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KIRKLAND **GOVERNANCE WATCH**

August 2009

Kirkland Governance Watch is a periodic publication summarizing significant corporate governance developments in order for senior management and boards of directors to remain informed and begin to consider key planning implications and initiatives.

An extraordinary amount of proposed corporate governance reform is currently under consideration, representing the potential for significant changes in the overall corporate governance landscape.

An extraordinary amount of proposed corporate governance reform is currently under consideration. Proposals have come from a variety of sources, federal and state legislators, the Securities and Exchange Commission (SEC), national securities exchanges and shareholder activists. Taken as a whole, these developments represent significant changes in the overall corporate governance landscape.

In this first edition of *Kirkland Governance Watch*, we bring together in one place a concise summary of the terms and status of the most significant corporate governance developments in recent months:

- **Proxy Access and the Election Exclusion**

  Shareholders' rights to require the company to include in the company's proxy materials both shareholder nominees to the board and proposals concerning board nomination procedures

  Status: *Comments due on the SEC's proposed rules by* ***August 17, 2009***

- **Broker Discretionary Voting**

  Elimination of broker discretionary voting in uncontested director elections

  Status: *Applicable at meetings held on or after* ***January 1, 2010***

- **Majority Voting**

  Mandatory adoption of majority voting for uncontested elections of directors

  Status: *Multiple federal proposals currently pending*

- **Mandatory "Say on Pay"**

  Shareholders' rights to an advisory vote on executive compensation

  Status: *Multiple federal proposals currently pending; Corporate and Financial Institution Compensation Fainess Act of 2009 (HR 3269) was approved by the House of Representatives on July 31, 2009*

- **Compensation Committee Independence**

  Mandatory independence of each compensation committee member as well as funding for retention of independent advisers

  Status: *Multiple federal proposals currently pending; Corporate and Financial Institution Compensation Fairness Act of 2009 (HR 3269) was approved by the House of Representatives on July 31, 2009*

- **Compensation and Governance Disclosures**

  Amendments to current proxy statement disclosures and to proxy procedures aimed at improving disclosure and facilitating shareholder communications

  Status: *Comments due on the SEC's proposed rules by* ***September 15, 2009***

We have outlined the more significant aspects of these corporate governance developments in our ***Overview of Recent Developments***,[1] which contains hyperlinks that permit direct access to underlying source documents of interest.

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Suggested Actions

In the wake of the current economic crisis, members of senior management and boards of directors should anticipate a strong push by federal and state legislators, the SEC, national securities exchanges and activists to implement some or all of the above initiatives in time to affect the annual meetings of U.S. public companies in 2010.

Given the significant impact of these developments, in the short term members of senior management and boards of directors should consider the following:

- **Take Inventory.** With the assistance of the attached chart and outside counsel, consider the potential impact of the each of the recent corporate governance developments on your company.
- **Review Charter and Bylaws.** The above developments will make it critical that the company's advance notice quorum and, if applicable, majority voting standards operate as intended.
- **Update Shareholder Communication Procedures.** The current economic climate and the elimination of broker discretionary voting will make it more important than ever to communicate effectively with shareholders and understand the composition of the company's shareholder base.
- **Comment on the Proposed Rules.** The SEC's proposed rules contain a multitude of specific requests for comment. Given the lengthy list of questions and the vast array of potential "answers" on proxy access in particular, companies should consider taking an active role in attempting to shape the final outcome of the SEC's proposed proxy access rules.
- **Review D&O Questionnaires.** Among other matters, the SEC's proposed rules, if adopted, would require more fulsome detail concerning each director and director nominee's experience and qualifications as well as lengthen the time periods applicable to disclosures regarding other directorships and legal proceedings.
- **Assess Compensation Consultant Independence.** Given the enhanced scrutiny of compensation consultant independence, a critical assessment of potential conflicts of interest and propriety of fees paid should be considered.
- **Begin Planning for a "Say on Pay."** Successful navigation of a say on pay proposal depends on a sound planning and communications process. Changes to the company's compensation policies, practices and disclosures may be necessary, so early planning is critical.

1 This publication does not specifically address requirements uniquely applicable to "small business issuers," "registered investment companies," "foreign private issuers," or financial institutions.

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KIRKLAND **GOVERNANCE WATCH** KIRKLAND & ELLIS LLP

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KIRKLAND **GOVERNANCE WATCH**

Overview of Recent Developments

August 2009

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Proxy Access (Proposed Exchange Act Rule 14a-11)	
Overview	On June 10, 2009, the Securities and Exchange Commission (the "SEC") proposed new Exchange Act Rule 14a-11 which would, under certain circumstances, provide shareholders an opportunity to include shareholders' director nominees in company proxy materials. Proposed Rule 14a-11, while not new in concept, has returned to the forefront of the SEC's corporate governance agenda under the mantra of investor advocacy. The proposed rule aims to facilitate "the ability of shareholders to exercise their fundamental right under state law to nominate and elect members to company boards of directors" by imposing federally mandated proxy access for director elections.[1] If the SEC's proposals sound familiar it is likely because the SEC touched on this subject previously, both in 2003 and 2007.[2] Public comments on the proposed rules are due by August 17, 2009.[3] Most commentators suspect that the SEC's comment deadline is an effort to have the proposed rules become effective in time for the 2010 proxy season. However, given the contentious nature of this proposal and the number of unresolved issues identified in the release, the adoption of proxy access in this time frame seems ambitious. Given the ongoing economic crisis, tremendous political pressure to adopt proxy access and the historic levels of federal government activism, we believe it is no longer a question of whether or not proxy access will be adopted but a question of when and in what form. **Securities Act Rel. No. 9046**
Company Eligibility	Proposed Rule 14a-11 would apply to all companies subject to the Exchange Act proxy rules (other than companies that are subject to the proxy rules solely because they have a class of debt registered under Section 12 of the Exchange Act—"debt only issuers"). "Controlled companies" are not presently exempt from the rule (although the SEC has solicited comments in this regard).
Six "Core" Requirements	Proposed Rule 14a-11 contains the following six "core" requirements that must be satisfied for the nominee to be included in the company's proxy materials: • state law / governing documents nomination restrictions; • nominee eligibility; • shareholder eligibility; • Schedule 14N; • anti-fraud requirements; and • number of permitted shareholder nominees. Each of these requirements is discussed in greater detail below.

