringing the proposal under Rule 14a-8; (ii) set a deadline for notice of shareholder proposals that is in reference to the annual meeting date, rather than the mailing date of the proxy materials (which is a Rule 14a-8 concept) and is a reasonable period of time prior to the annual meeting; (iii) specify the information required in the notice, rather than incorporate the requirements of the federal securities laws; and (iv) explicitly address shareholder nominations for directors, as well as other business proposed by shareholders.

⁹¹ See Complaint, *TRT Holdings, Inc. v. Gaylord Entm't Co.*, C.A. No. 4320-VCL (Del. Ch. Jan. 29, 2009). This case settled out of court.

⁹² See the Draft Dodd Bill, S. 1074 and H.R. 2861.

⁹³ Spencer Stuart, *supra*, at p. 7.

⁹⁴ Corporate Board Member and PricewaterhouseCoopers, "What Directors Think 2009 Annual Board of Directors Survey," pp. 4, 8, available at http://www.pwc.com/en_US/us/corporate-governance/assets/what-directors-think-2009-report.pdf.

⁹⁵ SEC Division of Corporation Finance Legal Bulletin 14E (Oct. 27, 2009).

⁹⁶ The SEC previously allowed companies to exclude these proposals from their proxy statements, based on the argument that they relate to the termination, hiring or promotion of employees and, therefore, involve the company's ordinary business operations and could be excluded pursuant to Rule 14a-8(i)(7) under the Securities Exchange Act.

⁹⁷ D. Fitzpatrick, "BofA's Lewis May Consider Postponing Retirement," *The Wall Street Journal* (Nov. 21-22, 2009), p. B3.

⁹⁸ S. A. Miles and N. Bennett, "How the SEC Just Changed Succession Planning: Part 1," *Forbes.com* (Nov. 17, 2009), available at <http://www.forbes.com/2009/11/17/succession-planning-sec-leadership-ceonetwork-search.html>.

⁹⁹ RiskMetrics Group, 2009 Proxy Season Scorecard (Results as of December 1, 2009).

¹⁰⁰ SEC Division of Corporation Finance Legal Bulletin 14E (Oct. 27, 2009).

¹⁰¹ Georgeson, *supra*, at p. 17.

¹⁰² Spencer Stuart, *supra*.

¹⁰³ *Id.* In communicating with shareholders, management and directors should be mindful of their obligations under Regulation FD, which prohibits the selective disclosure of material nonpublic information.

¹⁰⁴ Speech by SEC Chairman Mary Schapiro: Address to the Practicing Law Institute's 41st Annual Institute on Securities Regulation, (Nov. 4, 2009).

¹⁰⁵ R. Daines, I. Gow and D. Larcker, "Rating the Raters: Are Governance Ratings Any Good?" Stanford Univ. Law School and Graduate School of Business, The Rock Center for Corporate Governance, available at http://www.chamberpost.com/files/Draft_of_Governance_Ratings.pdf. The study shows little or no correlation between governance ratings and a company's future financial performance (as measured by return on assets and stock price performance), the avoidance of accounting restatements or the avoidance of shareholder litigation. In fact, with respect to RiskMetrics, the data showed that firms given high governance ratings have more class action lawsuits, lower return on assets and abnormally bad stock price performance. *Id.* at p. 9.

¹⁰⁶ S. Choi, J. Fisch and M. Kahan, "Director Elections and the Role of Proxy Advisors," (Aug. 11, 2008) U. of Penn, Inst. For Law & Econ. Research Paper No. 08-18, available at SSRN: <http://ssrn.com/abstract=1225963>.

CORPORATE ALERT

SEC ADOPTS CHANGES TO EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE DISCLOSURE RULES

On December 16, 2009, the Securities and Exchange Commission (SEC) adopted amendments to its disclosure rules that will require public companies to provide enhanced proxy and information statement disclosure about certain executive compensation and corporate governance matters.¹ Specifically, the rule changes—

- require that stock awards and option awards granted to executives and directors be reported at grant date fair value, rather than the value recognized for the fiscal year for financial reporting purposes
- require discussion of how a company's compensation policies and practices for employees affect the company's risk and management of risk if the risks arising from such policies and practices are reasonably likely to have a material adverse effect on the company
- require discussion of the board of directors' role in risk oversight
- require disclosure of the company's leadership structure (such as whether it separates or combines the CEO and chairman of the board positions) and the reason(s) the company has chosen its particular leadership format
- require disclosure of the specific qualifications and attributes of directors and nominees for director that qualify them to serve on the board and the role, if any, diversity plays in the selection of nominees
- expand the disclosure about directors and nominees to include any directorships held by them in the past five years, not just those currently held
- lengthen the time period for disclosing certain legal proceedings involving directors, nominees and executive officers from the past five years to the past 10 years and expand the types of legal proceedings for which disclosure is required
- require disclosure, in certain circumstances, of fees paid to compensation consultants if they played a role in determining or recommending the amount or form of executive or director compensation and also provided more than \$120,000 of additional services to the company.

¹ SEC Rel. Nos. 33-9089, 34-61175, Proxy Disclosure Enhancements (December 16, 2009).

The rule changes also require that results of shareholder votes be reported within four business days on Form 8-K (rather than quarterly on Form 10-Q).

In the proposing release regarding the rule changes, the SEC had also proposed changes to its proxy solicitation rules to codify certain SEC staff positions. The SEC deferred actions on these matters until 2010, when it takes up final consideration of its proxy access proposal.

The rule changes will become effective on February 28, 2010, and, therefore, will apply to the 2010 proxy season. It is not entirely clear, however, how the transition to the new rules will be made. For example, if a company files a preliminary proxy statement prior to February 28, 2010, but does not intend to file the definitive proxy statement until after the effective date, it is not clear whether the company should comply with the old rules or the new rules. Presumably, the SEC will provide further guidance on how companies transition to the new rules.

CHANGES TO EXECUTIVE COMPENSATION DISCLOSURE

Stock and Option Awards. The amendments to Item 402 of Regulation S-K require companies to report the value of stock and option awards in the Summary Compensation Table and the Director Compensation Table, based on the aggregate grant date fair value of such awards as computed in accordance with FASB ASC Topic 718 (formally referred to as FAS 123R), rather than the dollar amount recognized for financial reporting purposes for the fiscal year. The SEC believes that reporting the full grant date fair value better reflects the compensation committee's decision with regard to stock and option awards and will provide clearer, more meaningful disclosure of the compensation awarded to executives.

Because performance awards typically are designed to incentivize attainment of target performance, the rules clarify that the value of performance awards reported in the tables should be computed based upon the probable outcome of the performance condition as of the grant date and that this amount should be consistent with the grant date estimate of compensation cost to be recognized over the service period as determined under FASB ASC Topic 718, excluding the effect of estimated forfeitures. The SEC believes that basing the value on the probable outcome rather than on maximum performance better reflects how compensation committees take performance-contingent vesting conditions into account when granting awards. To ensure that investors understand the maximum potential value of the award, the rules do, however, require companies to disclose this value in a footnote.

Consistent with the prior rules, the amended rules require companies to report the aggregate grant date fair value of stock and option awards granted during the relevant fiscal year, even if they are granted for services performed in a prior year. The SEC had solicited comment on whether awards should be reported based on the aggregate grant date fair value of awards granted for services performed during the relevant fiscal year even if the awards were granted after fiscal year end. The SEC did state in the adopting release, however, that if a company does grant post-fiscal year-end equity awards that relate to services provided in a prior year, it should consider providing analysis on such decisions in its Compensation Discussion and Analysis.

The new rule changes for reporting equity awards are effective for disclosures relating to fiscal years ending on or after December 20, 2009. The rule changes may significantly alter the total compensation reported for executive officers and, therefore, may result in a change in the composition of a company's named executive officers for 2009. In transitioning to the new rule, companies are required to present in their 2010 proxy statements recomputed disclosure for 2008 and 2007, reflecting full grant date fair values of stock and option awards and corresponding adjustments to total

compensation. If a person who would be a named executive officer for 2009 was also disclosed as a named executive officer for 2007 but not for 2008, the officer's compensation should be reported for each of the three years. Companies are not, however, required to include different named executive officers for any preceding fiscal year based on the recomputation.

The SEC ultimately decided not to adopt proposed rules that would have: (1) rescinded the requirement to report the full grant date fair value of each individual equity award in the Grants of Plan-Based Awards Table and corresponding footnote disclosure in the Director Compensation Table and (2) changed the reporting obligations relating to salary or bonus forgone at a named executive officer's election. As such, the reporting obligations for these situations have not changed.

Risk Management Disclosure. Under the new rules, companies must include in their proxy statements a discussion and analysis of how a company's policies and practices of compensating its employees create incentives that can affect the company's risk and management of risk, if the risks arising from such policies and practices are reasonably likely to have a material adverse effect on the company. To the extent the risks arising from such compensation policies and practices are not reasonably likely to have a material adverse effect on the company, no disclosure is required.

The final rules contain several important changes from the rules as initially proposed. First, the new disclosure will not appear as part of Compensation Discussion and Analysis as had been originally proposed². Second, the rule has been clarified to provide that disclosure is required only if the risks that result are "adverse" risks. Third, the threshold for triggering disclosure has been changed to a "reasonably likely" standard, in contrast to the initially proposed threshold that would have required disclosure if the risks "may" have a material effect on the company. The SEC noted that companies are already familiar with the "reasonably likely" disclosure threshold, used in Management's Discussion and Analysis, that requires risk-oriented disclosure of known trends and uncertainties that are material to the company. By changing to the higher standard, the SEC seeks to avoid disclosure of potentially insignificant and speculative information about compensation policies. Furthermore, the change to the higher threshold allows policies and practices a company may have for different groups of employees that mitigate or balance incentives to be considered in deciding whether the risks from a company's compensation policies and practices are reasonably likely to have a material adverse effect on the company.

While the SEC acknowledges that the situations requiring disclosure will vary, the SEC lists several situations that may trigger the new disclosure, including compensation policies and practices—

- at a business unit of the company that carries a significant portion of the company's risk profile
- at a business unit with compensation structured significantly differently than other units within the company
- at business units that are significantly more profitable than others within the company
- at business units where the compensation expense is a significant percentage of the unit's revenues
- that vary significantly from the overall risk and reward structure of the company, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the company from the task extend over a significantly longer period of time.

² Nevertheless, a discussion of risk may be required in Compensation Discussion and Analysis regarding named executive officers. In both the adopting and proposing releases, the SEC stated that, under existing rules, companies should include in their Compensation Discussion and Analysis a discussion of risk considerations if they are a material aspect of the company's compensation policies and practices for named executive officers.

