Monday, October 25
11:00am-12:30pm

208 - Everything You Want to Know About Being a Corporate Secretary, But Never Had a Chance to Ask

Gayle Hyman
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Robin Johnson
Partner
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Scott Rammell
Vice President, General Counsel and Secretary
Tesoro Hawaii Corporation

Mark Rogers
Associate General Counsel, Assistant Secretary and Compliance Officer
Insight Enterprises, Inc.

Session 208

Faculty Biographies

Gayle Hyman

Gayle M. Hyman is the senior vice president and general counsel of Las Vegas Sands Corp.

Prior to joining Las Vegas Sands Corp., she was the deputy general counsel, finance and securities, at Allegheny Energy, Inc. She also was a corporate associate at Paul, Weiss, Rifkind, Wharton & Garrison LLP in its New York and Hong Kong offices and, prior to that, a corporate associate at Sullivan & Cromwell LLP in its New York office.

Ms. Hyman received an AB from Stanford University, an MBA from the University of Chicago Graduate School of Business and a JD from New York Law School.

Robin Johnson

Robin Johnson is the international head of Eversheds' company/commercial practice group. Eversheds has offices in 29 jurisdictions.

Mr. Johnson has authored many articles including recently in the Baird Monthly M&A Monitor, International Financial Law Review, The Journal of Private Equity, the Metropolitan Corporate Counsel, the European Private Equity Journal and ACQ. He recently spoke on an ACC webcast on Top 10 Tips in M&A and he has also spoken on similar topics for the ABA and National Director's Institute of Chicago. He was asked by Wall Street Journal to write an opinion piece on the UK quantative easing in January 2010. Legal Business in the UK recently voted Mr. Johnson as one of the top ten M&A lawyers in the UK. His team were awarded the Insider Merger Law Team Award in 2007, 2008 and 2009.

Scott Rammell

Scott Rammell is vice president, general counsel and secretary for Tesoro Hawaii Corporation, a wholly owned subsidiary of Tesoro Corporation. Mr. Rammell also serves as the antitrust corporate compliance officer and as the secretary or assistant secretary for all subsidiary and affiliated companies of Tesoro. Tesoro is a Fortune 100 Company and Fortune Global 300 Company and is one of the largest independent petroleum refining and marketing companies. Some of Mr. Rammell's additional responsibilities include corporate legal structure and governance, mergers and acquisitions, corporate and subsidiary management, real estate, anti-corruption and the Foreign Corrupt Practices Act, legislative and regulatory, credit/debit issues, banking and finance, procurement and supply chain management, legal risk management, franchising, marketing and retail, contracts administration, and database and contract storage (e-storage and paper copy filing) management.

Mr. Rammell was voted by his peers as "One of San Antonio's Best Lawyers," Business and Corporate Practice, and Energy, Oil and Gas Practice, Scene In SA Magazine, July, 2009.

Mr. Rammell received a BS, Master of Health and Hospital Administration and JD from Brigham Young University.

Mark Rogers

Mark Rogers is associate general counsel, assistant secretary and global compliance officer for Insight Enterprises Inc., a leading provider of brand-name information technology ("IT") hardware, software, and services to large enterprises, small- to medium-sized businesses and public sector institutions in North America, Europe, the Middle East, Africa, and Asia-Pacific. Mr. Rogers's responsibilities include corporate secretarial and governance work, SEC reporting, mergers and acquisitions, financing, design and implementation of compliance programs, internal investigations, negotiation of contracts and litigation and labor, and employment management. He sits on Insight's Disclosure Committee and currently chairs the Investment Committees for the company's 401(k) and Non-Qualified Deferred Compensation plans.

Prior to joining Insight, Mr. Rogers was general counsel of a business consultancy focused on technology solutions, and his first in-house position was as general counsel of a provider of outsourced services to telecommunications companies in the United States, Canada, the United Kingdom, and Australia.

Mr. Rogers was named a "Super Lawyer" in the Southwest Edition of Law & Politics Magazine and was the only in-house counsel named as a Super Lawyer in the edition. He is a Fellow of the American Bar Foundation. He is the current president of the Arizona chapter of the Association of Corporate Counsel.

Mr. Rogers received a bachelor of arts from Brown University and his juris doctorate from New York University School of Law.

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Corporate & Securities Law Committee

- organized forum to facilitate the identification, review, discussion and analysis of corporate and securities laws issues of particular interest to in-house corporate counsel
- The committee holds teleconferences on the second Tuesday of each month at 4 PM ET
- Lindquist & Vennum, PLLP is the 2010 sponsor of ACC's Corporate & Securities Law Committee

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Being a Corporate Secretary

- Course Outline
  - The Corporate Secretary – Overview
  - The Annual Meeting
  - The Proxy Statement
  - Subsidiary Corporate Governance

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The Corporate Secretary – Overview

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The Corporate Secretary – Overview

- Corporate Records/Custodian
  - Corporate Governance
    - Meetings (i.e., Board, Committees, Shareholders)
    - Shareholder Records, Transfer/Replacement and Stock Certificates (Transfer Agent)
  - Compliance/Regulatory Issues
    - Securities Compliance (e.g., Insider Trading) and SEC Disclosure
    - State Filings (e.g., Qualifications to do Business & Other Regulatory Filings)

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The Corporate Secretary – Overview

- Corporate Records/Custodian
  - Subsidiary Management
  - The Wearing of Many Hats
  - Personal Attributes
  - Best Practices

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Corporate Records

- Organizational Documents
- By-Laws
- Minutes and Resolutions
- Stock Certificates and Records

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Why Keep Minutes?