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Proxy Access (Proposed Exchange Act Rule 14a-11)	
State Law / Governing Documents Nomination Restrictions	Where applicable state law or the company's governing documents prohibit the company's shareholders from nominating a candidate for election as a director, Rule 14a-11 would be inapplicable (meaning that the company would not be required to include the shareholder's nominee in the company's proxy statement). In the case where a company's governing documents prohibited nomination, however, shareholders would be able to seek amendment of such provisions by submitting a shareholder proposal under the proposed amendment to Rule 14a-8(i)(8).
Nominee Eligibility	For the nominee to be included in the company's proxy materials, the nominee's candidacy or board membership (if elected) must not violate state law, the company's governing documents, federal law or the rules of a national securities exchange (other than rules regarding subjective determinations of independence).
Shareholder Eligibility	*Ownership Thresholds.* Under proposed Rule 14a-11, nominating shareholders must meet certain beneficial ownership thresholds, which are tiered based on the size of the company. Specifically, nominating shareholders must beneficially own: • at least 1% of the outstanding voting securities of "large accelerated filers" (generally companies with a public float of $700 million or more); • at least 3% of the outstanding voting securities of "accelerated filers" (generally companies with a public float of $75 million or more but less than $700 million); and • at least 5% of the outstanding voting securities of "non-accelerated filers" (generally companies with a public float below $75 million).[4] In performing the above calculation the SEC's proposed rules indicate that the *numerator* (i.e., the nominating shareholder or group's ownership) would be determined as of the date of the related Schedule 14N filing and that the *denominator* (i.e., the number of shares outstanding) would be determined by reference to the "company's securities that are entitled to be voted" at the shareholder meeting. In determining the denominator, the nominating shareholder or group would be entitled to rely upon information set forth in the company's most recent SEC filing (unless the nominating shareholder or group knows or has reason to know that such information is inaccurate). The proposed rules do not presently specifically address circumstances which may arise when the denominator used by the nominating shareholder or group differs from the actual number of shares entitled to vote at the meeting (for example if the record date for the meeting has not been set as of the date of the Schedule 14N filing[5] or should the number of shares outstanding increase after the filing of the Schedule 14N but prior to the meeting). Shareholders would be permitted to aggregate their shares for purposes of meeting the applicable minimum threshold.[6] *Ownership Period.* In addition to the ownership thresholds, nominating shareholders or groups must have held the securities used for purposes

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Proxy Access (Proposed Exchange Act Rule 14a-11)	
	of determining eligibility above continuously for at least one year (measured as of the date of the shareholder's Schedule 14N filing) and represent that they plan to continue to own the subject securities through the date of the meeting. Somewhat notably however, shareholders would not be required to hold their shares for a specified period of time following the annual meeting—even if the shareholder's nominee was elected. *No Control Intent*. Finally, the nominating shareholder or group must represent that it has no control intent.
Schedule 14N	The Schedule 14N would include the following eleven primary disclosure requirements: • *no violation of law or exchange rules* – a statement that the nominee's candidacy (or if elected, board membership) would not violate controlling state law, federal law or rules of a national securities exchange or national securities association (other than rules regarding independence); • *shareholder eligibility* – a representation that the nominating shareholder or group satisfies Rule 14a-11's shareholder eligibility requirements (including the lack of a control intent, satisfaction of ownership requirements and a statement of intent to hold requisite shares through the meeting date)—see "Shareholder Eligibility" above; • *nominee eligibility* – a statement that the nominee meets the generally applicable objective criteria for independence of the national securities exchange or national securities association (for this purpose subjective standards and heightened standards applicable to committees, such as the audit committee, would be disregarded); • *no agreements regarding nomination* – a representation that the nominating shareholder or group does not have an agreement with the company regarding the nomination; [7] • *consent to be named and serve* – a statement that the nominee consents to be named in the company's proxy statement and serve as a director; • *nominee disclosures required under traditional proxy contest rules* – proxy contest disclosures specified by Items 4(b) (Solicitations subject to Rule 14a-12(c)), 5(b) (Solicitation subject to Rule 14a-12(c)) and 7(a)-(c) (Directors and Executive Officers) of Schedule 14A; • *nominating shareholder or group disclosures required under traditional proxy contest rules* – proxy contest disclosures specified by Items 4(b) (Solicitations subject to Rule 14a-12(c)) and 5(b) (Solicitation subject to Rule 14a-12(c)) of Schedule 14A; • *legal proceedings* – disclosure as to whether the nominating shareholder or group has been involved in certain legal proceedings during the past five years; • *relationships between the shareholder/nominee and the company* – disclosure concerning relationships between the nominating

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Proxy Access (Proposed Exchange Act Rule 14a-11)

shareholder or group or nominee and the company (including contracts and pending or threatened litigation and present or *past* employment);

- *shareholder's website address* – disclosure regarding the website address on which the nominating shareholder group may publish soliciting materials; and
- *500-word statement of support* – the nominating shareholder or group would be permitted to have 500 words of support for its nominee included in the company's proxy statement (any arguments in favor of the nominee, including headings, would be included in the 500 word count; linking to a website would count as one word).

If adopted, the core disclosure requirements would be broader than those required in a traditional proxy contest in that the proposed Schedule 14N would also require representations regarding nominee eligibility, shareholder eligibility (including satisfaction of beneficial ownership tests) and lack of control intent.

Notably, however, the proposed rules do not presently require the nominating shareholder or group to disclose holdings of competitors of the company (even if those holdings are significant). Furthermore, a more limited set of disclosure requirements are applicable if the nomination is made pursuant to procedures set forth under applicable state law or the company's governing documents.

Filed with the company, the SEC and the exchange. A nominating shareholder or group would be required to file a new Schedule 14N with the company, the SEC and each national securities exchange on which the company's securities are listed.

Time of filing generally based on advance notice bylaws or, if not applicable, prior year's mailing date. The Schedule 14N would be required to be filed (1) by the date specified in the company's advance notice bylaws or (2) where no such provision is in place, 120 days before the date that the company mailed its proxy materials for the prior year's annual meeting. This means that *a company's advance notice bylaws will control* in determining the latest date by which a company must receive notice of a shareholder's nominee.[8] If the company did not hold an annual meeting during the prior year, or if the date of the meting has changed by more than 30 calendar days from the prior year, then the nominating shareholder must provide notice a *reasonable time* before the company mails its proxy materials. In such instance, the company would be required to disclose the date by which the shareholder must submit the required notice in a Form 8-K filed pursuant to proposed Item 5.07 within four business days after the company determines the anticipated meeting date.[9] The Schedule 14N would be required to be filed with the SEC on the same date that notice is first sent to the company.

Amended for material changes and a 'final' amendment. The Schedule 14N would be required to be amended any time there was a material change (for example, withdrawal of a nominee or nominating shareholder or group). A final amendment would be required within 10 calendar days of the final results of the election being announced by the company and would be required to disclose the nominating shareholders' or groups' intent with regard to continued ownership of the company's shares post-election.

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Proxy Access (Proposed Exchange Act Rule 14a-11)	
False or Misleading Statements	The company would be permitted to exclude a shareholder nominee if any representation or certification required in the Schedule 14N was false or misleading in any material respect. In addition, the SEC's proposed rules amend Rule 14a-9 to apply general anti-fraud based liability to nominating shareholders' or groups' disclosures.
Number of Permitted Shareholder Nominees	A company would be required to include in its proxy statement no more than one shareholder nominee or the number of nominees that represents 25% of the company's board of directors, whichever is greater. The required number of shareholder nominees is an absolute measurement at any point in time, not a requirement for every meeting at which director nominees are considered. For example, where a company has a staggered board with a director currently serving who was elected as a shareholder nominee pursuant to Rule 14a-11 and will continue his or her term past the date of the meeting, such director would be counted towards the 25% maximum in the company's determination of whether it would be required to include additional shareholder nominees for election at the meeting (despite the fact that such director would not currently be up for election). The proposed rules indicate that if the company has an agreement with the nominating shareholder or group regarding the nomination of an individual as a director, that individual is not included in the list of 14a-11 directors. Presently, however, the proposed rules are unclear as to whether a 14a-11 director who was elected in the prior year and re-nominated by the *company* the following year is included as a 14a-11 director or a non-14a-11 director for the purpose of the above calculation. We further note that the proposed rules still permit "board math" strategies and considerations, see our May 29, 2009 ***Kirkland M&A Update***.[10] Shareholder nominees would be included in a company's proxy on a first-in standard. If more than one shareholder or shareholder group submitted notice of a shareholder nominee, the company would be required to include the nominee of the first nominating shareholder or group and thereafter up to and including the total number of shareholder nominees required to be included by the company. This first-in rule applies regardless of the relative size of holdings of the shareholders or shareholder groups. The proposed rules do not presently specifically address when the "clock starts" for determining the first Schedule 14N filed (for example, whether the time begins to run after the company has announced a meeting? at the beginning of the company's fiscal year? nominating shareholders could file a Schedule 14N year(s) in advance?)
Excluding a Shareholder Nominee	As a threshold question, the company would determine whether it was required under proposed Rule 14a-11 to include a nominee. For a description of the six "core" requirements that must be satisfied for a nominee to be included in the company's proxy materials see "Six Core Requirements" above. The below timeline sets forth the process by which a company may exclude a shareholder nominee:

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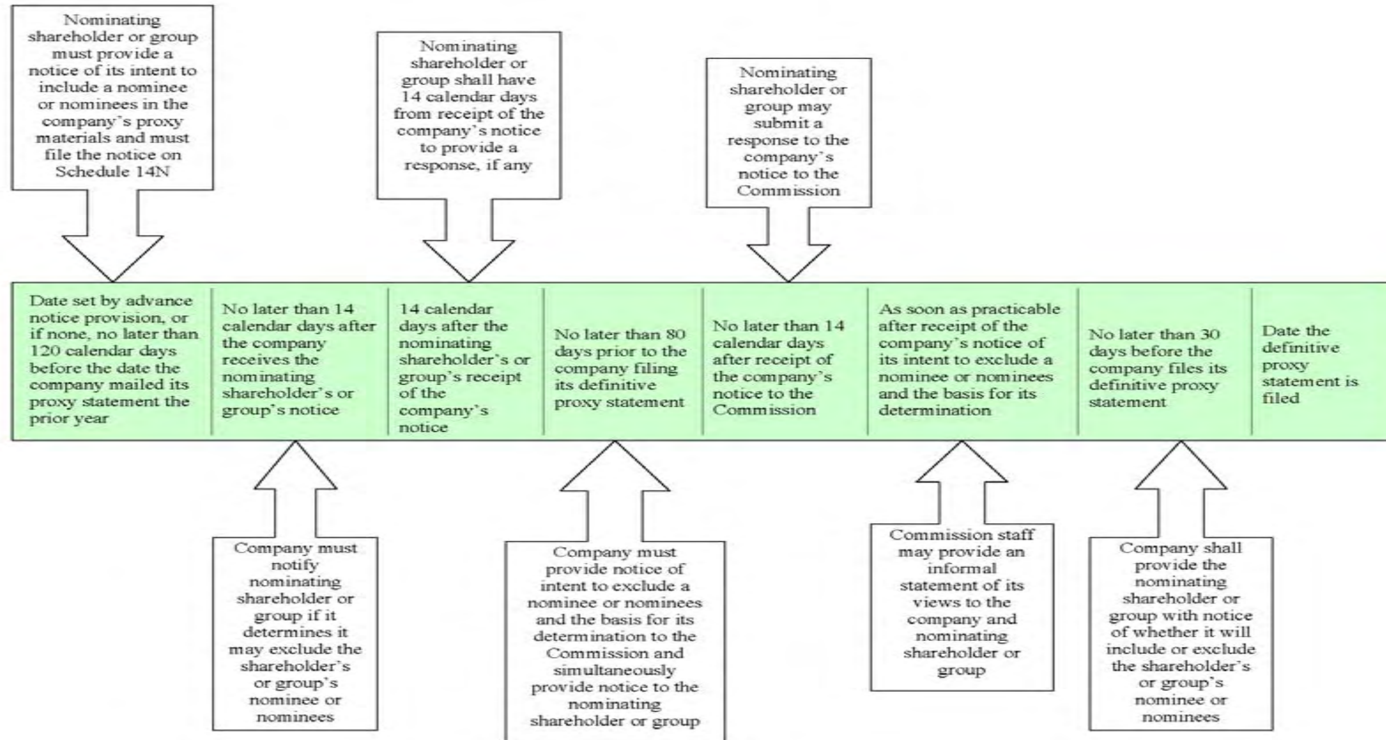
<table>
<tr><th colspan="2">Proxy Access (Proposed Exchange Act Rule 14a-11)</th></tr>
<tr><td></td><td>



As noted in endnote 8, a company's advance notice bylaws may make it impossible for the company to provide the SEC with notice of its intent to exclude a nominee 80 days prior to filing its definitive proxy statement. The SEC's proposed rules indicate that the SEC may relax this 80-day deadline if the company demonstrates "good cause" for missing the deadline.

The burden would generally be upon the company to demonstrate that it may exclude a nominee.

</td></tr>
<tr><td>Loss of Shareholder Eligibility</td><td>The proposed rules do not presently address the circumstance where a shareholder or director nominee meets the eligibility requirements of proposed Rule 14a-11 at the time of filing Schedule 14N, but such eligibility is not satisfied as of the date of the shareholder meeting (for example, a change in the shareholder's "control" intent). From a practical perspective it will be difficult (if not impossible) to completely "undo" the harm potentially caused by a nominee inappropriately included in a company's proxy materials although advance resignation</td></tr>
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Proxy Access (Proposed Exchange Act Rule 14a-11)	
	procedures may be considered.
Proxy Exemptions for the Formation of Shareholder Nominating Groups	The proposed rules contain exemptions from the proxy rules for the purpose of facilitating formation of a nominating shareholder group. Under the proposed exemptions, written communications would generally not be subject to SEC's proxy requirements as long as the written communication is filed with the SEC (on the date of its first use) and contains no more than: • the shareholder's intent to form a nominating shareholder group; • identification of the potential nominee or criteria to select the nominee; • the percentage of securities owned by the shareholder; and • the means by which the shareholder can be contacted. In addition shareholders would also have the ability to avail themselves of other existing proxy exemptions, including solicitations of less than 10 shareholders[11] and communications in electronic shareholder forums.[12]
Proxy Exemptions for the Purpose of Soliciting in Favor of the Shareholder Nominee	The proposed rules contain further exemptions from the proxy rules for the purpose of facilitating the nominating shareholder or group's ability to conduct solicitations for their nominee outside of the company's proxy statement. Under the proposed exemptions, written communications would generally not be subject to the SEC's proxy requirements as long as the written communication is filed with the SEC and each exchange on which the company's securities are listed (in each case, on the date of its first use) and includes: • the identity of the nominating shareholder or group and a description of all direct or indirect interests in the company, by security holdings or otherwise; and • a legend that advises shareholders to read the company's proxy statement and where the company's proxy statement can be found.
Potential Impact of Proposed Federal Legislation	The proposed Shareholder Bill of Rights Act of 2009 and the Shareholder Empowerment Act of 2009 aim to provide shareholders with an enhanced role in corporate oversight. Both proposed Acts are rooted in shareholder activism and are similarly focused on the director nomination and election process. To that end, the proposed Shareholder Bill of Rights Act of 2009 and the Shareholder Empowerment Act of 2009 mandate the SEC to establish rules providing for shareholder access to company proxy statements for inclusion of director nominees by shareholders who have beneficially owned at least 1% of the outstanding voting securities of a company for a minimum of two years.[13] The proposed Acts would specifically provide the SEC with the rulemaking authority on the topic of proxy access (reducing, although—as discussed below—not eliminating, the potential that the SEC's proposed proxy access rules may be challenged). **Shareholder Bill of Rights Act of 2009**