Emphasizing that the purpose of the new disclosure requirement is to provide investors with material information concerning how a company compensates and incentivizes its employees in ways that may create risks reasonably likely to have a material adverse effect on the company, the SEC provides the following examples of issues that a company may need to address—

- the general design philosophy of the company’s compensation policies for employees whose behavior would be most affected by the incentives established by the policies, as such policies relate to, or affect risk-taking by, those employees on the company’s behalf, and the manner of their implementation
- the company’s risk assessment or incentive considerations, if any, in structuring its compensation policies or in awarding and paying compensation
- how the compensation policies relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring clawbacks or imposing holding periods
- the company’s policies regarding adjustments to its compensation policies to address changes in its risk profile
- material adjustments the company has made to its compensation policies or practices as a result of changes in its risk profile
- the extent to which the company monitors its compensation policies to determine whether its risk management objectives are being met with respect to incentivizing its employees.

Smaller reporting companies are not required to provide the new disclosure, as the SEC believes that such companies are less likely to have the types of compensation policies and practices intended to be addressed by the new rules.

If a company determines that the risks arising from its compensation policies and practices are not reasonably likely to have a material adverse effect on the company, the company is not required to make an affirmative statement to that effect in its proxy statement.

Compensation Consultants. The amendments to Item 407 of Regulation S-K will require companies to disclose, in certain circumstances, fees paid to compensation consultants that played a role in determining or recommending the amount or form of executive or director compensation if they provided more than \$120,000 of additional services to the company during the company’s last fiscal year. These changes stem from concerns that fees paid to compensation consultants for providing additional services, such as benefits administration, human resources consulting or actuarial services, could create a conflict that calls into question the objectivity of the consultant’s executive compensation advice and recommendations, particularly if fees generated by these additional services are significant.

The final rules address these concerns as follows—

- If the board or compensation committee engaged a compensation consultant to provide executive compensation advice or recommendations, and the consultant or its affiliates provided additional services to the company or its affiliates in excess of \$120,000 during the company’s last fiscal year, the company must disclose—
 - the aggregate fees paid for determining or recommending the amount or form of executive and director compensation and the aggregate fees paid for the additional services
 - whether the decision to engage the consultant or its affiliates for these additional services was made, or recommended by, management

- whether the board or compensation committee approved such additional services.
- If the board or compensation committee did not engage a compensation consultant, but management did engage a consultant to provide executive or director compensation advice or recommendations, and the consultant or its affiliates provided additional services to the company in excess of the \$120,000 threshold, the company must disclose the aggregate fees paid for the executive and director compensation advice and the aggregate fees paid for the additional services.

The SEC noted that certain services are not likely to raise conflicts of interest concerns. Therefore, no disclosure is required if the compensation consultant's only role in recommending the amount or form of executive or director compensation is limited to: (1) consulting on any broad-based plans, such as 401(k) plans or health insurance plans, that do not discriminate in favor of a company's executive officers or directors and are available generally to all salaried employees or (2) providing information, such as a survey, that either is not customized for the company or is customized based on parameters that the consultant did not develop and about which the consultant did not provide advice.

The final rules do not require companies to describe the nature and extent of any additional services provided to the company by the consultant. Although the proposed rules would have required this disclosure, concerns were raised that such disclosures could cause competitive harm by revealing confidential and sensitive pricing information. Companies may, at their discretion, describe these additional services provided by the consultant if such information would facilitate an investor's understanding of the existence or nature of any potential conflicts of interest.

CHANGES TO CORPORATE GOVERNANCE DISCLOSURES

Director and Nominee Qualifications. Item 401 of Regulation S-K has been amended to expand the disclosure requirements regarding directors and nominees. Specifically, companies must disclose for each director and nominee for director the particular experience, qualifications, attributes or skills that led the board to conclude that, in light of the company's business and structure, the person should serve as a director of the company as of the time that the filing containing such disclosure is made with the SEC. This provision is aimed at helping investors determine whether a particular director and the entire board composition are appropriate choices for a given company. The new rules do not specify the particular information that should be disclosed, and unlike the proposed rules, the final rules do not require disclosure of why a person is qualified to serve on any board committees.

Diversity. Under amended Regulation S-K Item 407(c), companies must disclose whether—and if so, how—the nominating committee considers diversity in identifying nominees for director. If the nominating committee or board has a diversity policy, the company must disclose how the policy is implemented and how the nominating committee or board assesses its effectiveness.

The new rule does not contain a definition of “diversity.” In the adopting release, the SEC stated that companies may define diversity in different ways, noting that some companies view diversity expansively to include differences of viewpoint, professional experience, education, skills and other qualities and attributes that contribute to board heterogeneity, while other companies may view diversity in terms of race, gender and national origin.

Public Company Directorships. Under the new rules, companies must disclose any public company directorships³ held by each director and nominee at any time within the past five years. Prior to the amendment, Item 401 of Regulation S-K required disclosure only of presently held directorships.

³ Specifically, any directorship held at any company with a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934 or subject to the requirements of Section 15(d) of that act, or any company registered as an investment company under the Investment Company Act.

Legal Proceedings. Amended Item 401 lengthens, from five to 10 years, the period of time for which disclosure of specified legal proceedings involving any director, executive officer or nominee for director is required, and also expands the type of proceedings for which disclosure is required to include—

- any judicial or administrative proceedings resulting from involvement in mail or wire fraud or fraud in connection with any business entity
- any judicial or administrative proceedings based on violations of federal or state securities, commodities, banking or insurance laws and regulations, or any settlement⁴ to such actions
- any disciplinary sanctions or orders imposed by a stock, commodities or derivatives exchange or other self-regulatory organization.

Board Leadership Structure. Under amended Item 407 of Regulation S-K, companies must disclose their leadership structure, including whether the company separates or combines the positions of principal executive officer and chairman of the board. If one person serves in both capacities, the company must disclose whether it has a lead independent director and the specific role the lead independent director plays in the board's leadership. The company must also explain why it has determined that its leadership structure is appropriate given the company's specific characteristics or circumstances.

Board's Role in Risk Oversight. Amended Item 407 of Regulation S-K requires disclosure of the extent of the board's role in risk oversight and the effect that this has on the company's leadership structure. In view of the role that risk and the adequacy of risk oversight played in the recent market crisis, the SEC believes it is important for investors to understand the board's role in this area. Companies are expected to discuss how the board implements and manages its risk oversight function, such as through the board as a whole or through a committee, e.g., the audit committee.⁵ The disclosure might address matters such as whether the persons who oversee risk management report directly to the board as a whole or to a board committee or how the board or committee otherwise receives information from such individuals.

Shareholder Voting Results. Shareholder voting results must be reported under a new Item 5.07 to Form 8-K, which must be filed within four business days after the meeting at which the vote was taken.⁶ The requirement of reporting shareholder voting results on the Form 10-Q or Form 10-K (for the fourth quarter) for the quarterly period in which the shareholder meeting took place, has been deleted. Under the new rules, companies are required to file a Form 8-K disclosing the preliminary voting results within four business days after the date of the shareholder meeting and file an amended report on Form 8-K within four business days after the final voting results are known.⁷

⁴ This does not include disclosure of a settlement of a civil proceeding among private parties.

⁵ Section 303A of the NYSE's Listed Company Manual provides that the audit committee of companies listed on the exchange must "discuss guidelines and policies to govern the process by which risk assessment and management is undertaken."

⁶ The four-business-day period will begin to run on the day on which the meeting ended. Similar disclosures on Form 8-K will be required when a matter is submitted to a vote of security holders otherwise than at a meeting, such as by written consent.

⁷ If final results are known before the initial Form 8-K is filed, the company can simply file one Form 8-K reporting the final results.

PROXY SOLICITATION MATTERS DEFERRED

In addition to the changes to the disclosure rules relating to executive compensation and corporate governance, the SEC had also proposed to amend its proxy solicitation rules to codify several SEC staff positions. The SEC announced that it is deferring a decision on these matters pending consideration of its proxy access proposal. Among other things, the proposed changes to the proxy solicitation rules would allow persons to provide shareholders an unmarked copy of management's proxy card to be returned directly to management without having to conduct a fully regulated proxy solicitation. This would facilitate "just vote no" campaigns, since shareholders would be able to change their votes without having to request another proxy card from management. Another proposed change would codify an SEC staff position allowing a dissident in a proxy contest to round out a short slate with candidates proposed by another insurgent group.

WHAT COMPANIES SHOULD BE DOING NOW

The rule amendments will become effective February 28, 2010. Consequently, companies should begin immediately to address the rule changes. Among other things, companies should be addressing the following—

- *D&O Questionnaires.* Director and officer questionnaires should be revised or supplemented to reflect the required new disclosures concerning the 10-year lookback for certain legal proceedings, the expansion of the types of legal proceedings for which disclosure is required, any directorships held during the past five years and qualifications, experience and skills of directors.
- *Potential Changes to Named Executive Officers.* The change in the method of reporting the value of stock and option awards could significantly alter the total compensation reported for executive officers and, therefore, could affect which officers are identified as named executive officers in a company's proxy statement.
- *Risk Oversight and the Board.* In light of the additional disclosures required concerning the board's role in risk management oversight, the board of directors should evaluate the adequacy of its risk management oversight procedures. For a more detailed discussion of this topic, see our alert, "Top 10 Topics for Directors in 2010," which is available [here](#).
- *Risk Management and Compensation.* The compensation committee should review the company's compensation policies for all employees to determine whether the risks arising from those policies are reasonably likely to have a material adverse effect on the company, and, if so, whether any actions should be taken to mitigate or manage those risks. Because the compensation committee may not be involved in oversight of the design and administration of compensation programs for employees generally, the committee will need to devote additional time and attention to understanding these broader-based plans and assessing their risks.
- *Board Composition and Leadership Structure.* In light of the new disclosure requirements regarding director qualifications, the nominating committee should review the board's composition to determine whether it has the appropriate mix of experience and skills to address the company's business needs and challenges. Company counsel will need to work closely with the nominating committee to draft the required disclosure about why the board believes that each incumbent director and nominee is a good fit for the company and to allow sufficient time for each director to review the planned disclosures. The board should also reassess its leadership structure to determine whether the structure is appropriate for the company. The nominating committee or board should also address the extent to which diversity does, or should, play a role in determining board makeup, and how diversity is defined. Our client alert, referenced above, on "Top 10 Topics for Directors in 2010" discusses these topics in more detail.

- *Compensation Consultants.* In light of the additional disclosures concerning compensation consultants when they provide additional services to a company, the board or compensation committee should review the manner in which the company uses compensation consultants. Over the past few years, the use by compensation committees of pay consultants who perform other work for the company has drawn increasing fire from institutional investors and shareholder activists concerned about potential conflicts of interest.

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SECURITIES ALERT

PREPARING YOUR 2010 PROXY STATEMENT AND PERIODIC REPORTS: AN ACTION ITEM CHECKLIST OF RECENT CHANGES AND CONSIDERATIONS

Companies preparing their 2010 proxy statements and other periodic reports should keep in mind some recent rule changes and other developments that may affect their disclosures in these documents. While there are only a few rule changes relating to the Form 10-K, 10-Q and 8-K, there are several important rule changes relating to the proxy statement. Companies should also consider recent guidance provided by Securities and Exchange Commission staff about disclosure matters related to these documents, as well as the effect of the elimination of broker discretionary voting in uncontested director elections. To help companies address these changes and considerations, we have attached to this alert an [action item checklist](#). While we summarize below the changes and considerations, we address them in greater detail in the checklist.