- Requirement of State Law
  - e.g., DGCL§142(a)
- Corporate Formalities
  - Piercing Corporate Veil and Imposing Liability on Shareholders
- Clear and Accurate Direction to Management
  - Carry Out Board's Decisions
- Third Party Review
  - Shareholders (e.g., DGCL§220)
  - Independent Auditors
  - Underwriters, Banks (e.g., M&A, Financing)

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Why Keep Minutes?

- Foreign Corrupt Practices Act
  - Accurate Books and Records
  - Criminal and Civil Violations
- Sarbanes – Oxley
  - Section 302(a) CEO and CFO Certification
  - Section 802 Criminal Penalties for Altering Corporate Records

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The Art and Science of Writing Minutes

- Short Form vs. Long Form vs. Hybrid
- Objective - Support Business Judgment Rule
  - Drafted by Experienced Professional
  - Directors Exercised Due Care
    - By Obtaining Information, If Necessary From Experts
  - Allowing Directors to Make Informed Decision
  - Free From Conflicts of Interest
  - In The Best Interests of Company Shareholder

- Source Material: LexisNexis Expert Commentaries, Evelyn Cruz Sroufe, Rebecca H. Hoskins and Scott H. Husbands on Corporate Minutes: Best Practices Create Best Evidence Part II: The Art of Preparing Minutes

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The Nuts and Bolts of Writing Minutes

- Pre-Meeting Drafting and Preparation
- Organization
  - Introduction
  - Attendees
  - Presentations (i.e., Management, Advisors, etc.)
  - Documents Provided to Board
  - Issues Discussed and Decisions Made
  - Closing
  - Executive Session
- Drafting and Circulating Minutes

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The Nuts and Bolts of Writing Minutes

- Drafting and Circulating Minutes
  - Approval Formalities
- Safe Keeping and Retention of Minutes

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The Tool Box – Resources

- Competent Outside Counsel
- Reference Library
- Appropriate Staff
- Calendar System
- Forms Database (i.e., Agendas, Minutes, Certificates, Resolutions)
- Relevant Systems, Processes & Policies (i.e., Software, SEC Reporting)

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Board Calendar and Meeting Agendas

- Calendar and Scheduling Considerations
  - Location, Objectives, Annual vs. Regular Meetings, etc.
- Meeting Agendas
  - Involvement of Chairman, CEO and Lead/Presiding Director
  - Committee Meetings

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Board Materials

- Mailings Prior to Meetings
  - Collecting and Reviewing Materials From Presenters
- Mailings Between Meetings
  - Press Clippings
  - Analyst Reports
  - Unanimous Written Consents
- Materials at Meetings
  - Collecting Materials After Meetings
- Secure Board Websites

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Meeting Process

- Director Attendance
  - Telephone Participation
  - Unanimous Written Consents in Lieu of Meetings
- Committee Reports
- Executive Sessions
- Minutes
- Directors' Notes

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Use of "Consent Agendas"

- Bundling Many Routine Items Into One
  - Moved and Approved in One Vote with No Discussion
- Examples:
  - Approval of Minutes
  - Routine Matters, Such as Committee Appointments
  - Staff Appointments Requiring Board Confirmation
  - Reports Provided for Information Only
  - Correspondence Requiring No Action

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Board Training

- Internal v. External Programs
  - Cost
  - Relevant Content
  - Risk/Metrics Accreditation
  - Team-Building or Networking

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Board Training

- Topics for Board Training
  - Corporate Governance
  - Company and Industry Specific Topics
  - Director Liability and D & O Insurance
  - Crisis Management
  - Boardroom Confidentiality

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The Annual Meeting

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The Annual Meeting

Overview
- Preparation
- Conduct of the Meeting
- After the Meeting

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Preparing for the Annual Meeting

Timeline

Tasks to be completed well in advance of the meeting include:

- Set the meeting and record dates
- Identify the venue
- Notify stock exchange, solicitors, transfer agent, printer
- Organize internal working group

Practice tip:

- A successful annual meeting requires the participation and cooperation of a large team, so coordination and planning are important

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Preparing for the Annual Meeting

Working Groups

Internal – Legal, Investor Relations, PR & Communications, etc. Tasks include:

- Logistics – venue, refreshments, security, etc.
- Communications with shareholders, press, etc.
- Webcast?

