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KIRKLAND **M&A UPDATE**

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Looking Ahead to the Future of Proxy Access

The SEC is proposing new rules allowing shareholders meeting certain minimum ownership and other criteria to nominate directors for election directly in the company's proxy statement, instead of through the traditional proxy contest method of sending their own proxy statements.

On May 20, 2009, the SEC voted to propose a comprehensive set of rules governing proxy access. Although the full text of the proposed rules has not yet been made public, with the change of administration and SEC leadership in Washington, D.C., it is likely that the SEC will enact rules that allow shareholders meeting certain minimum ownership (as little as 1% for larger public companies) and other criteria to nominate directors for election directly in the company's proxy statement, rather than being required to use the traditional proxy-contest method of sending their own proxy statements, which is time-consuming and expensive.

It appears the SEC intends that its new rules will supersede contrary state laws and by-law requirements. Based on public statements, the SEC is committed to having these rules in place before the 2010 proxy season, meaning that director nominations are likely to be the pivotal governance issue for the upcoming year. It should be noted, however, that the detailed contours of the SEC proposal are yet to be disclosed and the impact of changes resulting from what is sure to be a lively and contested comment process is still unknown.

This article does not propose to provide a comprehensive overview of the SEC proposals, which will be covered in more detail in a future *Kirkland Alert*. However, based on the information made public to date, there are a few ideas for actions that a company can take to better position itself ahead of the likely effectiveness of the proxy access rules.

According to the SEC release, each year stockholders will be permitted to use the direct access process to nominate the greater of (i) one director (if the board has four or less members) and (ii) up to 25% of the board. Assuming that the SEC does not apply any rounding mechanism, this means that a board consisting of seven members will be subject to only one direct access nominee, while a board with eight members would be subject to two. Similarly, an 11-member board would be subject to two such nominees, while a 12-member board would be subject to three, and so on.

As such, board size soon may take on an additional level of importance. While determining the appropriate board size

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Chambers USA 2009

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The Legal 500 U.S. 2009

1st - Global Buyouts by volume,
1st - USA Buyouts by volume,
Mergermarket's *Global M&A Round-Up for Year End 2008*

2008 "Banking Team of the Year,"
Dow Jones *Private Equity News* Awards for Excellence in Advisory Services

Best Law Firm, Private Equity Deals,
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1st - Private Equity by volume,
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involves many delicate considerations beyond (and likely more important than) the impact of these potential new proxy access rules, utilizing the above-described math factors could be useful when considering board composition over the coming months. For example, if a vacancy occurs as a result of a resignation, it may be worth leaving the vacancy unfilled and shrinking the board size if such a move would shift the company into a lower "multiple of four" bracket (e.g., if a resignation occurs on a 12-member board, shrinking the board size to 11 would expose the company to only two direct access nominees rather than three if it chose to fill the vacancy). Alternatively, if increasing the size of the board is a near-term consideration (or becomes such a consideration in order to preemptively dilute the possible disruptive impact of elected direct access nominees), the same math merits consideration—it may be advisable, for example, to increase a 13-member board to 15 rather than 16 members so that it remains subject to only three direct access nominees rather than four. There are many permutations, but the basic principle remains the same.

The window for a company to take these actions in the run-up to the enactment of the proxy access rules may prove to be somewhat limited. Actions relating to board size will be subject to a greater degree of scrutiny from shareholders and governance activists as the final rules near effectiveness, particularly if the actions taken by a company directly impact the number of available slots for direct access nominees. Moreover, it is expected that the SEC rules will include an annual deadline of some sort, after which changes to board size will not affect the number of nominees eligible to use the direct access process for that year's upcoming annual meeting.

Of course, it remains possible, albeit unlikely, that the proxy access rules will not be in place in time to affect a company's 2010 annual meeting. In addition, the final rules may include changes or details that impact the effectiveness of the "board math" strategy proposed above. However, given that the governance spotlight will likely be more unforgiving in the run-up to the 2010 proxy season, some of these strategies may better position a company for the new world of direct proxy access.

If you have any questions about the matters addressed in this *Kirkland M&A Update* article, please contact the following Kirkland author or your regular Kirkland contact.

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Noted M&A Attorneys David Fox and Daniel Wolf Join Kirkland

David Fox and Daniel Wolf, prominent M&A lawyers, join Kirkland's Corporate practice from Skadden, Arps, Slate, Meagher & Flom.

Kirkland proudly announces that David Fox and Daniel E. Wolf, prominent M&A lawyers, have joined the firm's New York office as partners. David and Daniel come to Kirkland from Skadden, Arps, Slate, Meagher & Flom, where David had been a leader of Skadden's Corporate Group and a member of the firm's governing body.

In his more than 20 years of practice at Skadden, David Fox has advised leading companies on multifaceted domestic and international transactions. David also regularly counsels senior management in crisis situations and general governance matters. He has been a key figure in some of the highest-profile deals of the last decade, including, most recently, his representation of BHP Billiton in the largest transaction of 2008, the now-withdrawn $150 billion offer to acquire Rio Tinto, and real estate brokerage company Realogy Corporation in its $9 billion going-private acquisition by Apollo Management, L.P. David also represented the board of directors of Toys "R" Us, Inc. in its $6.6 billion acquisition by an investment group led by Kohlberg Kravis Roberts & Co., Bain Capital Partners LLC and Vornado Realty Trust. Other major representations include advising Cendant Corporation in its separation into three independent public companies and the $4.3 billion sale of its Travelport unit, representing Landmark Communications Inc. in its sale of The Weather Channel and advising Aztar Corp. in a bidding war that ended in the company's sale for $2.75 billion. To read David's full biography, visit http://www.kirkland.com/dfox.

Daniel Wolf focuses his thriving practice on mergers and acquisitions, corporate finance, securities and general corporate matters. He has been recognized by *The New York Times* as one of the "next generation of deal makers" under the age of 40, and was also named to *Investment Dealer's Digest*'s "40 Under 40." Daniel has substantial experience in the hospitality, health care, financial services and telecommunications industries and has advised clients on many significant negotiated and contested M&A transactions, including, among others, American General Corp.'s $25 billion merger-of-equals transaction with Prudential plc and its subsequent hostile takeover by American International Group (AIG). Other major representations include that of ECI Telecom Ltd. in its $1.2 billion buyout by a private equity consortium in the first significant private equity buyout of an Israeli public company and his representation of a consortium of buyers in the $800 million announced leveraged buyout of Winston Hotels Inc., a public hotel REIT. Daniel also collaborated with David in advising BHP Billiton in its $150 billion offer to acquire Rio Tinto and many other major transactions. To read Daniel's full biography, visit http://www.kirkland.com/dwolf.