PROXY STATEMENT CHANGES AND CONSIDERATIONS

1. Enhanced SEC Disclosure Requirements

Recent amendments to SEC disclosure rules will require public companies to provide enhanced proxy statement disclosure about certain executive compensation and corporate governance matters. Among other things, the amended rules—

- require that stock awards and option awards granted to executives and directors be reported at grant date fair value, rather than the value recognized for the fiscal year for financial reporting purposes
- require discussion of how a company's compensation policies and practices for employees affect the company's risk and management of risk if the risks arising from such policies and practices are reasonably likely to have a material adverse effect on the company
- require discussion of the board of directors' role in risk oversight
- require disclosure of the board's leadership structure (such as whether it separates or combines the CEO and chairman of the board positions) and the reason(s) the company has chosen its particular leadership format

- require disclosure of the specific qualifications and attributes of directors and nominees that qualify them to serve on the board, and the role, if any, diversity plays in the selection of nominees
- expand the disclosure about directors and nominees to include any directorships at public companies and registered investment companies held by them in the past five years, not just those currently held
- lengthen the time period for disclosing certain legal proceedings involving directors, nominees and executive officers from the past five years to the past 10 years and expand the types of legal proceedings for which disclosure is required
- require disclosure, in certain circumstances, of fees paid to, and services provided by, compensation consultants if they played a role in determining or recommending the amount or form of executive or director compensation and also provided more than \$120,000 of additional services to the company.

The SEC has published guidance for transitioning to the new disclosure rules.¹ The enhanced disclosure requirements will apply to proxy statements, as well as annual reports on Form 10-K, that are filed on or after February 28, 2010 for companies with fiscal years ending on or after December 20, 2009. If a company with a fiscal year ending on or after December 20, 2009 files its preliminary proxy statement before February 28, 2010, but expects to file its definitive proxy statement on or after that date, the preliminary proxy statement must comply with the new disclosure rules. If a company with a fiscal year ending on or after December 20, 2009 files its 2009 Form 10-K before February 28, 2010 and its proxy statement on or after February 28, 2010, the proxy statement must comply with the new rules. A company may elect to voluntarily comply with the new disclosure requirements before it is required to do so, but if it elects to comply with the new disclosure requirements relating to the reporting of stock and option awards in the Summary Compensation Table and Director Compensation Table, it must also comply with all of the other Regulation S-K amendments that apply to the form being filed.

2. Elimination of Broker Discretionary Voting in Director Elections

Commencing January 1, 2010, brokers will no longer be permitted to use their discretion in voting for directors in uncontested elections where the brokers have not received specific instructions from their clients on how to vote the shares. Because brokers typically have cast discretionary votes in favor of management's nominees in uncontested elections, the rule change is expected to have a major impact on public companies. The rule change, which amends New York Stock Exchange Rule 452, applies to all brokers that are NYSE member firms and, therefore, will affect all public companies regardless of the stock exchange on which a company's stock is listed.

3. Change in SEC Staff Position on Exclusion of Certain Shareholder Proposals under Rule 14a-8

Rule 14a-8(i)(7) allows companies to exclude from their proxy statements shareholder proposals relating to ordinary business operations. In a Staff Legal Bulletin issued in October 2009,² the SEC's Division of Corporation Finance announced that it will limit the availability of this exclusion as it applies to shareholder proposals relating to risk and CEO succession planning:

- *Risk*. Previously, SEC staff generally allowed companies to exclude shareholder proposals that relate to the company engaging in an internal assessment of risks and liabilities that the company faces as a result of its

¹ Compliance and Disclosure Interpretations regarding Proxy Disclosure Enhancements Transition (Dec. 22, 2009).

² Staff Legal Bulletin No. 14E (CF), available at <http://sec.gov/interps/legal/cfs1b14e.htm>.

operations. The staff now will, instead, focus on the subject matter to which the risk pertains, and if the subject matter “transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote,” the proposal generally will not be excludable under Rule 14a-8(i)(7). The SEC expressly noted that a proposal that focuses on the board’s role in the oversight of risk management may be such a proposal. The new SEC staff position will also likely result in more proposals dealing with environmental and social policy issues making their way onto company ballots.

- *CEO Succession Planning.* Previously, SEC staff allowed companies to exclude shareholder proposals calling for companies to disclose their policies regarding CEO succession planning on the grounds that these proposals related to the termination, hiring or promotion of employees, which are ordinary business matters. Going forward, the staff generally will not allow the exclusion of proposals relating to CEO succession planning.

The SEC did not change its policy that proposals that seek to “micro-manage” the company are excludable and expressly noted that a proposal on CEO succession planning could be excluded when it seeks to “micro-manage the company by probing too deeply into matters of a complex nature” for which shareholders typically would not be in a position to make an informed judgment.

In the bulletin, the SEC also encouraged companies to notify the staff of the date on which they intend to submit correspondence in connection with a no-action request. Companies can notify the staff by telephone (202-551-3500) or e-mail (shareholderproposals@sec.gov).

4. Tougher SEC Review

In a November 9, 2009 speech,³ the SEC’s Deputy Director of the Division of Corporation Finance, Shelley Parratt, announced that the SEC will be taking a tougher stance in its review of proxy statement disclosures regarding executive compensation and Compensation Discussion and Analysis (CD&A). Previously, the SEC had often allowed companies to agree to reflect SEC staff comments in future filings. Deputy Director Parratt, however, commented that, because companies have now had three years to digest the existing disclosure rules, “any company that waits until it receives staff comments to comply with the disclosure requirements should be prepared to amend its filings if it does not materially comply with the rules.”

In her speech, Parratt also discussed some topics on which companies should focus their attention in the coming year:

- *Analysis:* The SEC wants to see better explanation of *why* executive officers were compensated as they were, rather than just a description of the actions taken by the compensation committee.
- *Performance Targets:* Parratt reiterated that in deciding whether disclosure of performance targets is required, a company must first determine whether the performance targets are material. If the performance targets are material, they must be specifically disclosed unless the disclosure would likely cause the company substantial competitive harm (under the same standard as used in confidential treatment requests). Absent highly unusual circumstances, the staff does not believe that disclosure of performance targets will result in competitive harm *after* the company has disclosed the amounts, especially where the performance targets are tied to company-wide financial results that are publicly disclosed. If a company does decide to omit a performance target where

³ Available at <http://www.sec.gov/news/speech/2009/spch110909sp.htm>.

disclosure would cause competitive harm, it must disclose with meaningful specificity how difficult or likely it would be for the company or executive to achieve the target.

Benchmarking. If a company refers to a peer group used for benchmarking purposes, the SEC wants to see the names of the peer group companies, how they were selected and where actual results fell relative to the benchmark.

5. New Compliance and Disclosure Interpretations

During 2009, the SEC issued new Compliance and Disclosure Interpretations (CDIs) that may affect disclosures in the proxy statement. Among other things, there are new CDIs addressing the reporting of—

- clawbacks (CDIs for Reg. S-K Question 117.03)
- compensation of a person who has not been a named executive officer in all three years (CDIs for Reg. S-K Question 119.18)
- gross-up payments that are payable in a subsequent year (CDIs for Reg. S-K Question 119.19)
- grant-date fair value of equity awards allocated over several years with separate performance periods (CDIs for Reg. S-K Question 120.06)
- effect of amendment of an equity award on fair value (CDIs for Reg. S-K Question 120.07)
- restricted stock units that cease being subject to performance-based vesting conditions and become subject to service-based vesting (CDIs for Reg. S-K Question 122.03)
- reporting of deferred receipt of vested equity award (CDIs for Reg. S-K Question 125.05)
- effect of life insurance proceeds paid upon the death of an executive officer for purposes of determining whether the officer is a named executive officer and the amount of compensation (CDIs for Reg. S-K Interpretive Response 217.14)
- compensation in excess of \$120,000 paid to a director's child who is employed by the company, which compensation would be reportable as a related party transaction (CDIs for Reg. S-K Interpretive Response 230.07).

6. Changes to NYSE Corporate Governance Rules

For companies listed on the New York Stock Exchange, there are several changes to the NYSE corporate governance rules that will affect disclosures in the proxy statement. Among other things, the amended rules—

- *Eliminate categorical standards disclosures.* The amended rules continue to require that the board assess a director's independence under the NYSE's general independence definition and bright-line tests, but the amended rules replace the related disclosure requirements with those required by Regulation S-K Item 407(a), which requires disclosure for each director, by specific category or type, of any transactions the board considered. Thus, the NYSE rules will no longer refer to categorical standards, although companies may continue to find categorical standards useful in determining director independence.

- *Allow Web site disclosures of certain matters.* The amended rules permit a company to disclose on its Web site rather than in its proxy statement (or Form 10-K, if the company does not file a proxy statement) certain matters, provided the proxy statement (or annual report as applicable) states that the disclosures are made on the Web site and gives the Web site address:
- certain company contributions to a tax-exempt entity where an independent director is an executive officer
- the name of the director who presides at executive sessions and the method of selecting the presiding director if the position is rotated
- how interested parties can communicate with directors
- a board determination that service by an audit committee member on more than three public company audit committees does not impair such director's service on the company's audit committee.
- *Clarify communications with directors.* The amended rules clarify that all interested parties, not just shareholders, must be able to communicate directly with the presiding director or with the non-management or independent directors as a group. A company must disclose the method for such communications either in its proxy statement or on its Web site (or Form 10-K if the company does not file a proxy statement) provided the proxy statement (or annual report as applicable) states that fact and gives the Web site address. Companies that choose to provide the information in their proxy statement should make sure that their disclosure addresses the means by which all interested parties, and not just shareholders, can communicate.
- *Require proxy statement disclosure of Web site postings of committee charters.* Companies must disclose in their proxy statements (or Form 10-K if the company does not file a proxy statement) that its committee charters are available on its Web site and give the Web site address. This applies to charters for the nominating/corporate governance committee, compensation committee and audit committee.
- *Eliminate requirement to disclose availability of hard copies of corporate governance guidelines and committee charters.* While companies must still disclose in their proxy statements that their corporate governance guidelines, committee charters and code of business conduct and ethics are available on their Web sites and give the Web site address, they are no longer required to provide paper copies of these documents on request. Accordingly, companies are no longer required to disclose in their proxy statements that such documents are available in paper format on request.
- *Conform disclosure for controlled companies with Regulation S-K.* If a company is relying on the exemption from certain NYSE corporate governance rules that is provided for controlled companies, it need only comply with the disclosure requirements in Instruction 1 to S-K Item 407(a).

7. Proposed E-Proxy Rule Changes

The SEC has proposed amendments to the rules governing the form of notice that a company must send to shareholders when a company uses the notice-only method of e-proxy. The proposed amendments would give companies greater flexibility in the formulation of the notice and would allow the notice to be accompanied by additional materials explaining the notice and voting process. Companies that are planning to use e-proxy should continue to monitor the status of these proposed amendments, as they may be amended in time for the 2010 proxy season.