External – Printer, transfer agent, proxy solicitor, vendors to distribute proxy, host website, etc.

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Preparing for the Annual Meeting

Transfer Agent

- Broker search
- Certify stockholder list
- Distribution to record and/ or beneficial holders
- Proxy cards
- Tabulate vote
- Website hosting?
- Fulfillment?

Proxy Solicitor

- Communicate with Company and shareholders
- Work with brokers and institutional investors
- Ensure a quorum
- Anticipate shareholder issues
- Strategy

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Preparing for the Annual Meeting

Proxy Statement

- Delivery
  - Notice only
  - Full set delivery
  - Hybrid
- Considerations
  - Timing
  - Shareholders – retail vs institutional
  - Costs
  - Environmental concerns

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Preparing for the Annual Meeting

Shareholder proposals

- Develop response
- Discuss with the Board
- Discuss with the proponents

Practice tips:

- Discussions with proponents frequently help resolve issues
- Proponents may have broader agenda
- Consider proxy advisor voting guidelines (RiskMetrics, Glass Lewis, etc.)

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Preparing for the Annual Meeting

Soliciting votes

- Consider whether a proxy solicitation effort is required
- Work with proxy solicitor and IR to target shareholders
- Prepare talking points
- Consider FD compliant meetings with shareholders

Practice tips:

- Consider whether talking points should be filed with the SEC as additional soliciting materials
- Analyze shareholder base carefully, especially in light of new rules, such as NYSE Rule 452

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Preparing for the Annual Meeting

Meeting materials

- Prepare a meeting "Bible" with important documents:

• Agenda • Script • Chairman's speech	• Q&A • Annual meeting rules and procedure • Corporate governance documents • Shareholder list

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Preparing for the Annual Meeting

Practice tips:

- Prepare a list of hot topics and responses to Q&A
- Prepare for questions or statements that are out of order
- Prepare for disruptions – know local laws for disturbing the peace
- Consider adjourning the meeting, if necessary
- **PRACTICE, PRACTICE, PRACTICE**

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The Annual Meeting

Admission to the meeting

- Tickets – provided with proxy materials, or must shareholders request them in advance? (Alternate admission procedures)
- Press?
- Webcast?
- Arrangements for directors, officers, friends and family

Practice tips:

- Try to get a list of names of attendees in advance
- Review the by-laws and other rules governing attendance

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The Annual Meeting

Conduct of the meeting

- Confirm that a quorum is present
- Confirm the vote required to approve items on the ballot
- Distribute meeting rules and procedures to all shareholders
- Identify meeting participants, including the inspector of election and proponents of shareholder proposals
- Establish time for questions and comments

Practice tips:

- Have sufficient staff to hand out ballots, provide microphones, etc.
- Prepare for motions, questions or statements that are out of order
- Prepare for disruptions

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After the Annual Meeting

- If necessary, file FD 8-K
- File 8-K with voting results within 4 business days
- Other follow up items
  - e.g., in response to shareholder questions
- Debrief
- Start to plan for next year

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Recent Developments

- Dodd–Frank
- SEC "Proxy Plumbing" release

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The Proxy Statement

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Governing Documents, Laws and Rules

- Corporate Charter, Bylaws
- State Law, e.g., DGCL § § 211 - 212
- SEC
  - Section 14 of the Securities Exchange Act of 1934
  - Applies to issuers of securities registered under Section 12 of the Exchange Act
  - SEC Regulation 14A – Solicitation of Proxies
  - SEC Schedule 14A – Information Required in Proxy Statement

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Governing Documents, Laws and Rules

- NYSE, see §302, Listed Company Manual
- NASDAQ, see Rule 5620
  - subsection (a) each "Company listing common stock . . . shall hold an annual meeting of Shareholders"
  - subsection (b) each "Company . . . shall solicit proxies and provide proxy statements for all meetings of Shareholders"
- Note: exchange requirements don't trump state or federal securities laws concerning annual meetings
- RiskMetrics Group – Proxy Voting Guidelines

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Proxy Statement/Overview

- Communication from the company to shareholders
- Notice of a special meeting or an annual meeting
- Information about the issues on which shareholders are asked to vote
- SEC Definition/FAQ
  - http://www.sec.gov/answers/proxy.htm

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Proxy Statement/Basics and Content

- Date, Time and Place of Meeting
- Proposals to be Voted On at the Meeting
- Who is Soliciting the Proxy?
- SEC Rule 14a-9 – False or Misleading Statements
- Other Admonitions from the SEC
  - **"Any company that waits until it receives staff comments to comply with the disclosure requirements should be prepared to amend its filings if we raise material comments."**

http://www.sec.gov/news/speech/2009/spch110909sp.htm

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Proxy Statement/SEC Schedule 14A

- Shares Entitled to Vote/Voting Procedures
- Independent Public Accountants
  - A routine matter
  - Broker voting
  - Helps Establish a Quorum for the Meeting
- Amendment of Charter, Bylaws or other Documents

