PROVISION	SUMMARY	TRANSITION
PROXY ACCESS	• **Details Left to the SEC.** Under the Dodd-Frank Act, the Securities and Exchange Commission is authorized to adopt proxy access rules. Eligibility and other criteria are left for the SEC to determine and are not legislatively mandated. Efforts to require that nominating shareholders or groups hold at least 5% of the company's outstanding shares for a minimum of two years were ultimately excluded from the proposed legislation. • **SEC's Prior Proposed Rules.** The proposed legislation follows the SEC's 2009 proposed rules—which contemplated a proxy access right for shareholders or groups owning between 1-5% of the company's outstanding shares (based upon the company's market capitalization/filer status) for at least one year. The SEC's proposed rules are discussed in further detail in our August 2009 *Kirkland Governance Watch*.	• **No Mandated Transition Period But 2011 Proxy Season Anticipated.** Based upon statements by SEC Chairman Mary Schapiro, we anticipate that the SEC will promulgate rules in time for the 2011 proxy season. On June 18, 2010, *The Wall Street Journal* reported that CalPERS, CalSTRS and CII have begun to build a list of potential nominees to take advantage of any proxy access rules.
SAY ON PAY	• **Advisory Vote on Executive Compensation.** At least once every three years (initially) companies would be required to provide shareholders with a non-binding advisory vote on the compensation disclosures contained in the proxy statement. At least once every six years, companies would be required to provide shareholders with a non-binding advisory vote on whether say on pay would occur once every one, two or three years. • **Elimination of Broker Discretionary Voting.** Preliminary results indicate that the vast majority of advisory votes for management say on pay proposals were approved by shareholders during the 2010 proxy season. ISS reports that average support for management say on pay proposals was approximately 89% during the 2010 proxy season, slightly less than support received during the prior year. Without the protection of broker discretionary voting however, companies may have a more difficult time in approving say on pay in the years to come. See "Broker Voting" below.	• **Six Months After Enactment.** Meetings occurring six months or more after enactment of the proposed legislation would include both a (1) say on pay vote and (2) a vote to determine whether say on pay would be held every one, two or three years.

© 2010 Kirkland & Ellis LLP. All rights reserved.

PROVISION	SUMMARY	TRANSITION
SAY ON GOLDEN PARACHUTES	• **Advisory Vote on Golden Parachutes.** Companies would be required to provide shareholders with a non-binding advisory vote on any agreement or understanding between the company and its named executive officers which is based on or otherwise relates to a merger, acquisition or similar fundamental transaction unless the agreement was previously approved as part of an annual say on pay vote. The proposed legislation does not indicate whether agreements in existence on the date of enactment of the proposed legislation are exempt from say on golden parachutes. • **Investment Managers Disclosure.** Under the proposed legislation, large institutional investment managers would be required to disclose at least annually how they voted on say on pay and say on golden parachutes. See "Say on Pay" above.	• **Six Months After Enactment.** Say on golden parachutes would apply to any proxy or consent materials for a meeting of shareholders held to approve a merger, acquisition or similar fundamental transaction occurring six months after the date of enactment of the proposed legislation.
BROKER VOTING	• **Executive Compensation or "Any Other Significant Matter."** Exchanges would be directed to prohibit broker discretionary voting with respect to executive compensation or "any other significant matter" (to be determined by the SEC). At a minimum, the proposed legislation would prevent brokers from voting uninstructed shares on votes concerning say on pay and say on golden parachutes.	• **No Mandated Transition Period.** Although SEC rulemaking is anticipated, a deadline to implement the new rules is not provided.
COMPENSATION COMMITTEES – MEMBERSHIP	• **Enhanced Independence Requirements.** All members of the compensation committee would be required to satisfy enhanced independence requirements (similar to the Sarbanes-Oxley Act's enhanced independence requirements for members of the audit committee). • **Definition of Independence.** The definition of independence would be developed by the SEC, and would consider the sources of compensation paid to the compensation committee member (including any consulting or advisory fees) and whether the compensation committee member was otherwise affiliated with the issuer. • **Private Equity / Venture Capital Funds.** Private equity and venture capital funds are often affiliates of their portfolio companies, and therefore may be limited in their ability to serve on the compensation committees of equity listed portfolio companies (in a similar manner as the restrictions imposed on audit committee membership under the Sarbanes-Oxley Act).	• **360 Days After Enactment.** The SEC would be required to direct exchanges to prohibit the listing of non-compliant issuers 360 days after enactment of the proposed legislation. Controlled companies would be exempt from the new rules, and the SEC would be directed to develop a cure period for non-compliant issuers.