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Proxy Access (Proposed Exchange Act Rule 14a-11)	
	Shareholder Empowerment Act of 2009
Potential Impact of Recent State Legislation	The DGCL was amended, effective as of August 1, 2009, to add a new Section 112, which provides that a Delaware company may (but need not) grant shareholders proxy access for director nominees.[14] Section 112 further provides a non-exclusive list of procedures and conditions that a company may choose to impose with respect to shareholder nominations, which includes, among others: • minimum thresholds for stock ownership of a nominating shareholder both in amount and duration; • disclosure regarding the nominating shareholder and the director nominee, including stock ownership levels; and • the right to exclude a director nominee if the nominating shareholder or the director nominee or any of their affiliates has acquired or publicly proposed to acquire more than a specified amount of company stock within a specified period prior to the election of directors—in other words, the company would have the right to exclude a director nominee if such nominee or the nominating shareholder or their affiliates had a control intent. These amendments to the DGCL are discussed in more detail in our June 30, 2009 ***Kirkland M&A Update***. **DGCL 112**
Authority and Preemption Debate	A debate looms largely over the SEC's proposed proxy access rules, with business groups arguing that the SEC lacks the authority to promulgate such rules and further, that the proposed rules create substantive shareholder rights as opposed to merely establishing procedure—in short, infringing on the states' rights to dictate shareholders' rights. Others counter that the SEC's proposed rules merely provide a federal framework for the rights created under state law, citing for example, that the SEC's proposed proxy access rules would be additive, not trump, the proposed amendments to the DGCL and that the proposed rules would not create new shareholders' rights, but rather would put shareholders in the same place as if they had physically attended a company's annual meeting. As to whether the SEC has the authority to promulgate the proposed proxy access rules, arguments have been made that the SEC is granted sufficiently broad rulemaking authority under Section 14(a) of the Exchange Act, which provides the SEC with the authority to create rules and regulations with respect to the solicitation of proxies. While resolution to these issues is at present uncertain, litigation is likely.

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Election Exclusion (Proposed Amendments to Rule 14a-8(i))	
Overview	Rule 14a-8(i) presently allows a company to exclude from its proxy materials shareholder proposals that relate to a nomination or election to the company's board of directors or a procedure for such nomination or election.[15] On June 10, 2009, the SEC proposed amendments to Rule 14a-8(i) which would provide shareholders, subject to certain conditions, with the ability to include in company proxy materials proposals concerning director nomination procedures. The SEC states that the purpose of the proposed rules is to facilitate "the ability of shareholders to exercise their fundamental right under state law to nominate and elect members to company boards of directors." The SEC's proposed timing for adoption of amendments to Rule 14a-8(i) tracks the SEC's proposed adoption of proxy access Rule 14a-11 discussed above. See "Proxy Access – Overview" above.
Potential Impact of Proposed Rules by the SEC	The SEC has proposed amendments to Rule 14a-8(i)(8) which, if effective, would provide that a shareholder would be able to require the company to include in its proxy materials proposals that would amend, or request an amendment to, a company's governing documents regarding director nomination procedures or disclosures related to shareholder nominations so long as the proposal complies with the other requirements of Rule 14a-8 and is not in conflict with the proposed Rule 14a-11 or applicable state law. The proposed amendments to Rule 14a-8(i)(8) also aim to codify certain prior staff interpretations with respect to the type of proposals that would continue to be excludable, namely a company would be permitted to exclude a proposal under Rule 14a-8(i)(8) if it would: • disqualify a nominee who is standing for election; • remove a director from office before the expiration of his or her term; • question the competence, business judgment or character of one or more nominees or directors; or • nominate a director for election to the board of directors, other than pursuant to proposed Rule 14a-11, applicable state law or a company's governing documents or could otherwise affect the outcome of the election of directors. The proposed amendments to Rule 14a-8(i) gain increased significance when considered in light of the overall increases in shareholder activism. During the 2009 proxy season, companies were less successful in fighting shareholder governance proposals than in years past, despite an increase in effort. According to RiskMetrics Group, as of March 25, 2009, companies had filed no-action letters to exclude 37% (212 of 574) of shareholder corporate governance proposals, which marks an increase from 33% of exclusions sought in 2008. The company success rate on the no-action letters was 48% (75 of 157), down from the 69% success rate achieved in 2008. **Proposed Amendment to Rule 14a-8(i)(8)** **RiskMetrics' March 2009 Report**

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Broker Discretionary Voting (Amendments to NYSE Rule 452)	
Overview	As discussed in our July 7, 2009 ***Kirkland Alert***, on July 1, 2009, the SEC approved a proposed amendment to New York Stock Exchange ("NYSE") Rule 452 to provide that the election of directors is not a routine matter for which NYSE member firms would be permitted to cast votes for uninstructed shares. Currently, NYSE Rule 452 provides that if a broker does not receive instructions from a beneficial shareholder at least 10 days prior to the meeting date, the broker may exercise discretion in voting for "routine" matters—namely votes in favor of the board-recommended slate of directors in an uncontested election. The amended rule will become applicable to voting at annual meetings held on or after January 1, 2010 regardless of the stock exchange upon which a company is listed. In preparation for the 2010 proxy season, companies should consult with their proxy advisors and legal counsel now to assess the potential impact of the rule change on their annual meeting and the election of their directors. **Amendment to NYSE Rule 452** **SEC Press Release regarding Approval of Amendment to Rule 452**
Impact of Amendment to NYSE Rule 452	Revised NYSE Rule 452 characterizes uncontested director elections as "non-routine" matters, thereby eliminating the ability for brokers to exercise their discretionary voting power in the instance where a beneficial shareholder has not provided such broker voting instructions at least 10 days prior to the meeting date. This amendment is significant in that previously NYSE Rule 452 had treated the uncontested election of directors as a "routine" matter, which allowed for broker discretionary voting. Brokers had typically cast uninstructed shares on behalf of retail holders and had generally voted such uninstructed shares in accordance with the board's recommendations or in the same proportion as the actual instructions from retail investors dictated.[16] Under amended Rule 452, companies, particularly those with majority voting provisions, will need to: • revise proxy disclosure to describe the impact of amended Rule 452; • consider adding a routine matter (such as ratification of the company's auditors) so that broker non-votes for the routine proposal will be counted in determining whether quorum thresholds are met; • increase efforts with respect to voter turnout, especially if a majority voting standard is in place; [17] • consider their shareholder base when assessing whether to use the SEC's "notice only" e-proxy delivery option, particularly whether a low retail shareholder turn out (which is common in the case of "notice only" e-proxy delivery) could jeopardize attaining quorum thresholds;[18] • consider the potential for heightened impact of those who do vote, including "withhold the vote" campaigns and other shareholder activism; and

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Broker Discretionary Voting (Amendments to NYSE Rule 452)	
	• diligently monitor proxy advisory firms' voting recommendations. This amendment to the NYSE Rule 452 is discussed in more detail in our July 7, 2009 ***Kirkland Alert***.