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Proxy Statement/SEC Schedule 14A

- Directors and Executive Officers
  - Regulation S-K
    - Item 103 (legal proceedings)
    - Item 401 (basic biographical information, experience)
    - Item 404 (related party transactions)
    - Item 405 (compliance with §16)
    - Item 407 (corporate governance)

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Proxy Statement/SEC Schedule 14A

- Compensation of Directors and Executive Officers
  - Regulation S-K – Item 402
    - Compensation Discussion & Analysis
    - Summary Compensation Table
      - Recommended Reading: "Preparing the Executive Compensation Tables," W. Alan Kailer, Hunton & Williams
    - Equity Awards
    - Pension Benefits and Nonqualified Deferred Comp Plans
    - Potential Termination or Change-In-Control Payments
    - Compensation of Directors

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Proxy Statement/Optional Content

- Messages from Company to shareholders
- Not otherwise prohibited by laws, rules regulation
  - e.g., Say-on-pay (before it was mandatory)

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Proxy Statement/Delivery

- Bylaws
- State Laws
  - DGCL § 213 – shareholders of record (two record dates?)
- SEC
  - SEC Rule 14a-3 – Information to be Furnished to Security Holders
- Exchange Requirements
  - NYSE Rule 452
  - continue to monitor changes in voting and the effect on timing of proxy solicitation

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Proxy Statement/Delivery

- Voluntary eProxy (or Notice and Access) rules adopted in January 2007 (July 2007 effective date)
- Anticipated Benefits: save money on printing and postage; "greener"
- from paper to Internet-based communications with shareholders
- Revisions in 2008: mandatory eProxy, but choices – "Notice Only" and "Full-Set Delivery"
- Opportunities, Costs, Risks and Schedule

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Subsidiary Corporate Governance

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Subsidiary Corporate Governance Overview

- What do we mean by subsidiary corporate governance?
- What are your key concerns?
- How do you ensure the highest standards are met?
- Who is in control (central or local)?

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How much time and attention is needed?

- How many foreign companies do you have?
- What types of entities?
- Which countries are these entities registered in?
- How active are the entities?
- Do you see board papers?
- Do you operate a compliance programme?

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General Regulatory and Legal Considerations

- Subsidiary management
  - Local requirements
  - Parent company requirements
  - Meetings (ie meetings of shareholder(s), boards)
  - Records (ie corporate records, financial records)

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Branch against subsidiary – key differences

- ***Legal Status***
  - A subsidiary company has a distinct legal personality.
  - A branch has no legal personality distinct from that of its parent company.
- ***Directors***
  - A subsidiary company is usually required to appoint at least one statutory director.
  - A branch will not normally be required to appoint separate statutory directors.
- ***Annual General Meeting***
  - A subsidiary company may be required to hold an AGM depending on the jurisdiction within which it is registered and its legal status.
  - Generally no requirement for a branch to hold an AGM.
- ***Statutory Books***
  - A subsidiary company will usually be required to maintain statutory books.
  - Generally no requirement for a branch to maintain statutory books.

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Specific branch examples

- Spain
- Sweden
- UK

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Types of entity

Jurisdiction	Main corporate entities
UK	Private limited companies Public limited companies
Germany	Limited liability company (*Gesellschaft mit beschränkter Haftung*) (*GmbH*) Limited partnership (*GmbH & Co KG*)
France	Société anonyme (*SA*) Société par actions simplifiée (*SAS*) Société à responsabilité limitée (*SARL*)
Sweden	Limited liability company (*Sw: aktiebolag*) (*AB*)
China	Wholly foreign-owned enterprises (*WFOEs*)

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Key characteristics of individual entities

- Purpose and function of the board
- Board composition
- Role of shareholder

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Tax considerations

- Tax efficient structures
- Comparison of key European jurisdictions
- Extraction of dividends

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Holding Companies in Europe – A tax comparison