© 2010 Kirkland & Ellis LLP. All rights reserved.

PROVISION	SUMMARY	TRANSITION
COMPENSATION COMMITTEES – ADVISORS	• **Enhanced Independence Requirements.** Advisors to compensation committees (including compensation consultants and legal advisors) may only be selected "after taking into consideration" factors that may affect the advisor's independence. The definition of independence would be developed by the SEC and would consider whether the advisor provided other services to the issuer, the advisor's fees from the issuer as a percentage of the advisor's total revenues, the advisor's conflict of interest policies, relationships between the compensation committee and the advisor, and any stock of the company owned by the advisor. • **Authority to Retain; Appropriate Funding.** Compensation committees would be authorized to retain a compensation consultant, legal counsel and other advisors. Furthermore, companies would be required to provide 'appropriate' funding to the compensation committee so that such advisors could be retained.	• **One Year After Enactment.** Issuers would be required to disclose whether a compensation consultant had been retained and, if retained, whether any of the consultant's work had raised any conflicts of interest concerns. SEC rulemaking would be required within 360 days after enactment of the proposed legislation, see "Compensation Committees - Membership" above.
CLAWBACKS	• **Summary.** Exchanges would be directed to prohibit the listing of companies that do not develop and implement a policy providing that, in the event the company "is required to prepare an accounting restatement due to the material non-compliance of the issuer with any financial reporting requirement under the securities laws, the issuer will recover from any current or former executive officer of the issuer who received incentive based compensation … during the three-year period proceeding the date on which the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement." • **Current or Former Executive Officers.** Contrasted with the Sarbanes-Oxley Act (which applies to the CEO and CFO), the proposed legislation would apply to any current or former executive officers. • **Three-Year Lookback.** Furthermore, the proposed legislation would implement a three-year lookback period, in comparison to the Sarbanes-Oxley Act's 12-month lookback. • **Misconduct Irrelevant.** Lastly, in contrast to the Sarbanes-Oxley Act, the proposed legislation focuses on whether the incentive compensation was erroneously awarded and does not require any misconduct.	• **No Mandated Transition Period.** Although SEC rulemaking is anticipated, a deadline to implement the new rules is not provided.

© 2010 Kirkland & Ellis LLP. All rights reserved.

PROVISION	SUMMARY	TRANSITION
HEDGING POLICIES	• **Hedging Policies Disclosure.** Companies would be required to disclose whether they prohibit hedging by all employees (i.e., not just officers) and directors with respect to any equity (i.e., not just compensation awards). Disclosures would be required in proxy or consent materials at annual meetings of shareholders after rules are established by the SEC.	• **No Mandated Transition Period.** Although SEC rulemaking is anticipated, a deadline to implement the new rules is not provided.
EXECUTIVE COMPENSATION AND RELATED DISCLOSURE	• **Internal Pay Ratio Disclosure.** Companies would be required to disclose (1) the median total compensation of all employees (other than the CEO), (2) the annual total compensation of the CEO and (3) the ratio of (1) and (2). Calculating total compensation for all employees under SEC rules is likely to be burdensome. • **Pay for Performance Disclosure.** Companies would be required to disclose "the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions." While a graphical presentation is not required, companies are likely to implement this requirement with an enhanced version of their stock performance graph.	• **No Mandated Transition Period.** Although SEC rulemaking is anticipated, a deadline to implement the new rules is not provided.
MAJORITY VOTING	• **Excluded from the Legislation.** Provisions directing the exchanges to implement majority voting in uncontested director elections were eliminated from the legislation. ISS reports that majority voting proposals have averaged 57.6% support at 29 companies during the 2010 proxy season, up from 51.3% during 2009. ISS further indicates that 69.9% of S&P 500 companies have already implemented majority voting in uncontested director elections.	

The views, opinions, statements, analysis and information contained in these materials are those of the individual presenters and do not necessarily reflect the views of Kirkland & Ellis LLP or any of its past, present and future clients. These materials (1) do not constitute legal advice; (2) do not form the basis for the creation of the attorney/client relationship; and (3) should not be relied upon without seeking specific legal advice with respect to the particular facts and current state of the law applicable to any situation requiring legal advice. These materials may only be reproduced with the prior written consent of Kirkland & Ellis LLP. These materials are provided with the understanding that the individual presenters and Kirkland & Ellis LLP are not rendering legal, accounting or other professional advice or opinions on specific facts or matters, and, accordingly, such entities assume no liability whatsoever in connection with their use. © 2010 Kirkland & Ellis LLP. All rights reserved.