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Majority Voting (Various Federal Proposals)	
Overview	Most states' corporate laws provide the default rule that shareholders elect directors by plurality vote. Although companies are always free to set a higher standard, such as majority voting, historically few companies have chosen to do so. In recent years shareholder activists have encouraged companies to replace their plurality voting standards with majority voting standards in uncontested director elections based on the belief that majority voting would provide shareholders with a more effective means of voicing their discontent with director candidates nominated by the board. A recent study by The Corporate Library[19] indicates that over two-thirds of companies in the S&P 500 have enacted some form of majority voting in uncontested director elections. However, a plurality voting standard amongst smaller companies is still the norm. Nearly 54.5% of Russell 100 companies and 74.9% of Russell 3000 companies have retained a plurality voting standard in director elections.
Potential Impact of Proposed Federal Legislation	The proposed Shareholder Bill of Rights Act of 2009 and the Shareholder Empowerment Act of 2009 both seek to mandate majority voting in uncontested director elections of listed U.S. public companies. Specifically, both Acts provide that all listed U.S. public company directors shall be elected (1) by a majority of votes cast as to each nominee in uncontested board elections, and (2) by the vote of a plurality of votes cast in contested board elections (where the number of nominees exceeds the number of directors to be elected). However, the two proposed Acts differ in the prescribed resignation policy for directors not elected to a new term in an uncontested election. Under the proposed Shareholder Bill of Rights Act of 2009, such director would tender his or her resignation to the board and the board would be required to accept such resignation. Under the proposed Shareholder Empowerment Act of 2009, such director would offer to tender his or her resignation to the board and the board would have the discretion as to what action should be taken as to that resignation. Given the "holdover rule" in most states corporate statutes, the board's discretion in accepting a director's resignation is significant in whether or not the directors in question is removed from the board. The proposed Shareholder Bill of Rights Act of 2009 and the Shareholder Empowerment Act of 2009 are discussed above in further detail in the section entitled "Proxy Access (Proposed Exchange Act Rule 14a-11)—Potential Impact of Proposed Federal Legislation" and endnote 13. **Shareholder Bill of Rights Act of 2009** **Shareholder Empowerment Act of 2009**

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Mandatory "Say on Pay" (Various Federal Proposals)	
Overview	The proposed versions of say on pay legislation, currently abounding in many variations, all effectively provide shareholders the right to have a non-binding vote on executive compensation. Say on pay legislation, which if adopted would be applicable to all U.S. public companies, is gaining momentum because many believe that certain compensation practices encouraged the excessive risk-taking that contributed to the current economic crisis.[20] Proponents of say on pay feel that shareholder approval, albeit non-binding, will result in greater attention to executive compensation by companies and their boards, as well as serve to more closely align executive pay with shareholder interests.
Potential Impact of Proposed Federal Legislation	Say on pay legislation has been gaining momentum since 2007, when a say on pay bill was introduced by Congressman Barney Frank (D-MA) on March 1, 2007, and passed by the House of Representatives on April 20, 2007. A comparable Senate bill was subsequently introduced to the Senate by then Senator Barack Obama (D-IL). Furthermore, each of the following proposed federal legislation seek to mandate a non-binding, advisory shareholder vote on executive compensation at any annual or special meeting where compensation disclosure is required under the SEC's proxy rules: • the Shareholder Bill of Rights Act of 2009 (Senator Charles Schumer; D-NY); • the Shareholder Empowerment Act of 2009 (Congressman Gary Peters, D-MI); • the Investor Protection Act of 2009 (Treasury Department); • the Corporate and Financial Institution Compensation Fairness Act of 2009 (Congressman Barney Frank, D-MA); • the Corporate Governance Reform Act of 2009 (Congressman Keith Ellison, D-MN); and • the Proxy Voting Transparency Act of 2009 (Congresswoman Mary Jo Kilroy, D-OH). The proposed Proxy Voting Transparency Act of 2009, Investor Protection Act of 2009, Shareholder Bill of Rights Act of 2009 and Corporate and Financial Institution Compensation Fairness Act of 2009 further call for say on pay in the context of golden parachutes.[21] The Corporate and Financial Institution Compensation Fairness Act of 2009, which was approved by the House of Representatives on July 31, 2009, specifically states that the non-binding shareholder vote will not overrule a compensation decision by the board or create or imply any additional fiduciary duty of the board. However, despite this language, there is concern that the say on pay vote will be construed to impute new fiduciary duties to the board. The Senate is not expected to consider legislation similar to the Corporate and Financial Institution Compensation Fairness Act of 2009 until

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Mandatory "Say on Pay" (Various Federal Proposals)	
	sometime after the August 2009 recess. The effective date for the say on pay requirement in the House-approved Act is six months after the SEC adopts rules implementing the same (the SEC is directed to adopt rules within six months of enactment of the Act into law). As such, mandatory say on pay is not likely to be in effect during the 2010 proxy season. **Shareholder Bill of Rights Act of 2009** **Shareholder Empowerment Act of 2009** **Investor Protection Act of 2009** **Corporate and Financial Institution Compensation Fairness Act of 2009** **Corporate Governance Reform Act of 2009** **Proxy Voting Transparency Act of 2009**
Potential Impact of Other Recent Developments	The advancement of say on pay legislative initiatives is coupled with increased scrutiny of executive compensation decisions. On June 10, 2009 Treasury Secretary Geithner outlined principles that companies should consider in designing executive compensation, including principles concerning: • pay for performance; • long term value creation; • compensation programs and risk management; • golden parachutes and supplemental retirement packages; • compensation committee member independence and compensation consultant independence; and • clarity in executive compensation disclosures. In May 2009, Senator Richard Durbin (D-IL) introduced to the Senate the Excessive Pay Shareholder Approval Act and the Excessive Pay Capped Deduction Act of 2009. The Excessive Pay Shareholder Approval Act seeks to require a 60% shareholder vote to approve a compensation program at U.S. public companies in which highest paid employees are paid more than 100 times the average employee of the company. The Excessive Pay Capped Deduction Act of 2009 would define "excessive compensation" as the amount by which compensation to any employee is greater than 100 times the company's average employee compensation. Under the Excessive Pay Capped Deduction Act of 2009, no federal income tax deductions would be allowed for any such "excessive compensation." In July 2009, Senators Carl Levin (D-MI) and John McCain (R-AZ) introduced to the Senate the Ending Excessive Corporate Deductions for