		Austria	Belgium	Denmark	France	Germany	Hungary	Ireland	Italy	Luxembourg	Netherlands	Poland	Spain	Switzerland	UK
1	Registration or other duties on transfers of shares	No	No[1]	No	Yes[2]	No[3]	No	1%[4]	No[5]	No	No	1%	No	0.15%[6]	0.5%[6]
2	Capital duty (on increase in share capital)	1%	No[6]	No	No	No[3]	No	No	No	1%[7]	No	0.5%	1%	1%[8]	No
3	Deduction for interest on acquisition finance	Yes	Yes	Yes	Yes[9]	Yes[10,18]	Yes	Yes[11]	Yes	Yes[12]	Yes[13]	Yes	Yes	Yes	Yes[14]
4	Thin capitalisation rules Restrictions on interest rate Debt/equity ratio	Yes[15]	Yes 7 : 1	Yes Yes 4 : 1[16]	Yes Yes 1.5 : 1[17]	Yes[18] 30% EBITDA	Yes 3 : 1	No[19]	No[20] 30% EBITDA	Yes 85 : 15	Yes No[21] 3 : 1[22]	Yes Yes 3 : 1	Yes 3 : 1[23]	Yes % of assets[24]	Yes Yes 1 : 1[25]
5	Withholding tax on payments to foreign parent* of – interest – royalties	No[26] 20%	15% 15%	No[27] No	No 33.33%	31.65%[28] 21.1%	No No	20% 20%	27%[29] 22.5%[30]	No[30] No	No[30] No	20%[31] 20%	18% 24%	35% No	20% 20%
6	Full corporate income tax rate	25%	33.99%	25%	33.33%[32]	29.83-33.7%[33]	20%[34]	12.5%[35]	27.5%	Max 29.63%[36]	25.5%	19%	35%	12-30%[37]	28%
7	Tax on dividends received	No[38]	95% exempt[39]	Yes[40]	95% exempt[41]	95% exempt[10]	No	Yes[42]	95% exempt[43]	Yes[44]	Yes[44]	Yes	No[43]	Yes[44]	Yes[46]
8	Participation/exemption regime re dividends Minimum participation	Yes 25%	Yes 10% or €1.2M[47]	Yes 15%[48]	Yes 5%	No N/A[10]	No N/A	No N/A	No[47] N/A	Yes 10% or €1.2M	Yes 5%	Yes 15%[49]	Yes 5% or €6M	Yes 20% or CHF2M	No[48] N/A
9	Withholding tax on divs paid to foreign shareholder*	25%	25%	corp: 16.5% individuals: 28%	25%	26.375%	corp: 0% individuals: 25%	20%	1.375%[50]	15%	15%[51]	19%	No[52]	35%	No
10	Capital gains tax on sale of shares in subsidiary**	No[53]	No[54]	No	95% exempt	95% exempt[55] [10]	Yes[56]	No[57]	95% exempt[58]	No	No	Yes	No	No[59]	No[57]
10a	Minimum participation	10%	No	No	N/A	No[10]	30%[34]	5%[60]	No	10% or €6M	5%	N/A	5%	10%[61]	10%
10b	Minimum period (months) of continuous ownership	12	No	36	24	No[10]	12	12 in last 24	12	12	None	N/A	12	12	12 in last 24
10c	Must subsidiary be active?	Yes	No	Yes	N/A	No[10]	N/A	Yes[62]	Yes	No	Yes[63]	N/A	Yes[64]	No	Yes
10d	Must subsidiary be within the charge to tax?	Yes	Yes[65]	No	N/A	Yes[66]	No[34]	Yes	No	Yes	Yes[67]	N/A	Yes	No	No
11	Tax on capital distribution on liquidation of holding company	No[68]	Yes[69]	Yes[70]	Yes[71]	Yes[71]	Yes[72]	Yes[73]	No	No	Yes[71]	Yes[74]	No	Yes[72]	No[75]
12	Consolidated tax group Minimum participation	Yes[76] 50%	No	Yes >50% of votes	Yes 95%	Yes >50% of votes	No	No[77]	Yes	Yes 95%	Yes 95%	Yes 95%	Yes 75%	No	No[77]
13	CFC rules	No	No[78]	Yes	Yes	Yes	Yes	No	Yes	No	No[79]	No	Yes[80]	No[81]	Yes
14	Binding pre-transaction rulings	No	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes[82]

*If the EU parent/subsidiary directive does not apply and no DTT relief is available. Assume interest cannot be re-classified as an equity return.

**Assuming conditions 10a-10d are met, if applicable.

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Potential personal liabilities

- Personal liability and sanctions:
  - Civil liability
  - Criminal liability
- Managing the risks
  - Indemnity from the company
  - D&O insurance
- Improving your code of ethics/issues
- Delegated authorities

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How to handle this – some key choices

Technology
- Maintain hard copy records
- Maintain records in-house using 'standard' applications such as Word or Excel
- Use an entity management software programs

In country assistance
- Use the local business unit
- Have separate legal providers in each jurisdiction
- Use a single outsource provider

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LexisNexis® Expert Commentaries

Evelyn Cruz Sroufe, Rebecca H. Hoskins and Scott H. Husbands on

Corporate Minutes: Best Practices Create Best Evidence Part I: Regulatory Framework

2008 Emerging Issues 2847

Preparing board minutes is often the poor stepchild of corporate governance tasks.* Minutes themselves are frequently given only cursory review by board members. Yet greater emphasis on corporate record keeping under the Sarbanes-Oxley Act of 2002[1] ("Sarbanes-Oxley") and related regulations, shareholders' heightened expectations of directors and intense scrutiny of director conduct in litigation, including option backdating cases, are increasingly placing corporate minutes in the spotlight. Because courts continue to view the minutes of board and committee meetings as the best evidence of what took place at the meetings – including whether the directors' conduct complied with their duties of care and loyalty – careful and defensive preparation of minutes by skilled professionals should be part of every company's arsenal of best governance practices.

