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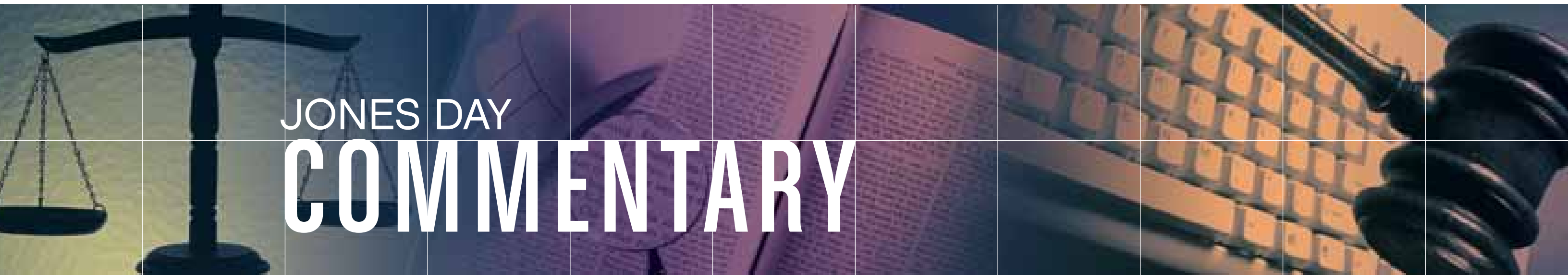

2009 PROXY SEASON UPDATE: RISKMETRICS FAQs REGARDING UPDATED 2009 COMPENSATION POLICIES

In November 2008, RiskMetrics Group, formerly Institutional Shareholder Services, issued 2009 updates to its U.S. Corporate Governance Policy, which are effective for all shareholder meetings on or after February 1, 2009.[1] U.S. public company compensation practices, long a focus for RiskMetrics, feature prominently in the 2009 updates. Among other things, under the 2009 updates, RiskMetrics now includes in the category of "poor pay practices" excise tax gross-ups, modified "single-trigger" severance or change in control provisions, and tax gross-ups on executive perquisites. The 2009 updates reflect RiskMetrics' view that "[i]nvestors in the current environment have little patience for 'pay for failure' and will continue to press companies to adopt executive compensation practices that are aimed at creating and sustaining shareholder value."[2]

As RiskMetrics has gained influence in the shareholder voting arena, particularly among institutional investors, U.S. public company boards of directors have faced increasing pressure to conform their compensation practices to RiskMetrics' policies, which often puts boards in difficult positions. The spotlight placed upon executive compensation by RiskMetrics is not unexpected, given its past emphasis on executive compensation, current market conditions, and the increasing focus being placed on executive compensation by the U.S. federal government. Unfortunately, RiskMetrics' aspirational compensation standards do not necessarily take into account the realities that boards face, especially during these troubled economic times. Boards need to balance RiskMetrics' increasingly restrictive standards against their need, in discharging their duties to the company, to

1. The 2009 updates can be found at the following link: http://www.riskmetrics.com/sites/default/files/RMG2009PolicyUpdateUnitedStates.pdf.
2. RiskMetrics Group U.S. Corporate Governance Policy, 2009 Updates, November 25, 2008, p. 22.

implement and utilize compensation practices that help attract and retain talented executives for the benefit of the company and its shareholders.

As companies and legal counsel review and analyze the 2009 updates, questions have arisen as to their breadth and scope, and what they will mean in practical terms during the upcoming proxy season. Set forth below is a brief discussion of highlights of the Frequently Asked Questions recently issued by RiskMetrics regarding the 2009 updates (the "FAQs"). The FAQs are intended to provide high-level insight regarding the ways in which RiskMetrics is generally likely to analyze and issue voting recommendations on specific compensation issues.

The FAQs provide that the 2009 updates apply to all new or materially amended contracts that took effect after a company's 2008 annual meeting of shareholders, even where the new contract or amendment preceded the release of the 2009 updates. RiskMetrics will review companies' proxy statements and exhibits to their annual reports on Form 10-K to identify new or materially amended arrangements. Companies should provide clear and specific disclosure in the Compensation Discussion and Analysis sections of their upcoming proxy statements as to the nature of any recent amendments or modifications to existing compensation arrangements; otherwise, RiskMetrics will consider all identified amendments to be substantial for purposes of applying its poor pay practices policy.

TAX GROSS-UPS

The FAQs address a number of questions about tax gross-up provisions in both new and amended employment and change in control arrangements. In the context of new arrangements, the inclusion of an excise tax gross-up likely will result in a recommendation of a "withhold" vote, although RiskMetrics will review the company's facts and circumstances on a case-by-case basis to determine a voting recommendation. However, RiskMetrics will view a public commitment by the company not to enter into future agreements providing excise tax gross-ups as a mitigating factor in its analysis. RiskMetrics does not view modified excise tax gross-ups differently from full excise tax gross-ups.