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Mandatory "Say on Pay" (Various Federal Proposals)	
	Stock Options Act, which aims to curb certain corporate tax deductions currently allowed in connection with option grants. Specifically, the Ending Excessive Corporate Deductions for Stock Options Act would amend the Internal Revenue Code of 1986 to provide that a company's tax benefits based upon stock option compensation expenses be consistent with its accounting expenses for such stock option compensation. Furthermore, on July 10, 2009, the SEC proposed amendments to the Compensation Discussion and Analysis required under Item 402 of Regulation S-K that would broaden compensation disclosure to include a discussion of how a company's compensation policies may incentivize risk and management of that risk and to Item 407 of Regulation S-K that would require enhanced disclosure regarding fees paid to and services provided by compensation consultants. See "Compensation Committee Independence (Various Federal Proposals)" below. These foregoing developments all suggest a greater likelihood that say on pay and enhanced executive compensation disclosures will soon become a reality for all U.S. public companies. **Treasury Secretary Geithner's Statement on Executive Compensation** **Excessive Pay Shareholder Approval Act** **Excessive Pay Capped Deduction Act of 2009** **Ending Excessive Corporate Deductions for Stock Options Act** **Securities Act Rel. No. 9052**

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Compensation Committee Independence (Various Federal Proposals)	
Overview	On July 16, 2009, the Treasury Department presented to Congress the Investor Protection Act of 2009—draft legislation which would require that each member of the compensation committee at listed U.S. public companies meet certain independence standards. On July 21, 2009, Congressman Barney Frank (D-MA) introduced to the House of Representatives the Corporate and Financial Institution Compensation Fairness Act of 2009—draft legislation which largely tracks the say on pay and compensation committee independence provisions of the Treasury Department's Investor Protection Act of 2009. The Corporate and Financial Institution Compensation Fairness Act of 2009 was passed by the House of Representatives on July 31, 2009 and referred to the Senate committee on Banking, Housing, and Urban Affairs on August 3, 2009. In addition, on July 21, 2009, Congressman Keith Ellison (D-MN) introduced to the House of Representatives the Corporate Governance Reform Act of 2009. Should any of the above Acts become law, the SEC would be directed within 270 days after enactment (under the Investor Protection Act and the Corporate and Financial Institutions Compensation Fairness Act) or 6 months after enactment (under the Corporate Governance Reform Act) to adopt rules regarding compensation committee independence (more fully described below). **Investor Protection Act of 2009** **Corporate and Financial Institution Compensation Fairness Act of 2009** **Corporate Governance Reform Act of 2009**
Compensation Committee Independence	The above Acts each would require that members of the compensation committee be independent. The Investor Protection Act and Corporate and Financial Institution Compensation Fairness Act each indicates that to be considered independent, a member of the compensation committee may not, other than in his or her capacity as a member of the compensation committee "…accept any consulting, advisory, or other compensatory fee from the issuer." The Investor Protection Act further defines independence by stating that a compensation committee member may not be an "affiliated person" of the issuer or any of its subsidiaries; however, the Act does not presently define "affiliated person." The SEC is permitted under each Act to exempt particular relationships as being determinative of independence.
Compensation Committee Consultants	Under the Investor Protection Act and the Corporate and Financial Institution Compensation Fairness Act, the compensation committee would be authorized to retain an independent consultant and would be required (in proxy materials for meetings of shareholders on or after one year after enactment) to disclose whether the compensation committee retained an independent compensation consultant. The Acts would require additional disclosure as to whether the compensation committee had retained an independent consultant. U.S. public companies listed on a national securities exchange (such as the New York Stock Exchange and NASDAQ) would further be required to provide sufficient funding to the compensation committee to retain an independent compensation consultant.

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Compensation Committee Independence (Various Federal Proposals)	
	The Investor Protection Act and the Corporate and Financial Institution Compensation Fairness Act would each further require that the SEC review the use of independent compensation consultants and report to Congress the results of its findings within two years of the Act's enactment.
Compensation Committee Legal Advisers	Finally, the Investor Protection Act and the Corporate and Financial Institution Compensation Fairness Act would each further require that U.S. listed public companies provide sufficient funding to the compensation committee to retain independent legal counsel.

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Executive Compensation and Governance Disclosure (Proposed Amendments to CD&A and the Proxy Solicitation Process)	
Overview	On July 10, 2009, the SEC issued proposed amendments to its compensation and governance disclosures[22] aimed at facilitating voting decisions through a focus on corporate accountability and the alignment of the short term incentives of management with the long term interests of shareholders. In addition, the proposal would make several technical amendments to the proxy rules to facilitate shareholder communications and increase the information received by shareholders in connection with the proxy solicitation process. **Securities Act Rel. No. 9052**
CD&A Disclosure Regarding Compensation Policies Impact on Risk Management	The proposal would require additional disclosure in the CD&A regarding the extent to which risks arising from the company's compensation policies and practices may have a material effect on the company.[23] Companies would be required to discuss their policies or practices of compensating their employees, including non-executive officers, as they relate to risk management practices and/or risk-taking incentives. The proposed rule states that the situations requiring disclosure will vary depending on the particular company and compensation policies, but that situations that may trigger disclosure include, among others, compensation policies: • 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 compensation expense is a significant percentage of the unit's revenues; and • at business units 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. The proposed rule states that the information to be disclosed may vary depending upon the nature of the company's business and the compensation approach, but that the following are examples of the issues that the company may need to address for the business units or employees discussed: • The general design philosophy of the company's compensation policies for employees whose behavior would be most impacted by the incentives established by the policies, as such policies relate to or affect risk taking by employees on behalf of the company, and the

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Executive Compensation and Governance Disclosure (Proposed Amendments to CD&A and the Proxy Solicitation Process)	
	manner of its implementation; • The company's risk assessment or incentive considerations, if any, in structuring compensation policies or in awarding and paying compensation; • How the company's 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 claw backs 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 risk profile; and • 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.
Stock and Options Valued at Grant Date Fair Value in the Summary Compensation Table ("SCT") and Director Compensation Table ("DCT")	The proposed rule would revise the SCT and the DCT to require disclosure of the aggregate grant date fair value of stock and option awards computed in accordance with FAS 123R. Note that the rule requires disclosure relating to awards granted during the relevant fiscal year, although the SEC has requested comments regarding whether disclosure should be for awards granted with respect to service during the fiscal year (even if granted after the end of the fiscal year). The proposed rule would rescind the requirement to report the full grant date fair value of each individual equity award in the Grants of Plan-Based Award Table and corresponding footnote disclosure. Instruction 2 to the salary and bonus columns would be amended to provide that the company is not required to report the amount of salary or bonus foregone at the NEO's election and that non-cash awards should instead be reported in the column applicable to the form of award elected. The proposal states that the SEC is considering requiring companies to recompute disclosure for previous years shown in the tables, although the SEC would not require companies to include different NEOs for any preceding fiscal year based on the recomputed total compensation. The SEC has specifically requested comment on this aspect of the proposals.
Enhanced Director and Nominee Disclosure	The proposed amendments would further require a discussion for each director or person nominated or chosen to become a director of the specific experience, qualifications, attributes or skills that qualify that person to serve as a director for the company at the time that the disclosure is made, and as a member of any committee that the person serves on or is chosen to serve on (if known), in light of the company's business and structure. The SEC's rule proposal states that, if material, this disclosure should cover more than the past five years, and include