In *Part I: Regulatory Framework*, the authors discuss the increased focus on the role of the board of directors in response to corporate scandals and shareholder activism, summarize director fiduciary duties, review various requirements to maintain minutes and the issues raised by third party review of minutes, illustrate how minutes are used in litigation with examples from the *Disney* and *NetSmart* cases and discuss the role of fraudulent minutes in the option backdating cases. In *Part II: The Art of Preparing Minutes*, they offer guidance on preparing and safeguarding accurate and complete minutes that will provide the best evidence that directors complied with their duties in approving significant corporate actions.

Changing Shareholder and Regulatory Views of the Board's Role

In response to corporate abuses at Enron, WorldComm, Tyco and other companies, Congress enacted Sarbanes-Oxley, and the Securities and Exchange Commission ("SEC") and the stock exchanges proceeded to adopt rules implementing and supplementing it. Sarbanes-Oxley and the related regulatory changes emphasized the importance of independent directors and processes – such as executive sessions – that encourage independent decision making, independent and active audit committees,

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1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 145 (codified in scattered sections of 15, 18 U.S.C.).

heightened implementation and disclosure of internal controls and certifications of public company financial information by the chief executive officer and chief financial officer.[2]

Concurrent with this regulatory activity, activist shareholders have increasingly sought to hold directors accountable for their decisions. Shareholders have pushed boards, in many cases successfully, to dismantle takeover protections and to adopt charter amendments providing for majority voting and have persuaded other shareholders to "just vote no" against directors whose performance they have criticized. In addition, activist hedge funds do not hesitate to run, or threaten to run, competing slates in director elections to get representation on boards in order to press for strategic changes. The bottom line of all this activism is higher expectations of corporate directors and greater scrutiny of their performance.

Directors' Oversight Duties

Despite this backdrop of increased regulatory and shareholder pressure, the legal obligations of directors under state corporate laws have remained constant and case law relatively director-friendly. Under state corporate statutes, the business and affairs of a corporation must be managed by, or under the direction of, a board of directors,[3] but directors will generally not be liable in exercising their oversight role except under unusual circumstances.

In making decisions on behalf of the company, directors are held to duties of care and loyalty.[4] If directors comply with their duties, their decision will be protected by the business judgment rule, a standard of judicial review in which courts defer to a board's decision making unless there is evidence that the directors have violated their duty of care or loyalty.[5] Directors may also breach their duty of oversight by failing to make a deci-

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2. Further, in 2004 the United States Sentencing Commission amended the Organizational Sentencing Guidelines to place greater responsibility on officers and directors for the oversight and management of compliance programs. U.S. SENTENCING GUIDELINES MANUAL Ch. 8 (2007).

3. *See, e.g.*, Del. Code Ann. Title 8, § 141(a).

4. The duty of care requires that directors be fully informed when making decisions in their capacity as directors and act with requisite care. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 366-67 (Del. 1993). The duty of loyalty requires directors to consider the best interests of the corporation and its shareholders in making business decisions and to make any such decisions in good faith. *Id.* at 361-62.

sion at all, for example, by not acting to hold management accountable for compliance with laws.[6] In such cases, the directors are liable only if they essentially acted in bad faith.[7]

Certain significant board decisions, such as the sale of the company, the adoption of anti-takeover measures or the execution of a merger agreement with specific provisions for the protection of the transaction, present the possibility that the board may be acting to entrench itself in a manner that is not in the best interests of the shareholders. Consequently, in cases such as *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[8] and *Unocal Corp. v. Mesa Petroleum Co.*,[9] Delaware courts have applied a higher level of scrutiny to director decisions and have articulated guidelines for boards to follow in making such decisions.[10]

Directors are rarely liable for monetary damages for breach of their duty of care. Most companies have adopted director exculpation provisions authorized by state statutes that hold that directors will not be liable unless they have breached their duty of loyalty or were so grossly negligent as to have acted in bad faith.[11] The Delaware Chancery Court sent a wake-up call, however, in *In re The Walt Disney Co. Derivative Litigation* [12] by refusing to dismiss claims that the Disney board had been grossly negligent in approving several executive compensation decisions – potentially subjecting the directors

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5. *See, e.g., In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006). If the business judgment rule applies, the board's decision will stand if it can be attributed to any rational business purpose. *Cede*, 634 A.2d at 361. If, however, a conflict of interest arises that is not properly handled by the board or if the board has otherwise breached its duties, a court will apply a stricter standard of review – the entire fairness standard – and will determine whether the challenged board action is entirely fair to shareholders, both procedurally (fair dealing) and substantively (fair price). *Id.*

6. *See, e.g., Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996); *Abbot Labs. Derivative Litig.*, 325 F.3d 795 (7th Cir. 2003) (allegations that the board knew of, but failed to act on, repeated notices from a regulatory agency about safety violations by the company stated a claim for breach of the duty of oversight).