OTHER PERIODIC REPORTS CHANGES AND CONSIDERATIONS

1. Form 10-K

- *Change to Cover Page.* Companies will need to make sure that the cover page of Form 10-K includes the following language related to XBRL that was added to the cover page effective April 13, 2009—

“Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes No”

Companies (including companies that voluntarily submit Interactive Data Files) should not start checking the cover page box relating to Interactive Data File compliance until they are required to submit those files.

- *FASB Codification.* Companies will need to make sure that references to generally accepted accounting principles in Management’s Discussion and Analysis and in the notes to financial statements reflect the new FASB Accounting Standards Codification. In July 2009, the Codification became the sole authoritative source for nongovernmental U.S. generally accepted accounting principles, with the exception that SEC accounting guidance is also authoritative for public companies. The Codification is not intended to change U.S. GAAP, but it does change references to accounting standards in MD&A and in the notes to financial statements. The Codification is effective for financial statements for periods ending after September 15, 2009. Consequently, for calendar year-end companies, the Codification first applied to their third-quarter Form 10-Qs.

In August 2009, the SEC issued an interpretive release emphasizing that the Codification does not supersede SEC rules or regulations and also stating that references in existing SEC rules and guidance to specific standards under U.S. GAAP should be understood to mean the corresponding reference in the Codification.⁴

SEC staff and the Center for Audit Quality also have provided guidance on how to transition to the Codification.⁵ The SEC and FASB both encourage companies to use “plain English” references to Codification topics, rather than numerical citations. For financial statements for periods ending after September 15, 2009, if there are specific references—

- companies should use Codification references
 - references to specific GAAP should be consistent for all periods (consequently, disclosures for comparative periods should not refer to only pre-Codification literature).
- *Shareholder Voting Results.* Effective February 28, 2010, the requirement to disclose shareholder voting results for a shareholder meeting that occurs in the fourth quarter of the fiscal year will be eliminated. Instead, for any shareholder meeting occurring on or after February 28, 2010, shareholder voting results must be reported on a Form 8-K, as discussed below.

⁴ SEC Interpretive Release Nos. 33-9062A; 34-60519A (Aug. 19, 2009)

⁵ June 23, 2009 meeting of SEC staff and Center for Audit Quality summarized at http://www.thecaq.org/resources/secregs/pdfs/highlights/2009_0623_highlights.pdf

- *Start Date for Auditor Report on Internal Control for Non-accelerated Filers.* Commencing with its first annual report for a fiscal year ending on or after June 15, 2010, a non-accelerated filer must include an attestation report from its independent auditors regarding the company's internal control over financial reporting. Smaller companies should note, however, that there is legislation pending in Congress that would eliminate this requirement.
- *New Compliance and Disclosure Interpretations Regarding XBRL.* The SEC issued new CDIs during 2009 regarding XBRL. These CDIs are available [here](#).
- *Changes to NYSE Corporate Governance Rules.* An NYSE-listed company is no longer required to disclose in its Form 10-K that it filed the CEO certification required by the NYSE as well as the CEO and CFO certifications required by the SEC. There are also several disclosure changes that apply to companies that do not file an annual proxy statement and, instead, are required to make disclosures in their Form 10-K.
- *Amendments to Oil and Gas Reserve Disclosure Requirements.* The SEC has amended the reporting requirements for oil and gas reserves. These amendments, which are effective for annual reports on Form 10-K for fiscal years ending on or after December 31, 2009, revise Regulation S-K, Regulation S-X and Industry Guide 2.⁶

The SEC also issued new CDIs on October 26, 2009 regarding the amended rules. These CDIs are available [here](#).

The SEC's Office of the Chief Accountant issued Staff Accounting Bulletin No. 113 on October 30, 2009, which contains updated guidance on accounting rules related to the oil and gas industry. This Staff Accounting Bulletin is available [here](#).

- *Staff Comments at December 2009 AICPA National Conference on Current SEC and PCAOB Developments.* Several SEC staff members gave speeches that address matters relevant to accounting and Management's Discussion and Analysis, including—
 - goodwill impairment disclosures
 - income tax disclosures
 - disclosure of the impact of recently issued accounting standards.

Reports of the conference are available from several major accounting firms.

2. Form 10-Q

Shareholder Voting Results. Effective February 28, 2010, the requirement to disclose the voting results on Form 10-Q for the quarterly period in which a shareholder meeting occurred will be eliminated. Instead, for shareholder meetings occurring on or after February 28, 2010, shareholder voting results must be reported on a Form 8-K, as discussed below.

⁶ SEC Release Nos. 33-8995; 34-59192 "Modernization of Oil and Gas Reporting" (Dec. 31, 2008), available at <http://sec.gov/rules/final/2008/33-8995.pdf>

XBRL for Certain Large Accelerated Filers. Large accelerated filers with public floats of less than \$5 billion that use U.S. GAAP will be required to comply with the SEC’s XBRL requirements in the first Form 10-Q (or Form 20-F or Form 40-F, if applicable) that contains financial statements of the company for a fiscal period that ends on or after June 15, 2010.⁷ Currently, only certain large accelerated filers with public floats in excess of \$5 billion are subject to the requirements, which require that an Interactive Data File formatted in eXtensible Business Reporting Language (XBRL) be submitted to the SEC and posted on a company’s Web site.

New Compliance and Disclosure Interpretations. As discussed above, the SEC issued new CDIs during 2009 regarding XBRL. The SEC also confirmed in a CDI that if a company is current but not timely in its reporting obligations, the company may check the “yes” box on the cover page of a Form 10-Q indicating that it has filed all required reports during the preceding 12 months so long as such reports have been filed by the date of the filing of the Form 10-Q (CDIs for Exchange Act Forms Question 105.03).

3. Form 8-K

Shareholder Voting Results. For any shareholder meeting occurring on or after February 28, 2010, voting results must be reported under a new Item 5.07 to Form 8-K, which must be filed within four business days after the meeting at which the vote was taken.

NYSE Rule Change for Code of Ethics Waivers. NYSE rule changes allow listed companies to report a waiver of the code of business conduct and ethics for an executive officer by means of a press release, Web site disclosure or a Form 8-K. The disclosure must be made within four business days.

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⁷ They must also comply with the XBRL requirements in any registration statement under the Securities Act of 1933 that contains a price or price range and includes financial statements of the company for a fiscal period that ends on or after June 15, 2010. S-K Item 601(b) (101).

AKIN GUMP
STRAUSS HAUER & FELD LLP

Action Item Checklist
For
2010 Proxy Statement and Other Periodic Reports
Changes and Considerations

PROXY STATEMENT CHANGES AND CONSIDERATIONS			
Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
I. Executive Compensation			
<input type="checkbox"/>	<p>Reporting of Equity Awards at Grant Date Fair Value:</p> <ul style="list-style-type: none"> Report stock and option awards granted to executives and directors in the Summary Compensation Table and the Director Compensation Table at aggregate grant date fair value in accordance with FASB ASC Topic 718 (formerly FAS 123R). S-K Item 402(c)(2)(v) and (vi); Item 402(k)(2)(iii) and (iv). For stock or option awards that are subject to performance conditions, the amount reported should be the value at the grant date based on the probable outcome of the performance conditions. This amount should be consistent with the estimate of aggregate compensation cost to be recognized over the service period determined as of grant date under FASB ASC Topic 718, excluding the effect of estimated forfeitures. For awards disclosed in the Summary Compensation Table or Director Compensation Table, include a footnote to the table disclosing the award's value at grant date, assuming that the highest level of performance conditions will be achieved if an amount less than the maximum is shown in the table. Instruction 3 to S-K Item 402(c)(2)(v) and (vi); Instruction to Item 402(k). If at any time during the last fiscal year, the company amended or adjusted the exercise price of options or SARs previously awarded to NEOs or otherwise materially modified such awards, report in column (f) of the Summary Compensation Table the incremental fair value of the amended or modified award, 	<ul style="list-style-type: none"> <input type="checkbox"/> Compute values of equity awards that are not subject to performance conditions at grant date fair value <input type="checkbox"/> Compute values of equity awards that are subject to performance conditions at grant date value based on probable outcome of performance conditions <input type="checkbox"/> Determine whether identity of named executive officers changes due to change in their Total Compensation amounts <input type="checkbox"/> Recompute and report amounts for 2007 and 2008 in compliance with the new rules. Note that this will affect the Total Compensation columns for those years as well. If a person who would be a named executive officer (NEO) for 2009 was also disclosed as an NEO for 2007 but not for 2008, the officer's compensation should be reported for all three years. A company is not required to include different NEOs for any preceding fiscal year based on the recomputation. See the Adopting Release at pp. 26-27. <input type="checkbox"/> Inform compensation committee and/or board of change and its implications <input type="checkbox"/> Prepare proxy statement disclosure 	<ul style="list-style-type: none"> Previously, stock and option awards were reported in the Summary Compensation Table and Director Compensation Table at their value for the fiscal year for financial reporting purposes Disclosure is to be made for awards granted <i>during</i> the applicable fiscal year. If awards are granted after the end of a fiscal year for services in the prior fiscal year, consider whether additional disclosure in CD&A is appropriate. The SEC has suggested that if an executive officer would normally be a named executive officer but for the fact that an extraordinary award was made to another officer, the company may wish to consider including additional disclosure. SEC Release Nos. 33-9089; 34-61175 (Dec. 16, 2009) (“<i>Adopting Release</i>”) at p. 22.

PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
	<p>computed as of the repricing or modification date in accordance with FASB ASC Topic 718. Instruction 2 to Item 402(c)(2)(v) and (vi).</p> <ul style="list-style-type: none"> • Due to the change in reporting equity awards at grant date fair value and new Instruction 3 to S-K Item 402(c)(v) and (vi) regarding the valuation of performance-based awards, there is no longer an instruction to Item 402(c)(2)(v) and (vi) requiring companies to disregard estimates of forfeitures relating to service-based vesting conditions when valuing awards and requiring companies to include a footnote to the Summary Compensation Table describing all forfeitures during the year and the assumptions made in the valuation of such awards. • Consistent with the prior rules, report the grant date fair value of stock and option awards granted during the last completed fiscal year in the Grants of Plan-Based Awards Table. However, when valuing performance-based awards, use the new method discussed above. Instruction 8 to S-K Item 402(d). 		<ul style="list-style-type: none"> • For companies that desire to disclose the fiscal year-end intrinsic value of outstanding stock options, the SEC will allow companies to voluntarily add a column captioned “Value of unexercised in-the-money options/SARs at fiscal year end (\$)” to the Outstanding Awards at Fiscal Year-End Table. See Adopting Release at fn. 87.
<input type="checkbox"/>	<p>New Compliance & Disclosure Interpretations Regarding Executive Compensation: There are new CDIs regarding the reporting of—</p> <ul style="list-style-type: none"> • clawbacks (CDIs for Reg. S-K Question 117.03) • compensation of a person who has not been a named executive officer in all three years (CDIs for Reg. S-K Question 119.18) • gross-up payments that are payable in a subsequent year (CDIs for Reg. S-K Question 119.19) • grant-date fair value of equity awards allocated over several years with separate performance periods (CDIs for Reg. S-K Question 120.06) • effect of amendment of an equity award on fair value (CDIs for Reg. S-K Question 120.07) • restricted stock units that cease being subject to performance-based vesting conditions and become subject to service-based vesting (CDIs for Reg. S-K Question 122.03) 	<input type="checkbox"/> Conform proxy statement disclosure as applicable	<p>Some CDIs regarding equity compensation reporting may no longer be applicable in light of the changes to the method for reporting stock and option awards.</p>

PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
	<ul style="list-style-type: none"> reporting of deferred receipt of vested equity award (CDIs for Reg. S-K Question 125.05) effect of life insurance proceeds paid upon the death of an executive officer for purposes of determining whether the officer is a named executive officer and the amount of compensation (CDIs for Reg. S-K Interpretive Response 217.14) compensation in excess of \$120,000 paid to a director’s child who is employed by the company, which compensation would be reportable as a related party transaction (CDIs for Reg. S-K Interpretive Response 230.07). 		