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Executive Compensation and Governance Disclosure (Proposed Amendments to CD&A and the Proxy Solicitation Process)	
	information about the person's risk assessment skills, particular areas of expertise, or other relevant qualifications. The proposed rule would require disclosure of any directorships held by each director and nominee at any time during the previous five years at public companies and would lengthen the time during which disclosure of legal proceedings is required from five to ten years.
Disclosure Relating to Company Leadership Structure and Board's Role in Risk Management Process	The proposed rule would require disclosure of the company's leadership structure and why the company believes it is the best structure for it at the time of filing. In addition the proposed rules would require disclosure regarding whether and why the company has chosen to separate or combine the role of principal executive officer and board chair positions.[24] A company must disclose whether it has a lead independent director and what specific role the lead independent director plays in its leadership structure. The proposal would also add disclosure concerning the board's role in the company's risk management process. The disclosure would appear in proxy statements and information statements. The SEC has stated that these proposals are not intended to influence a company's decision regarding its board leadership structure, but is aimed at increasing transparency into how boards function.
Compensation Consultant Disclosure	The proposed rule would require disclosure of any role of compensation consultants in determining or recommending the amount or form of executive and director compensation (other than any role limited to consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees) during the company's last completed fiscal year, identifying such consultants, stating whether such consultants were engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person, describing the nature and scope of their assignment, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement. If any compensation consultants or their affiliates played a role in determining or recommending the amount or form of executive and director compensation and they also provided additional services to the company or its affiliates during the company's last completed fiscal year (including consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees), then the company must disclose: • the nature and the extent of all additional services provided; • 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 compensation consultant or its affiliates for these other services was made, subject to screening, or

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Executive Compensation and Governance Disclosure (Proposed Amendments to CD&A and the Proxy Solicitation Process)	
	recommended, by management; and • whether the compensation committee or the board approved such other services of the compensation consultants or their affiliates.
Voting Results Reportable on Form 8-K	The proposed rules would add a new Item 5.07 to Form 8-K to require disclosure of the results of a shareholder vote within four business days and delete the requirement from Form 10-Q and Form 10-K. In contested elections where results are not conclusively determined at the end of the meeting, companies would be required to disclose preliminary results and file an amended report with four business days after final results are certified.
Proxy Solicitation Process	The SEC has proposed several amendments that relate specifically to the proxy solicitation process itself. The amendments would make clear that an unmarked copy of management's proxy card that is requested to be returned directly to management is not a "form of revocation" under Exchange Act Rule 14a2(b)(1) so that a person who furnishes such a duplicate proxy card is not disqualified from relying on the exemption from the proxy rules. The SEC stated that the purpose of this amendment is to aid efforts by persons who are not seeking proxy authority to encourage other shareholders to vote in a particular manner with respect to a proposal, e.g. a "just vote no" campaign, by not subjecting them to the costs of a fully-regulated proxy solicitation. This allows shareholders to hear the views of the person sending the materials and then to vote without having to request another proxy card from management. The amendments would provide that a person need not be a security holder of the class of securities being solicited and a benefit need not be related to or derived from any security holdings in the class being solicited in order to disqualify the person from relying on the Exchange Act Rule 14a-2(b)(1) exemption from the proxy rules. Exchange Act Rule 14a-2(b)(1) provides that the Rule 14a-2(b)(1) exemption is not available to "[a]ny person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities, other than a benefit arising from the person's employment with the registrant." The SEC stated that the purpose of the rule is broader than applying only to shareholders and that shareholders should have the benefit of the disclosure required by the proxy rules if a soliciting person has a substantial interest in the matter so that the shareholder has sufficient information to make an informed voting decision. The amendments would make clear that a person soliciting in support of nominees who, if elected, would constitute a minority of the board may

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Executive Compensation and Governance Disclosure (Proposed Amendments to CD&A and the Proxy Solicitation Process)	
	seek authority to vote for another soliciting person's nominees in addition to or instead of the company's nominees to round out its short slate. This amendment is consistent with the current rule, which expressly permits rounding out of a short slate by seeking authority to vote for nominees named in the company's proxy statement. The amendment will apply only where the non-management parties are not acting together and the non-management soliciting person will be required to make representations to this effect in its proxy statement. Currently Rule 14a-12 permits solicitation prior to filing a proxy statement if each written communication is filed and contains specified participation information. This information is also permitted to be incorporated by reference. The amendment would make clear that the information cannot be provided in a document to be filed later and must be filed or incorporated by reference into a document that exists at the time of the written communication.

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[1] Under current rules, shareholders have the ability to: (1) conduct a proxy contest in accordance with the SEC's proxy rules (which can require the shareholder to incur costs disproportionate to the shareholders ownership in the company, although e-proxy has decreased these costs); (2) use the shareholder proposal process under Rule 14a-8 to submit proposals to be voted on in the company's proxy (although Rule 14a-8(i) currently allows the company to exclude proposals relating to director elections); (3) conduct a "withhold the vote" or "vote no" campaign (though plurality voting may limit the effect of this approach); (4) sell their shares (though this may require the investor to sell at an otherwise undesirable time); (5) attempt to engage in dialogue with management or the board; and (6) propose a board nominee at the shareholder meeting (if permitted by state law and the company's governing documents).

[2] The SEC's 2003 proposal required, among other matters, that the nominating shareholder hold at least 5% of the company's voting securities for two years. Proxy access has also been the subject of discussion in the proposed Shareholder Bill of Rights Act of 2009 (introduced by Senator Charles Schumer (D-NY) and Senator Maria Cantwell (D-WA) on May 19, 2009) and the Shareholder Empowerment Act of 2009 (introduced by Congressman Gary Peter (D-MI) on June 12, 2009). The foregoing federal developments were preceded by revisions to Section 112 and 113 of the Delaware General Corporation Law, which became effective on August 1, 2009, designed to facilitate optional proxy access and related company reimbursement obligations.

[3] A comment letter submitted by the U.S. Chamber of Commerce and certain other parties, on June 30, 2009 requested an extension of this deadline. It is unclear whether the SEC will in fact extend the deadline.

[4] We note that the ownership threshold under the proposed rules for the accelerated filer tiers is substantially less than the 5% required for all companies (regardless of classification) under the SEC's 2003 proposals. We further note that the ownership threshold and holding period under the SEC's proposed rules for accelerated filers is less than the 4% ownership threshold and two year holding period required under the Bylaws of Risk Metrics Group Inc. A copy of RiskMetrics' Bylaws is available at: **http://www.sec.gov/Archives/edgar/data/1295172/000104746908000146/a2181888zex-3_2.htm**.

[5] The potential for this "issue" to arise becomes more likely given recent amendments to Section 213 of the DGCL — which became effective on August 1, 2009. Under the amendments companies are permitted to set separate record dates for notice and voting at shareholder meetings. Section 213 of the DGCL is available at: **http://delcode.delaware.gov/title8/c001/sc07/index.shtml**.

[6] Shareholders who aggregate their holdings and thus form a nominating shareholder group need to consider whether they have formed a group for purposes of Section 13 and Section 16 reporting under the Exchange Act. In that regard, the SEC has proposed an amendment to Rule 13d specifically providing that a shareholder or shareholder group will not lose its eligibility to file a Schedule 13G by virtue of engaging in activities solely in connection with a nomination under Rule 14a-11. The amendment would not apply however to nominating shareholders or groups submitting a nomination pursuant to state law or a company's governing documents. With respect to Section 16 reporting, the SEC purposefully did not propose standards for establishing the independence of the nominee from the nominating shareholder or group, leaving ambiguity as to whether successful use of proposed Rule 14a-11 could result in the nominating shareholder or group also being deemed a director under the "deputization" theory developed by courts in Section 16(b) short-swing profit recovery cases.