In the context of materially amended arrangements, the FAQs provide that RiskMetrics will weigh all "shareholder friendly" changes against preserved excise tax gross-up provisions and other provisions that RiskMetrics views as injurious to shareholders in deciding whether to apply its poor pay practices policy. The FAQs clarify that a materially amended arrangement is one "that a company is required to file with the Securities and Exchange Commission,"[3] but that an amendment or modification made solely to comply with statutory or regulatory changes, such as amendments made only to comply with Section 409A of the Internal Revenue Code, will not be viewed as a material amendment (even where the amendment preserves an existing excise tax gross-up provision). Overall, the updated policy regarding tax gross-ups focuses on situations in which a company is paying taxes on an executive's behalf, or reimbursing the executive for taxes, or providing ongoing tax gross-ups on perquisites commonly provided to named executive officers, including the personal use of corporate aircraft, home security, financial planning services, and country club memberships.

RiskMetrics' stance on tax gross-ups may cause difficulties for boards in attracting new executives or in retaining current executives who seek to modify their employment arrangements. RiskMetrics appears to view tax gross-ups as an element of compensation, rather than as a mechanism for harmonizing the compensation of executives who may be affected differently by tax regulations. Unfortunately, this is not a situation where there is a clear choice—boards will need to carefully balance the RiskMetrics stance on tax gross-ups against any particular needs of their companies to implement or retain tax gross-ups in order to attract and retain executives or otherwise address the realities of market conditions.

3. RiskMetrics Group, 2009 Compensation FAQs, A2.

OPTION REPRICING/EXCHANGE PROGRAMS

The FAQs also clarify RiskMetrics' views that option repricing or exchange programs that have not been approved by shareholders are a poor pay practice. In addition, the 2009 updates provide that market deterioration alone is not an acceptable reason for repricing stock options or recalibrating goals under performance plans. In a situation where, despite language in an equity plan prohibiting repricing, a company conducted an option exchange program without prior shareholder approval, RiskMetrics will likely recommend "withhold" votes for the company's entire board.

In the current corporate governance environment, in which many boards are subject to majority voting standards, the threat of a "withhold" vote for the entire board is significant. While complying with the RiskMetrics guidelines might satisfy a number of institutional investors, compliance may not always be in the best interests of the company, resulting in a tension that boards must analyze and address with care.

SINGLE-TRIGGERS VERSUS DOUBLE-TRIGGERS

The payment of benefits under most severance or change in control arrangements are governed by so-called "double-trigger" provisions (under which an executive receives benefits only if he or she incurs a loss of employment in connection with a change in company ownership) or so-called "single-trigger" provisions (which allow an executive to receive benefits upon the occurrence of only the change in company ownership). In recent years, so-called "modified single-trigger" provisions have also been developed that allow an executive to receive benefits upon a voluntary termination for "any reason," often during a window period, following the change in company ownership. The FAQs continue to espouse RiskMetrics' stance against "modified single-trigger" provisions.

DIVIDEND PAYMENTS

The FAQs further clarify RiskMetrics' position on certain aspects of dividend payments in connection with equity awards. For example, the FAQs explain that RiskMetrics does not view accruing dividends on unvested performance shares as a poor pay practice if the dividends are only paid out to the extent the performance shares are actually earned. However, while RiskMetrics generally does not issue a recommendation against approval of an equity plan where a company may pay current dividends on unvested performance awards, such a practice likely will result in a recommendation of a "withhold" vote for the company's compensation committee members who permit this practice.

FOCUS ON COMPENSATION PRACTICES

Forecasts for the 2009 proxy season indicate that compensation practices will continue to be a focal point for both shareholders in general and for institutional shareholder groups in particular. As evidenced by the restrictions detailed in RiskMetrics' 2009 updates and the FAQs, institutional shareholders and proxy voting organizations are likely to place significant pressure on U.S. public company boards to comply with increasingly stringent executive compensation guidelines. In addition, it seems likely that governmental action will further influence, through regulation of financial and other sectors, the area of executive compensation, placing even more restrictions on the types of compensation boards can utilize to attract and retain talented executives.

The RiskMetrics FAQs highlighted and briefly discussed in this *Commentary* are available at http://www.riskmetrics.com/policy/2009__compensation__FAQ.

Jones Day continues to help companies navigate the ever-changing and increasingly rigorous area of executive compensation and implement programs and practices to help resolve problems that may arise in all areas of the rapidly changing landscape of executive compensation.

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