7. Failing to implement a reporting or information system or controls or having implemented such a system of controls but consciously failing to monitor or oversee its operations could constitute bad faith. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

8. 506 A.2d 173 (Del. 1985).

9. 493 A.2d 946 (Del. 1985).

10. *Revlon*, 506 A.2d at 182; *Unocal*, 493 A.2d at 954.

11. *See, e.g.*, Del. Code Ann. Title 8, § 102(b)(7).

12. 825 A.2d 275 (Del. Ch. 2003).

to liability for monetary damages for their actions. The directors were eventually exonerated;[13] however, the series of decisions in the Disney derivative litigation highlighted the importance of the minutes of board and committee meetings in establishing whether the board met its duties.

The Requirement to Maintain Minutes

Corporations are required by law to keep accurate books and records, and specifically to prepare and maintain minutes recording the proceedings of any meetings of directors and shareholders.[14] The Foreign Corrupt Practices Act also mandates that issuers with securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act") or issuers that are required to file reports pursuant to Section 15(d) of the Exchange Act maintain accurate books and records, of which corporate minutes are a part.[15] More recently, pursuant to Section 302(a) of Sarbanes-Oxley, the SEC adopted a rule requiring the chief executive officer and the chief financial officer of a public company to certify that, among other things, they have designed a system of internal controls "to ensure that material information relating to the issuer" is made known to them.[16] Finally, Section 802 of Sarbanes-Oxley provided additional criminal penalties for those who alter documents such as corporate records.[17]

The rules adopted by the SEC to implement Section 302(a) of Sarbanes-Oxley define "internal control over financial reporting" as a process "to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting

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13. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

14. For example, Del. Code Ann. Title 8, §142(a) requires that "[o]ne of the officers shall have the duty to record the proceedings of the meetings of the shareholders and directors in a book to be kept for that purpose." At least one court has suggested that the falsification of a company's minutes might constitute a breach of a director's duty of candor. *Oberly v. Kirby*, 592 A.2d 445, 465 (Del. 1991).

15. The Exchange Act requires such issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." Exchange Act § 13(b)(2)(A).

16. Exchange Act Rule 13a-14.

17. "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . shall be fined under this title, imprisoned not more than 20 years, or both." 18 U.S.C. § 1519.

principles," including policies and procedures that, among other things, "pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[18] Accurate minutes of board and shareholder meetings, prepared on a timely basis, are an essential component of a system of internal control over financial reporting.

Even without these statutory requirements, there are compelling reasons to maintain accurate minutes of director and shareholder meetings. Regularly maintaining corporate minutes is a key component of observing corporate formalities, which is essential to recognition of the corporate form. Failure to observe formalities can result in creditors piercing the corporate veil and imposing liability on the shareholders for corporate obligations.[19] In addition, clear and accurate minutes also provide direction to the company's management who are charged with carrying out the board's decisions.

Third-Party Review of Minutes

Minutes are prepared not just for internal use but also for possible review by third parties such as shareholders. In addition to shareholders, those who may seek to review corporate minutes include the company's independent auditors in connection with periodic reviews or annual audits, underwriters in connection with due diligence reviews for capital raising transactions and buy-side counsel in connection with mergers or acquisitions. Such outside review may be problematic when the minutes contain information that is subject to the attorney-client privilege, constitutes material, nonpublic information or is proprietary or otherwise sensitive. Independent auditors generally have a professional obligation to keep confidential the information acquired through their services,[20] and buy-side counsel in acquisition transactions are generally subject to express confidentiality agreements, but shareholders do not have a general obligation to keep confidential the information they obtain through inspection.

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18. Exchange Act Rule 13a-15(f). The policies and procedures must also "(2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements." *Id.*

19. See Minutes at 20.

20. David F. Taylor, *Auditors and Internal Investigations*, ABA CRIMINAL JUSTICE SECTION NEWSLETTER, Spring 2008, at 10 (disclosure to auditors will generally waive the attorney-client privilege, but the author suggests strategies to minimize the waiver).

LexisNexis® Expert Commentaries

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Corporate Minutes: Best Practices Create Best Evidence Part I: Regulatory Framework

Statutory Inspection Rights. Shareholders have a statutory right to inspect their company's books and records during normal business hours.[21] Under Delaware law, for example, a shareholder may make a request to inspect so long as the shareholder has a proper purpose,[22] that is, a purpose reasonably related to the requesting party's interest as a shareholder.[23] A proper purpose may include a shareholder's desire to solicit proxies for a slate of directors[24] or, as we address in more detail below, preparing to file a derivative lawsuit.[25] If a company refuses a shareholder's written demand for inspection or fails to reply within five business days of receiving the demand, the shareholder can seek relief from the Delaware Court of Chancery for the purpose of determining whether the shareholder is entitled to the inspection being sought.[26]

Attorney-Client Privilege. Privileged information can easily end up in a company's minute books. Attorneys frequently present reports to the board and committees about ongoing litigation matters and the results of internal investigations directed by the board. As another example, a special committee may work closely with outside counsel and report to the board on the subject of its investigation. The general rule is that disclosure outside of the attorney-client relationship results in loss of the privilege.[27] A company's success in objecting to inspection based on attorney-client privilege grounds will depend

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21. *See, e.g.*, Del. Code Ann. Title 8, § 220. *See generally* Elizabeth Hinck, *Open Season for Board Minutes*, DIRECTORS AND BOARDS, Second Quarter 2006.