II. Risks Related to Employee Compensation Policies and Practices

<input type="checkbox"/>	<p>Risk Management Disclosures: To the extent that risks arising from the company’s compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the company, discuss the company’s policies or practices of compensating its employees, including non-executive officers, as they relate to risk management practices and risk-taking incentives. S-K Item 402(s).</p> <ul style="list-style-type: none"> This new disclosure is a separate disclosure item; it is not part of Compensation Discussion and Analysis 	<ul style="list-style-type: none"> <input type="checkbox"/> Inform compensation committee and/or board as appropriate of the new disclosure and its implications <input type="checkbox"/> Consider amending compensation committee charter to delegate to compensation committee oversight responsibility for evaluating and monitoring risks associated with compensation policies and practices <input type="checkbox"/> Educate compensation committee about the company’s compensation programs and practices for non-executives if committee is not otherwise involved in oversight of the design and administration of such programs <input type="checkbox"/> Determine whether risks arising from company’s current compensation policies and practices for employees are reasonably likely to have a material adverse effect on the company. <ul style="list-style-type: none"> <input type="checkbox"/> If not, no disclosure is required <p>While the situations requiring disclosure will depend on the particular company and compensation policies, the SEC states that situations that may trigger disclosure include compensation policies and practices—</p> <ul style="list-style-type: none"> at a business unit of the company that carries a significant portion of the company’s risk profile at a business unit with compensation structured significantly differently than other units within the company at a business unit that is significantly more profitable 	<ul style="list-style-type: none"> Smaller reporting companies are not subject to this new disclosure requirement. The new disclosure requirement is not part of CD&A and is not part of the Compensation Committee Report. Nevertheless, companies may wish to expressly delegate to the compensation committee oversight responsibility with respect to risks arising from compensation policies and practices for employees. If management makes this determination, it should review the basis for its determination with the compensation committee or board. The “reasonably likely” standard is consistent with the disclosure threshold in MD&A for known trends and uncertainties that are material to the company’s business. See Adopting Release at p. 12. The “reasonably likely” standard has been previously interpreted as being higher than “possible” but lower than “more likely than not.” In assessing effect, the company can consider controls and other measures that mitigate or offset incentives that otherwise create risks: “If
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PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
		<p>than others within the company</p> <ul style="list-style-type: none"> ● at a business unit where the compensation expense is a significant percentage of the unit’s revenues, and ● that vary significantly from the overall risk and reward structure of the company, such as when bonuses are awarded upon accomplishment of a task, while the income and risk to the company from the task extend over a significantly longer period of time. S-K Item 402(s). <p><input type="checkbox"/> Determine whether any changes in compensation policies/practices are needed in view of risks identified</p> <p><input type="checkbox"/> Prepare disclosure for proxy statement. The SEC states that the purpose of the new disclosure is to provide investors with material information concerning how a company compensates and incentivizes its employees that may create risks reasonably likely to have a material adverse effect on the company.</p> <p>The SEC provides the following examples of issues that a company may need to address for the business units or employees discussed—</p> <ul style="list-style-type: none"> ● the general design philosophy of the company’s compensation policies for employees whose behavior would be most affected by the incentives established by the policies, as such policies relate to, or affect risk-taking by, those employees on the company’s behalf, and the manner of their implementation ● the company’s risk assessment or incentive considerations, if any, in structuring its compensation policies or in awarding and paying compensation ● how the compensation policies and practices relate to the realization of risks resulting from the actions of employees in both the short term and the long term, such as through policies requiring clawbacks or imposing holding periods ● the company’s policies regarding adjustments to its compensation policies and practices to address changes in its risk profile ● material adjustments the company has made to its compensation policies and practices as a result of changes in its risk profile 	<p>a company has compensation policies or practices for different groups that mitigate or balance incentives, these could be considered in deciding whether risks arising from the company’s compensation policies and practices for employees are reasonably likely to have a material adverse effect on the company as a whole.” Adopting Release at p. 13.</p> <ul style="list-style-type: none"> ● For a helpful tool in assessing risks, see the Center on Executive Compensation, “Compensation Committee Checklist for Assessing Incentives and Risks.” ● A company is not required to make an affirmative statement that it has determined the risks arising from its compensation policies and practices are not reasonably likely to have a material adverse effect on the company. See Adopting Release at p.17. ● Even if disclosure is not required, the company may still wish to include some discussion of risk management relating to compensation. ● SEC staff has noted that, under existing rules, companies are required to include in their CD&A a discussion of risk considerations if they are a material aspect of the compensation policies and practices for named executive officers. See Adopting Release at p. 12, n. 38.

PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
		<ul style="list-style-type: none"> the extent to which the company monitors its compensation policies and practices to determine whether its risk management objectives are being met with respect to incentivizing its employees. S-K Item 402(s). 	

III. Compensation Discussion and Analysis (CD&A)

<input type="checkbox"/>	<p>Staff Comments on CD&A: In a November 9, 2009 speech,¹ the SEC’s Deputy Director of the Division of Corporation Finance, Shelley Parratt, announced that the SEC will be taking a tougher stance in its review of proxy statement disclosures regarding executive compensation and CD&A. Previously, the SEC had often allowed companies to agree to reflect SEC staff comments in future filings. Deputy Director Parratt, however, stated that, because companies have now had three years to digest the existing disclosure rules, “any company that waits until it receives staff comments to comply with the disclosure requirements should be prepared to amend its filings if it does not materially comply with the rules.”</p> <p>Parratt also discussed some topics on which companies should focus their attention in the coming year:</p> <ul style="list-style-type: none"> <i>Analysis:</i> The SEC wants to see better explanation of <i>why</i> executive officers were compensated as they were. For example, it isn’t sufficient for a company to state that its compensation committee used tally sheets, wealth accumulation analyses or internal pay equity analyses in making compensation decisions. Instead, the company should discuss <i>how</i> the committee used these tools to determine compensation amounts and structures, and explain <i>why</i> it reached its decisions. If a committee’s pay determinations were simply subjective decisions, the company should say that. If a company based its decision on qualitative factors, these factors should be specifically identified, and the analysis should explain the way that 	<input type="checkbox"/> Confirm that proxy statement disclosures are consistent with SEC staff’s views <input type="checkbox"/> Confirm that CD&A clearly explains why company compensated executive officers as it did <input type="checkbox"/> Determine whether compensation committee— <ul style="list-style-type: none"> <input type="checkbox"/> used tools <ul style="list-style-type: none"> <input type="checkbox"/> If so, explain how they were used and why committee reached its decisions <input type="checkbox"/> simply made subjective decisions <ul style="list-style-type: none"> <input type="checkbox"/> If so, state so <input type="checkbox"/> based its decisions on qualitative factors <ul style="list-style-type: none"> <input type="checkbox"/> If so, identify factors and explain how they translated into pay decisions. 	
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¹ Available at <http://www.sec.gov/news/speech/2009/spch110909sp.htm>.

PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
	<p>qualitative inputs were ultimately translated into objective pay determinations.</p> <ul style="list-style-type: none"> • <i>Performance Targets</i>: In deciding whether disclosure of performance targets is required, a company must first determine whether the performance targets are material. The fact that a target was not met or was otherwise disregarded may be a factor, but even where a target does not result in an actual payout, the target may still be material if it plays an important role in how the company incentivizes management. Moreover, if the targets were not met, and the company nonetheless pays executive incentive compensation, this can suggest that the compensation was paid without regard to risk outcome, and the SEC questions whether shareholders are getting a complete picture of whether the board is acting in their best interests if the targets are not disclosed. If the performance targets are material, they must be specifically disclosed unless the disclosure would likely cause the company substantial competitive harm (under the same standard as used in confidential treatment requests). Absent highly unusual circumstances, the staff does not believe that disclosure of performance targets will result in competitive harm <i>after</i> the company has disclosed the amounts, especially where the performance targets are tied to company-wide financial results that are publicly disclosed. If a company does decide to omit a performance target where disclosure would cause competitive harm, it must disclose with meaningful specificity how difficult or likely it would be for the company or executive to achieve the target. Simply saying that the target is intended to be “challenging” is insufficient; a company should provide support for the level of difficulty, e.g., the correlation between future and historical achievement of the performance metric. • <i>Benchmarking</i>. If a company refers to a peer group used for benchmarking purposes, the SEC wants to see the names of the peer group companies, how they were selected and where actual results fell relative to the benchmark. 	<ul style="list-style-type: none"> <input type="checkbox"/> Determine whether performance targets are material <ul style="list-style-type: none"> <input type="checkbox"/> If not, no disclosure is required <input type="checkbox"/> If material, determine whether disclosure would likely cause substantial competitive harm <ul style="list-style-type: none"> <input type="checkbox"/> If so, determine whether company desires not to disclose performance targets. If so, company should be prepared to— <ul style="list-style-type: none"> <input type="checkbox"/> defend its determination <input type="checkbox"/> disclose with meaningful specificity how difficult or likely it would be for company or executive to achieve the target. <input type="checkbox"/> If company uses benchmarking, make sure CD&A discloses— <ul style="list-style-type: none"> <input type="checkbox"/> names of peer group companies <input type="checkbox"/> how they were selected <input type="checkbox"/> where actual results fell relative to benchmark. 	

PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
III. Enhanced Director and Nominee Disclosures			
<input type="checkbox"/>	<p>Director and Nominee Qualifications: For each director and each nominee for director, briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director of the company at the time the disclosure is made, in light of the company’s business and structure. If material, this disclosure should cover more than the past five years, including information about the person’s particular areas of expertise or other relevant qualifications. S-K Item 401(e)(1).</p>	<input type="checkbox"/> Inform board of the new disclosure and its implications <input type="checkbox"/> Have board and/or nominating committee determine whether any changes in board composition should be made in light of new disclosures <input type="checkbox"/> Revise corporate governance guidelines if needed <input type="checkbox"/> Revise/supplement D&O Questionnaire <input type="checkbox"/> Prepare draft disclosures for review by nominating committee and individual directors <input type="checkbox"/> Conform proxy statement disclosure <input type="checkbox"/> Going forward, establish controls and procedures to support the nominating committee’s conclusions regarding the qualifications and skills of individual directors and nominees	<p>This disclosure is required annually for every director and nominee, even if the director is not up for re-election that year.</p>
<input type="checkbox"/>	<p>Director Diversity: Disclose whether—and, if so, how—the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented and how the nominating committee (or the board) assesses the policy’s effectiveness. S-K Item 407(c)(2)(vi).</p>	<input type="checkbox"/> Inform board/nominating committee of the new disclosure and its implications <input type="checkbox"/> Determine whether nominating committee considers diversity and, if so, how diversity is defined <input type="checkbox"/> If there is a diversity policy, determine how it is implemented and its effectiveness assessed <input type="checkbox"/> Determine whether any changes should be made regarding definition of diversity and implementation of policy <input type="checkbox"/> Update/revise corporate governance guidelines and nominating committee charter as appropriate <input type="checkbox"/> Prepare draft proxy statement disclosure for review by board/nominating committee	<ul style="list-style-type: none"> • The new rule does not define diversity, and, in the Adopting Release, the SEC stated that, for purposes of this disclosure requirement, companies are allowed to define diversity in ways that they consider appropriate. The SEC noted some companies may view diversity expansively to include differences of viewpoint, professional experience, skills, education and other attributes that contribute to board heterogeneity, while others may focus on race, gender or national origin. See Adopting Release at p. 39. • For example, some companies specifically mention gender, race and nationality in both the corporate governance guidelines and the nominating committee charter (see, e.g., The Coca-Cola Company), while others mention diversity factors only in their corporate governance guidelines. • In implementing a policy, be wary of setting quotas that the company may not be able to meet.

PROXY STATEMENT CHANGES AND CONSIDERATIONS

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<input type="checkbox"/>	Look-back Period for Legal Proceedings: Amended S-K Item 401(f) requires disclosure of specified legal proceedings involving any executive officer, director or director nominee during the past 10 years (lengthened from five years). S-K Item 401(f).	<input type="checkbox"/> Revise/supplement D&O Questionnaire <input type="checkbox"/> Revise proxy statement disclosure if necessary	Companies may wish to set no time limit with respect to this question in the D&O Questionnaire so that the company can evaluate whether any legal proceedings that occurred more than 10 years ago might be material to investors.
<input type="checkbox"/>	Expansion of Types of Legal Proceedings Covered: The types of legal proceedings for which disclosure is required under S-K Item 401(f) has been expanded to include whether— <ul style="list-style-type: none"> • the person was the subject of, or a party to, any federal or state judicial or administrative order, judgment, decree or finding (excluding in all cases a settlement of a civil proceeding among private litigants), not subsequently reversed, suspended or vacated, relating to an alleged violation of— <ul style="list-style-type: none"> • any federal or state securities or commodities law or regulation • any law or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order • any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity; or • such person was the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization (as defined in Section 3(a)(26) of the Securities Exchange Act of 1934), any registered entity (as defined in Section 1(a)(29) of the Commodity Exchange Act) or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member. S-K Item 407(f)(7)-(8); Instruction 5 to S-K Item 401(f). 	<input type="checkbox"/> Revise/supplement D&O Questionnaire <input type="checkbox"/> Revise proxy statement disclosure if necessary	
<input type="checkbox"/>	Other Directorships in Past Five Years: Disclose any	<input type="checkbox"/> Revise/supplement D&O Questionnaire	

PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
	<p>directorships held by each director and director nominee at any time within the past five years (vs. currently) at any company with a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934 or subject to the requirements of Section 15(d) of that act, or any company registered as an investment company under the Investment Company Act. S-K Item 401(e).</p>	<input type="checkbox"/> Revise proxy statement disclosure if necessary	

IV. Compensation Consultants

<input type="checkbox"/>	<p>If the compensation committee or the board engaged a compensation consultant to provide advice or recommendations on the amount or form of executive and director compensation and such consultant or its affiliates provided additional services to the company or its affiliates in excess of \$120,000 during the company's last completed fiscal year, disclose—</p> <ul style="list-style-type: none"> the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such additional services whether the decision to engage the consultant or its affiliates for these additional services was made or recommended by management whether the compensation committee or the board approved such additional services. <p>S-K Item 407(e)(3)(iii)(A)</p> <p>If the compensation committee or the board did not engage a compensation consultant, but management did engage a consultant to provide advice or recommendations on the amount or form of executive and director compensation, and such consultant or its affiliates provided additional services to the company in excess of \$120,000 during the company's last completed fiscal year, disclose—</p> <ul style="list-style-type: none"> the aggregate fees for determining or recommending the amount or form of executive and director compensation and the aggregate fees for such additional services <p>S-K Item 407(e)(3)(iii)(B)</p> <p>The amendments, as well as the existing disclosure</p>	<input type="checkbox"/> Inform board and/or compensation committee of the new disclosure and its implications <input type="checkbox"/> Identify all compensation consultants who, during last fiscal year, played a role in determining or recommending executive or director compensation <input type="checkbox"/> Determine whether any such consultant or any of its affiliates provided other services to the company or any of its affiliates during last fiscal year. If so, determine— <input type="checkbox"/> amount <input type="checkbox"/> nature of such services <input type="checkbox"/> If the additional services exceeded \$120,000, prepare proxy statement disclosure <input type="checkbox"/> Determine whether management made decision to engage consultant or its affiliates or recommended consultant or its affiliates for additional services <input type="checkbox"/> Determine whether board or compensation committee approved the additional services <input type="checkbox"/> Have board or compensation committee review procedures for hiring and use of compensation consultants and determine whether any changes should be made	<p>In addition to the new disclosures, Item 407 <i>continues</i> to require companies to disclose any role of compensation consultants in determining or recommending the amount or form of director compensation during the company's last completed fiscal year, including—</p> <ul style="list-style-type: none"> the identity of the consultant whether such consultant was engaged directly by the compensation committee or board or any other person the nature and scope of the assignment the material elements of the instructions given to the consultant with respect to the performance of their duties. <p>S-K Item 407(e)(iii)</p> <p>The rules do not require companies to disclose the nature and extent of the additional services, but companies may, at their discretion, include such information if it would help investors understand the existence or nature of any potential conflict of interest.</p>
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PROXY STATEMENT CHANGES AND CONSIDERATIONS

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	<p>requirements of Item 407 regarding compensation consultants, do not apply to those situations in which the compensation consultant's <i>only</i> role in recommending the amount or form of executive or director compensation is limited to (1) consulting on broad-based plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the company and that are available generally to all salaried employees or (2) providing information that either is not customized for the company or that is customized based on parameters that are not developed by the consultant and about which the consultant did not provide advice.</p>		

V. Board Role in Risk Oversight

<input type="checkbox"/>	<p>Disclose the extent of the board's role in risk oversight, such as how the board administers its oversight function, and the effect that this has on the board's leadership structure. S-K Item 407(h)</p>	<input type="checkbox"/> Evaluate board's current role in risk management oversight and determine whether any changes should be made before the new disclosure is required. Among other things, consider— <ul style="list-style-type: none"> <input type="checkbox"/> Oversight structure <ul style="list-style-type: none"> <input type="checkbox"/> Does board as a whole oversee risk management or does a committee (e.g., the audit committee) have primary responsibility? <input type="checkbox"/> Does the compensation committee oversee risk related to compensation? <input type="checkbox"/> Do any committee charters need to be amended to specifically address risk management oversight? 	<ul style="list-style-type: none"> • The audit committee of an NYSE-listed company is required to discuss the company's guidelines and policies regarding risk assessment and risk management, as well as the company's major financial risks and the steps management has taken to monitor and control these risks. NYSE Listed Company Manual § 303A.07(b)(iii)(D) and related commentary. However, the audit committee is not required to be the sole body responsible for risk management and assessment. If other mechanisms are used, the audit committee should review such processes "in a general manner." Commentary to NYSE Listed Company Manual § 303A.07(b)(iii)(D). • Consider delegating oversight of risk-related compensation matters to compensation committee. • Six percent of public companies (primarily in the insurance and financial services industries) have stand-alone risk committees. See <i>Directorship</i>, "Risk Oversight: Faster, Higher, Stronger" (Sept. 4, 2009).
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PROXY STATEMENT CHANGES AND CONSIDERATIONS

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		<input type="checkbox"/> Reporting processes <ul style="list-style-type: none"> <input type="checkbox"/> Do the officers responsible for risk management report directly to the board or the appropriate committee? <input type="checkbox"/> Are the activities and sharing of information among different committees that may have oversight responsibility coordinated? <input type="checkbox"/> How often are risk management matters discussed at board meetings? <input type="checkbox"/> Risk management review <ul style="list-style-type: none"> <input type="checkbox"/> Does the board or appropriate committee understand the company’s material enterprise risks, including operational, financial, strategic, compliance and reputational risks? <input type="checkbox"/> Are any changes in board or committee composition advisable in light of the company’s risk profile? <input type="checkbox"/> Has the company implemented an enterprise-wide approach to risk management? <input type="checkbox"/> Is the board or appropriate committee satisfied with the risk management processes in place? <input type="checkbox"/> Prepare proxy statement disclosure	<p>In the Adopting Release, the SEC stated that “where relevant, companies may want to address whether the individuals who supervise the day-to-day risk management responsibilities report directly to the board as a whole or to a board committee or how the board or committee otherwise receives information from such individuals.” See Adopting Release at p. 44.</p> <p>For helpful resources regarding the board’s role in risk oversight, see the Committee of Sponsoring Organizations of the Treadway Commission (COSO), “Effective Enterprise Risk Oversight, The Role of the Board of Directors 2009,” available at www.coso.org, and National Association of Corporate Directors, Blue Ribbon Commission Report on Risk Governance: Balancing Risk and Reward (2009).</p>

VI. Leadership Structure

<input type="checkbox"/>	Disclose— <ul style="list-style-type: none"> • the board’s leadership structure, such as whether the same or separate persons serve as CEO and chairman of the board • if the positions of CEO and chairman are combined, whether the company has a lead independent director and the specific role that such director plays in the board’s leadership • why the company has determined that its leadership structure is appropriate given the company’s specific characteristics or circumstances • the effect that the board’s role in risk management has on the company’s leadership structure. S-K Item 407(h). 	<input type="checkbox"/> Inform board of change and its implications <input type="checkbox"/> Analyze type of disclosure that will be required and whether any changes are advisable before disclosures are made. If board has not recently done so, consider— <ul style="list-style-type: none"> <input type="checkbox"/> whether positions of CEO and chairman should be separated <input type="checkbox"/> if separated, whether chairman should be independent <input type="checkbox"/> whether to have a lead or presiding director <input type="checkbox"/> responsibilities of lead or presiding director <input type="checkbox"/> whether corporate governance guidelines need to 	<ul style="list-style-type: none"> • In the Adopting Release, the SEC stated that the new rules are not intended to promote one leadership structure over another. • Thirty-seven percent of S&P 500 companies separate the CEO and chairman and less than half of these have an independent chair. Consequently, 16 percent of S&P 500 companies have an independent chair. Typically a former CEO or other executive of a company fills the chairman’s seat where the positions are separated. See Spencer Stuart, 2009 Spencer Stuart Board Index (2009). • Ninety-five percent of S&P 500 companies have a lead or presiding officer. At 89 percent
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PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
		be updated to reflect structure and responsibilities. <input type="checkbox"/> Prepare proxy statement disclosure	of these companies, a single individual fills the role, while at the other 11 percent, the role is rotated among independent directors at each meeting. <i>Id.</i> <ul style="list-style-type: none"> • NYSE-listed companies are required to have a non-management or independent director preside over executive sessions of the non-management or independent directors. Commentary to NYSE Listed Company Manual § 303A.03. • For sample disclosures, see prior proxy statements of companies that received a shareholder proposal that the positions be separated.