[7] Negotiations with the company's nominating committee to have a director nominee included on the company's proxy would not be considered an agreement with the company for purposes of this disclosure.

[8] The time frame provided by advance notice bylaws for certain companies may not be sufficient to accommodate the SEC's proposed proxy access rules, particularly the process by which a company may exclude a shareholder nominee. As a result, companies may be required to amend their advance notice bylaws.

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[9] We note that the proposed rules would also impact General Instruction B.1 to Current Report on Form 8-K (a late filing of Item 5.07 of Current Report on Form 8-K would result in loss of Form S-3 eligibility). What will constitute a "reasonable time" when the company determines its annual meeting date a short period of time before the meeting, remains to be determined.

[10] Given the methodology for calculating the number of permitted shareholder nominees, the size of boards of directors may take on additional importance. For example, a board consisting of seven members would be required to include one shareholder nominee in the company's proxy materials, while a board with eight members would be required to permit two. The reality of this "board math" is that, in certain instances, it may be advisable to increase or lower the number of directors on a board to reduce the number of shareholder nominees that would be permitted as a result of sizing a board within a multiple of four. For a more detailed discussion of "board math" strategies and considerations, see our May 29, 2009 ***Kirkland M&A Update***.

[11] See Exchange Act 14a-2(b)(2).

[12] See Exchange Act 14a-2(b)(6).

[13] The proposed Shareholder Bill of Rights Act of 2009 and the Shareholder Empowerment Act of 2009 further look to:

- bifurcate the chairman of the board and chief executive officer positions by requiring companies to have an independent chairman;
- mandate majority voting in uncontested director elections; and
- mandate say on pay by providing shareholders a non-binding, advisory vote on executive compensation (including, in the case of the Shareholder Bill of Rights Act of 2009, "golden parachute" arrangements).

In addition to the above, the proposed Shareholder Bill of Rights Act of 2009 seeks to:

- eliminate staggered boards of directors; and
- mandate establishment of a board risk committee tasked with creating and evaluating risk management.

The proposed Shareholder Empowerment Act of 2009 includes the following additional provisions:

- require independent compensation consultants;
- require mandatory claw-backs on pay awarded due to fraud, financial results that require restatement or some other cause;
- eliminate severance for executives terminated for poor performance; and
- enhance disclosure of performance targets.

[14] We note that in 2007 North Dakota amended its corporate law to provide shareholder access to company proxy statements for inclusion of director nominees by shareholders who have beneficially owned at least 5% of the outstanding voting securities of a company for a minimum of two years. The North Dakota statute is more inflexible than Section 112 of the DGCL not only because it mandates the eligibility thresholds (as opposed to allowing the company to establish such thresholds, as is the case in Section 112 of the DGCL), but because it also limits the disclosure that the company can require from the nominating shareholder and does not allow for the company to impose any additional conditions or procedures on a nominating shareholder. A copy of the North Dakota statute (Section 10-35-08 of the North Dakota Publicly Traded Corporations Act) is available at: **http://ndcgc.org/Reference/HB1340Signed.pdf**. The statute has caught the attention of activist shareholders — particularly of note is Carl Icahn who, as

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the controlling shareholder of American Railcar Industries, Inc., spearheaded the vote to reincorporate the company in North Dakota (making it the first company to take advantage of the new statute). Further, RiskMetrics reported that for the 2009 proxy season (as of July 1, 2009), 16 companies had received shareholder proposals to reincorporate in North Dakota. A copy of the report is available at: **http://www.riskmetrics.com/knowledge/proxy_season_scorecard_2009**.

[15] In 2007, following the Second Circuit's American Federation of State, County and Municipal Employees, Employees Pension Plan v. American International Group, Inc., 462 F.3d 121 (2d Cir. 2006) decision, the SEC published for comment two alternative proposals addressing shareholder nomination bylaw proposals and Rule 14a-8(i). The SEC ultimately adopted amendments to Rule 14a-8(i) which presently permit a company to exclude from its proxy materials a shareholder bylaw proposal concerning director nominations.

[16] Shareholder activists had long argued that uninstructed broker votes distorted director elections and made it more difficult to remove underperforming boards. Activists further argued that as more companies adopted majority voting, uninstructed broker votes would have a great potential to distort director elections. Most boards, and opponents of the amended Rule 452, argued that the new amendment will likely increase the costs of proxy solicitations — either through a company engaging outside proxy solicitors or increasing its own efforts to reach shareholders.

[17] Typical majority voting provisions provide that a nominee is elected only if he or she receives a majority of the votes cast (as opposed to having received a vote by the majority of the shares outstanding or the plurality standard of simply having received the most votes). Under a majority voting provision, the impact of non-votes will be to ostensibly increase the voice of those shareholders who vote because non-votes will not count towards the number of votes cast, thereby reducing the number of votes needed to obtain a majority vote.

[18] Broadridge reported that for the 2009 proxy season 13.48% of retail shareholders who received "notice only" delivery under the SEC's e-proxy rules voted, whereas 28.63% of retail shareholders who received a full package of proxy materials voted. A copy of this report is available at: **http://www.broadridge.com/notice-and-access/NAStatsStory.pdf**.

[19] A copy of the study is available at: **http://www.thecorporatelibrary.com/info.php?id=76**.

[20] Institutions that have outstanding obligations under the Troubled Asset Relief Program ("TARP") are already required to provide shareholders with a say on pay. In addition, say on pay shareholder proposals and voluntary adoption of say on pay are increasing in popularity. According to a recent preliminary 2009 postseason report from RiskMetrics Group, say on pay proposals have received majority support at 18 companies as of June 1, 2009, up from 11 companies during all of 2008 (with the latest vote at XTO Energy receiving 51% support on May 19, 2009). According to a November 2008 RiskMetrics report, as of the date of the report 12 companies had volunteered to provide advisory votes on compensation. A copy of the 2009 preliminary postseason report from RiskMetrics is available at **http://www.riskmetrics.com/governance_weekly/2009/357**. A copy of the November 2008 RiskMetrics Group report, "What's Next on Say on Pay," is available at **http://www.riskmetrics.com/webcasts/governance_exchange_say_on_pay**.

[21] The Corporate and Financial Institution Compensation Fairness Act of 2009 would require disclosure of all golden parachutes, including those previously approved by shareholders; however, once approved, such golden parachutes would not be subject to subsequent shareholder voting requirements.

[22] The Corporate Governance Reform Act of 2009, if adopted, would go a *significant* step further — requiring the SEC to carry out a study on the feasibility of requiring any individual desiring to be a director to first be certified by the SEC as having the "experience and expertise necessary to carry out the functions of a member of the board of directors . . . "

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[23] The Corporate Governance Reform Act of 2009, if adopted, would require the establishment of a "risk management committee" to periodically review the company's risk management policies and establish a "chief risk officer" who would report to the risk management committee and establish, evaluate and enforce the company's risk management policies.

[24] The Corporate Governance Reform Act of 2009, if adopted, would require that the chairman of the board be "independent" and specifically prohibit any individual from serving as an executive officer of the company and the chairman of the board of the company at the same time.

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