VII. Elimination of Broker Discretionary Voting in Director Elections

<input type="checkbox"/>	NYSE Rule 452 has been amended to eliminate the ability of brokers to vote for directors in uncontested elections where the broker has not received specific instructions from a client on how to vote the shares. <ul style="list-style-type: none"> • Because the rule applies to all brokers that are NYSE member firms, the rule change affects all public companies regardless of the stock exchange on which a company's stock is listed. • Rule change is effective for shareholder meetings held on or after January 1, 2010. 	<input type="checkbox"/> Inform board of change and its implications <input type="checkbox"/> Revise proxy statement disclosure regarding broker voting in director elections <input type="checkbox"/> Estimate broker discretionary vote based on composition of shareholder base and turnout at prior annual meetings <input type="checkbox"/> Consider hiring a proxy solicitor <input type="checkbox"/> If company has majority voting for directors, consider effect of loss of broker discretionary vote <input type="checkbox"/> Assess vulnerability to "just vote no" campaign <input type="checkbox"/> Decide whether to use e-proxy	Because brokers typically cast discretionary votes in favor of company nominees, the elimination of broker discretionary voting will make it more difficult for a nominee to achieve a majority vote. Without the inclusion of broker discretionary votes in favor of management nominees, "vote no" campaigns waged by activist shareholders will have a greater influence on director elections, as there will be fewer votes cast "for" the company's nominees to outweigh those votes that are "withheld" or voted "against" such nominees. <ul style="list-style-type: none"> • The response rate of shares voted by retail shareholders during the 2009 proxy season of companies using the notice-only method of e-proxy was only half that of retail shareholders of companies that delivered full sets of their
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PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
		<input type="checkbox"/> Consider allowing additional time between the date that proxy materials are mailed and the annual meeting date in case additional solicitation is required. <input type="checkbox"/> Make sure quorum is obtainable. If company has relied on broker discretionary votes to reach a quorum, make sure there is at least one “routine” item on the agenda (such as ratification of auditors), so that brokers can cast votes that can be counted for purposes of determining a quorum. <input type="checkbox"/> Understand institutional investor base <input type="checkbox"/> Determine likelihood of a withhold/against recommendation by proxy advisory firms	<p>proxy materials in paper form. See Broadridge, Notice and Access, Statistical Overview of Use with Beneficial Shareholders (as of June 30, 2009).</p> <ul style="list-style-type: none"> • In response to the low retail turnout at companies using e-proxy, the SEC has proposed rule changes that are designed to reduce shareholder confusion regarding e-proxy. The rule changes, which may go into effect in time for the 2010 proxy season, will give companies more flexibility in the formulation of the notices and also allow explanatory materials to accompany the notice. It remains to be seen, however, whether these changes will increase retail participation. <p>The influence of institutional investors will likely increase as a result of the elimination of broker discretionary voting, as institutional shareholders are more likely to vote their shares than are retail investors. Consequently, boards should be sensitive to the “hot buttons” that are likely to trigger a negative vote by major institutional investors.</p> <p>Because institutional investors often follow the advice of proxy advisory firms, these firms will gain more clout. The company should assess the likelihood that RiskMetrics or another proxy advisory firm will recommend that its clients withhold or vote against any directors. RiskMetrics has a long list of reasons for withholding votes from individual directors, directors serving on certain committees and, in some cases, the entire board.</p>

PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
VIII. Changes to NYSE Corporate Governance Rules			
<input type="checkbox"/>	<p>Categorical Standards Disclosure Eliminated: Amended NYSE corporate governance rules continue to require that the board assess a director’s independence under the NYSE’s general independence definition and bright-line tests, but the amended rules replace the related disclosure requirements with those required by Regulation S-K Item 407(a), which requires disclosure for each director, by specific category or type, of any transactions the board considered. Thus, the NYSE rules no longer refer to categorical standards, although companies may continue to find categorical standards useful in determining director independence. NYSE Rule 303A.02(a) and related Commentary and Disclosure Requirement.</p>	<input type="checkbox"/> Conform proxy statement disclosure	
<input type="checkbox"/>	<p>Web Site Disclosures of Certain Matters: The amended rules permit a company to disclose on its Web site rather than in its proxy statement (or Form 10-K if it does not file a proxy statement) certain matters, provided the proxy statement (or Form 10-K as applicable) states that the disclosures are made on the Web site and gives the Web site address:</p> <ul style="list-style-type: none"> • certain company contributions to a tax-exempt entity where an independent director is an executive officer (NYSE Rule 303A.02(b)(v) Disclosure Requirement) • the name of the director who presides at executive sessions and the method of selecting the presiding director if the position is rotated (NYSE Rule 303A.03 Disclosure Requirements) • how interested parties can communicate with directors (NYSE Rule 303A.03 Disclosure Requirements) • a board determination that service by an audit committee member on more than three public company audit committees does not impair such director’s service on the company’s audit committee (NYSE Rule 303A.07(a) Disclosure Requirement) 	<input type="checkbox"/> Conform proxy statement disclosure if company elects to disclose these matters on its Web site	
<input type="checkbox"/>	<p>Communications by Interested Parties with Directors: The amended rules clarify that all interested parties, not just shareholders, must be able to communicate directly with the</p>	<input type="checkbox"/> Conform proxy statement disclosure	Companies that choose to provide the information in their proxy statement should make sure that their disclosure addresses the means by which all

PROXY STATEMENT CHANGES AND CONSIDERATIONS

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	<p>presiding director or with the non-management or independent directors as a group. A company must disclose the method for such communications either in its proxy statement (or Form 10-K if the company does not file a proxy statement) or on its Web site, provided the proxy statement (or Form 10-K as applicable) states that fact and gives the Web site address. NYSE Rule 303A.03 Disclosure Requirements.</p>		<p>interested parties, not just shareholders, can communicate.</p>
<input type="checkbox"/>	<p>Web Site Postings of Committee Charters: A company must disclose in its proxy statement (or Form 10-K if the company does not file a proxy statement) that its committee charters are available on its Web site and give the Web site address. This applies to charters for the nominating/corporate governance committee, compensation committee and audit committee. See Disclosure Requirements for each of NYSE Rules 303A.04, 303A.05, 303A.07(b)(iii)(H), 303A.09 and 303A.10.</p>	<input type="checkbox"/> Confirm that proxy statement includes this disclosure	
<input type="checkbox"/>	<p>Disclosure Regarding Paper Copies of Governance Documents Eliminated: While companies must still disclose in their proxy statements that their corporate governance guidelines, committee charters and code of business conduct and ethics are available on their Web sites and give the Web site address, they are no longer required to provide paper copies of these documents on request. Accordingly, companies are no longer required to disclose in their proxy statements that such documents are available in paper format on request.</p>	<input type="checkbox"/> Delete disclosure in proxy statement unless company voluntarily desires to continue to provide paper copies on request.	<p>Note that S-K Item 406(c)(2) requires a company to undertake in its Form 10-K to provide any person on request with a copy of the code of ethics applicable to certain senior officers and the manner in which requests can be made.</p>
<input type="checkbox"/>	<p>Controlled Company Exemption: If the company is relying on the exemption from certain NYSE corporate governance rules that is provided for controlled companies, it need only comply with the disclosure requirements in Instruction 1 to S-K Item 407(a). NYSE Rule 303A.00 Controlled Companies Disclosure Requirement.</p>	<input type="checkbox"/> Conform proxy statement disclosure if applicable	

PROXY STATEMENT CHANGES AND CONSIDERATIONS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
IX. Change in SEC Staff Position on Exclusion of Certain Shareholder Proposals Under Rule 14a-8			
<input type="checkbox"/>	<p>Rule 14a-8(i)(7) allows companies to exclude from their proxy statements shareholder proposals relating to ordinary business operations. In a Staff Legal Bulletin issued in October 2009², the SEC’s Division of Corporation Finance announced that it will limit the availability of this exclusion as it applies to shareholder proposals relating to risk and CEO succession planning:</p> <ul style="list-style-type: none"> • <i>Risk.</i> Previously, SEC staff generally allowed companies to exclude shareholder proposals that relate to the company engaging in an internal assessment of risks and liabilities that the company faces as a result of its operations. The staff now will instead focus on the subject matter to which the risk pertains, and if the subject matter “transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote,” the proposal generally will not be excludable under Rule 14a-8(i)(7). The SEC expressly noted that a proposal that focuses on the board’s role in the oversight of risk management may be such a proposal. • <i>CEO Succession Planning.</i> Previously, the SEC staff allowed companies to exclude shareholder proposals calling for companies to disclose their policies regarding CEO succession planning on the grounds that these proposals related to the termination, hiring or promotion of employees, which are ordinary business matters. Going forward, the staff generally will not allow the exclusion of proposals relating to CEO succession planning. <p>The SEC did not change its policy that proposals that seek to “micro-manage” the company are excludable and expressly noted that a proposal on CEO succession planning could be excluded when it seeks to “micro-manage the company by probing too deeply into matters of</p>	<input type="checkbox"/> Evaluate any shareholder proposals submitted to the company in light of the new staff position before determining whether to seek no action relief for exclusion of the proposal.	<p>The new SEC staff position will also likely result in more proposals dealing with environmental and social policy issues being included in company proxy statements.</p>

² Staff Legal Bulletin No. 14E (CF), available at <http://www.sec.gov/interps/legal/cfslb14e.htm>.

PROXY STATEMENT CHANGES AND CONSIDERATIONS

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	<p>a complex nature” for which shareholders typically would not be in a position to make an informed judgment.</p> <p>In the bulletin, the SEC also encouraged companies to notify the staff of the date on which they intend to submit correspondence in connection with a no-action request. Companies can notify the staff by telephone (202-551-3500) or e-mail (shareholderproposals@sec.gov).</p>		
X. Proposed E-Proxy Rule Changes			
<input type="checkbox"/>	<p>The SEC has proposed amendments to the rules governing the form of notice that a company must send to shareholders when a company uses the notice-only method of e-proxy. The proposed amendments would give companies greater flexibility in the formulation of the notice and would allow the notice to be accompanied by additional materials explaining the notice and voting process. SEC Rel. Nos. 33-9073; 34-60825 (Oct. 14, 2009).</p>	<input type="checkbox"/> If the company intends to use e-proxy, monitor the status of the proposed amendments as they may be amended in time for the 2010 proxy season.	

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CHANGES TO OTHER PERIODIC REPORTS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
I. Form 10-K			
<input type="checkbox"/>	<p>Change to Cover Page: Effective April 13, 2009, Form 10-K was amended by adding the following paragraph to the cover page: “Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). <input type="checkbox"/> Yes <input type="checkbox"/> No”</p>	<p><input type="checkbox"/> Confirm cover page of Form 10-K includes XBRL language.</p>	<p>If a company is not yet required to submit Interactive Data Files with its Exchange Act reports, it should not start checking the cover page box relating to Interactive Data File compliance until it is required to submit those files. Companies that voluntarily submit Interactive Data Files should not check the box until they are required to submit the files. CDIs for Exchange Act Forms Question 105.04.</p>
<input type="checkbox"/>	<p>FASB Codification: In July 2009, the FASB Accounting Standards Codification became the sole authoritative source for nongovernmental U.S. generally accepted accounting principles, with the exception that SEC accounting guidance is also authoritative for public companies. The Codification is not intended to change U.S. GAAP, but it does change references to accounting standards in MD&A and in the notes to financial statements. The Codification is effective for financial statements for periods ending after September 15, 2009. Consequently, for calendar year-end companies, the Codification first applied to their third-quarter 10-Qs.</p> <p>In August 2009, the SEC issued an interpretive release emphasizing that the Codification does not supersede SEC rules or regulations and also stating that references in existing SEC rules and guidance to specific standards under U.S. GAAP should be understood to mean the corresponding reference in the Codification.</p>	<p><input type="checkbox"/> Check references to GAAP in MD&A and notes to financial statements to ensure they reflect the Codification.</p>	

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	<p>SEC staff and the Center for Audit Quality also have provided guidance on how to transition to the Codification.³ The SEC and FASB both encourage companies to use “plain English” references to Codification topics, rather than numerical citations. For financial statements for periods ending after September 15, 2009, if there are specific references—</p> <ul style="list-style-type: none"> • companies should use Codification references • references to specific GAAP should be consistent for all periods (consequently, disclosures for comparative periods should not refer to only pre-Codification literature). 		
<input type="checkbox"/>	<p>Elimination of Disclosure of 4th Quarter Shareholder Voting Results: Effective February 28, 2010, the requirement to disclose shareholder voting results for a shareholder meeting that occurs in the fourth quarter of the fiscal year will be eliminated, and Items 5 through 15 of Part I of Form 10-K will be redesignated as Items 4 through 14. For any shareholder meeting held on or after February 28, 2010, shareholder voting results must be reported on a Form 8-K, as discussed below.</p>	<p><input type="checkbox"/> Conform Form 10-K if filed on or after February 28, 2010</p>	
<input type="checkbox"/>	<p>New Compliance and Disclosure Interpretations Regarding XBRL: The SEC issued new CDIs during 2009 regarding XBRL. These CDIs are available here.⁴</p>		
<input type="checkbox"/>	<p>Changes to NYSE Corporate Governance Rules: An NYSE-listed company is no longer required to disclose in its Form 10-K that it filed the CEO certification required by the NYSE, and the CEO and CFO certifications required by</p>	<p><input type="checkbox"/> Delete disclosure from Form 10-K</p>	

³ June 23, 2009 meeting of SEC staff and Center for Audit Quality summarized at http://www.thecaq.org/resources/secregs/pdfs/highlights/2009_0623_highlights.pdf.

⁴ <http://www.sec.gov/divisions/corpfin/guidance/interactivedatainterp.htm>.

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	<p>the SEC. NYSE Rule 303A.12(a).</p> <p>There are also several disclosure changes that apply to NYSE-listed companies that do not file an annual proxy statement and, instead, are required to make disclosures in their Form 10-K. A discussion of these changes appears above under “Proxy Statement Changes and Considerations, VIII. Changes to NYSE Corporate Governance Rules.”</p>		
<input type="checkbox"/>	<p>Amendments to Oil and Gas Reserve Disclosure Requirements: The SEC has amended the reporting requirements for oil and gas reserves. These amendments, which are effective for annual reports on Form 10-K for fiscal years ending on or after December 31, 2009, revise Regulation S-K, Regulation S-X and Industry Guide 2.⁵</p> <p>The SEC also issued new CDIs on October 26, 2009 regarding the amended rules. These CDIs are available here.</p> <p>The SEC’s Office of the Chief Accountant issued Staff Accounting Bulletin No. 113 on October 30, 2009, which contains updated guidance on accounting rules related to the oil and gas industry. This Staff Accounting Bulletin is available here.</p>	<input type="checkbox"/> If an oil and gas company, revise oil and gas disclosures in accordance with amended rates and related guidance	
<input type="checkbox"/>	<p>Staff Comments at December 2009 AICPA National Conference on Current SEC and PCAOB Developments: Several SEC staff members addressed matters relevant to accounting and Management’s Discussion and Analysis, including—</p> <ul style="list-style-type: none"> • goodwill impairment disclosures 		

⁵ SEC Release Nos. 33-8995; 34-59192 “Modernization of Oil and Gas Reporting” (Dec. 31, 2008), available at <http://sec.gov/rules/final/2008/33-8995.pdf>.

CHANGES TO OTHER PERIODIC REPORTS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
	<ul style="list-style-type: none"> • income tax disclosures • disclosure of the impact of recently issued accounting standards. <p>Reports of the conference are available from several major accounting firms. Click on the accounting firm's name to view the reports:</p> <ul style="list-style-type: none"> • Deloitte • KPMG • PricewaterhouseCoopers 		
<input type="checkbox"/>	<p>June 15, 2010 Start Date for Auditor Report on Internal Control for Non-accelerated Filers: Commencing with its first Form 10-K for a fiscal year ending on or after June 15, 2010, a non-accelerated filer must include an attestation report of its independent auditor regarding the company's internal control over financial reporting. S-K Item 308T.</p>	<ul style="list-style-type: none"> <input type="checkbox"/> If non-accelerated filer, engage auditors to prepare report <input type="checkbox"/> Monitor legislative developments 	Legislation has been proposed in Congress that would exempt non-accelerated filers from this requirement.
II. Form 10-Q			
<input type="checkbox"/>	<p>Elimination of Disclosure of Shareholder Voting Results: Effective February 28, 2010, the requirement to disclose the voting results on Form 10-Q for the quarterly period in which the shareholder meeting occurred will be eliminated, and Items 5 and 6 of Form 10-Q will be redesignated as Items 4 and 5. For any shareholder meeting occurring on or after February 28, 2010, shareholder voting results must be reported on a Form 8-K, as discussed below.</p>	<ul style="list-style-type: none"> <input type="checkbox"/> Conform Form 10-Q if filed on or after February 28, 2010 	
<input type="checkbox"/>	<p>June 15, 2010 Start Date for XBRL for Certain Large Accelerated Filers: Large accelerated filers with public floats of \$5 billion or less that use U.S. GAAP will be required to comply with the SEC's XBRL requirements in the first Form 10-Q (or Form 20-F or Form 40-F, if applicable) that contains financial statements of the company for a fiscal period that ends on or after June 15, 2010. Currently, only certain large accelerated filers with public floats in excess of \$5 billion are subject to the requirements, which require that an Interactive Data File</p>	<ul style="list-style-type: none"> <input type="checkbox"/> If large accelerated filer with public float of \$5 billion or less as of the last business day of the second quarter of most recently completed fiscal year, begin preparations for XBRL submissions. 	Note that for fiscal periods ending on or after June 15, 2010, additional XBRL tagging requirements will apply with respect to financial statements for a large accelerated filer with a public float of more than \$5 billion as of the last business day of the second quarter of its most recently completed fiscal year. See Regulation S-T Rule 405(d), (e), and (f)(1).

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	formatted in eXtensible Business Reporting Language (XBRL) be submitted to the SEC and posted on a company's Web site. S-K Item 601(b)(101).		
<input type="checkbox"/>	New CDIs: As discussed above, the SEC issued new CDIs during 2009 regarding XBRL. The SEC also confirmed in a CDI that if a company is current but not timely in its reporting obligations, the company may check the "yes" box on the cover page of a Form 10-Q indicating that it has filed all required reports during the preceding 12 months so long as such reports have been filed by the date of the filing of the Form 10-Q (CDIs for Exchange Act Forms Question 105.03).		

III. Form 8-K

<input type="checkbox"/>	<p>Shareholder Voting Results: For any shareholder meeting occurring on or after February 28, 2010, voting results must be reported under a new Item 5.07 to Form 8-K.</p> <ul style="list-style-type: none"> • Specifically, if any matter was submitted to a vote of security holders, through the solicitation of proxies or otherwise, provide— <ul style="list-style-type: none"> • the date of the meeting and whether it was an annual or special meeting • if the meeting involved the election of directors, the name of each director elected at the meeting, as well as a brief description of each other matter voted upon at the meeting, along with the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office • a description of the terms of any settlement between the company and any other participant terminating any solicitation subject to Rule 14a-12(c), including the cost or anticipated cost to the company. • Preliminary voting results must be reported within 	<input type="checkbox"/> Revise disclosure controls and procedures to reflect change	
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CHANGES TO OTHER PERIODIC REPORTS

Comply / Status	Description of Provision	Necessary or Recommended Client Actions/Procedures	Comments
	<p>four business days, which period begins to run on the date the meeting ended. An amended report on Form 8-K must be filed to disclose the final voting results within four business days after the final voting results are known; however, no preliminary voting results need be disclosed if the company discloses final voting results under Item 5.07 of Form 8-K within the initial four-business-day period.</p> <ul style="list-style-type: none"> • If any matter has been submitted to a vote of security holders otherwise than at a meeting, corresponding information with respect to such submission must be provided. The solicitation of any authorization or consent (other than a proxy to vote at a stockholders' meeting) with respect to any matter is deemed a submission of such matter to a vote of security holders. • If the company did not solicit proxies, and the board of directors as previously reported to the SEC was re-elected in its entirety, a statement to that effect will suffice in response to the requirement to disclose the election results. • If the company has furnished to its security holders proxy soliciting material containing the terms of a settlement, the requirement to describe the settlement may be answered by reference to the information contained in such material. • If the company has published a report containing all the information called for by Item 5.07, the item may be answered by a reference to the information contained in such report. 		
<input type="checkbox"/>	<p>NYSE Rule Change: NYSE rule changes allow listed companies to report a waiver of the code of business conduct and ethics for an executive officer or director by means of a press release, Web site disclosure or a Form 8-K. The disclosure must be made within four business days. NYSE Rule 303A.10.</p>		