22. *Id.* A requesting party that has no idea what it will do with the requested information does not have a proper purpose for the request. *Security First Corp. v. U.S. Die Casting & Dev.*, 687 A.2d 563 (Del. 1997). Other examples of improper requests or purposes include where the shareholder already has access to the information that is being requested, where the request is made based simply on curiosity, or where the only purpose is to harass the company. *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982).

23. *Weisman v. W. Pac. Indus., Inc.*, 344 A.2d 267 (Del. Ch. 1975). Valuation of the company to determine whether or not to increase a purchase price is not a proper purpose. *BBC Acquisition Corp. v. Durr-Fillauer Med., Inc.*, 623 A.2d 85 (Del. Ch. 1992).

24. *See Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*, 290 A.2d 691 (Del. 1972). The question of a proper purpose is generally determined from the facts on a case-by-case basis. *Carroll*, 453 A.2d 788.

25. *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 565-66 (Del. Ch. 1998).

26. Statutes governing the right of inspection are generally construed in favor of shareholders. *Rainbow Navigation, Inc. v. Pan Ocean Navigation, Inc.*, 535 A.2d 1357 (Del. 1987). However, in a proceeding to establish inspection rights, the shareholder bears the burden to prove that it has a proper purpose for making its request. *Skouras v. Admiralty Enters., Inc.*, 386 A.2d 674 (Del. Ch. 1978). If the shareholder satisfies this requirement, the burden then shifts to the company to prove that the purpose is improper. *Compaq Computer Corp. v. Horton*, 631 A.2d 1 (Del. 1993).

27. Brette S. Simon & Lawrence M. Braun, *Protecting Privilege in Transactional Negotiations*, LOS ANGELES LAWYER (Dec. 2003).

largely on the context and will be influenced by whether the requesting shareholder has initiated litigation against the company.[28] To protect privileged information, many companies have the general counsel or outside counsel report orally on litigation matters or those that may lead to litigation, and simply state in the minutes that the report was given without providing details.

Regulation FD. Regulation FD[29] prohibits a publicly traded company from selectively disclosing material, nonpublic information regarding itself or its securities when it is reasonably foreseeable that the recipient of the information would trade on the basis of that information. Regulation FD exempts companies from its disclosure requirements when the company enters into a confidentiality agreement with the information recipient.[30] The agreement may be oral or written, but the terms must be express, not implicit.[31] Since a company cannot be certain that a shareholder seeking inspection will not trade on the information received, it is advisable to seek a confidentiality agreement or a protective order for any material nonpublic information that may be provided in response to an inspection request.

Confidentiality Agreements and Orders. Where minutes would reveal proprietary and confidential information such as the company's strategic plans, particular sales and marketing initiatives or projections of future results, companies have been successful in obtaining confidentiality agreements from shareholders as a condition to the shareholders' exercise of their inspection rights or in obtaining court orders to protect sensitive information.[32] Although neither a standard confidentiality agreement nor a court order will prevent a waiver of the attorney-client privilege, either will help to address Regulation

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28. *See Grimes*, 724 A.2d at 568-69 (in a Section 220 demand for inspection by a potential derivative plaintiff, the court found that the plaintiff demonstrated good cause for production of the documents because the documents sought were unavailable from any other source and production was integral to the plaintiff's ability to assess whether the defendant company wrongfully refused his pre-suit demand).

29. 17 C.F.R. § 243.100-.103 (2007).

30. *Id.* § 243.100(b)(2)(ii).

31. Regulation FD, 17 C.F.R. 243.100(b)(2)(ii); Simon and Braun, *supra*, note 28.

32. *See Stroud v. Grace*, 606 A.2d 75 (Del. 1992) The company was closely held, and had a policy that it would disclose confidential financial information only to shareholders who signed a confidentiality agreement. In upholding the policy, the opinion notes the emphasis Delaware courts place on the protection of a closely held corporation's information from curiosity seekers. *Id.* at 89-90 (citations omitted).

FD concerns and the company's more fundamental concerns about release of sensitive information.

The ability to obtain such an agreement or court order may be enhanced if the company has a written confidentiality agreement in place for directors and officers. For example, in *Disney v. Walt Disney Co.*,[33] Roy Disney, a former director of Disney turned gadfly, sought confidential board documents relating to executive compensation, including documents identifying internal targets for a company incentive plan, documents providing details about bonus levels for individual executives and the directors' written communications commenting on these matters. The court noted that Mr. Disney was subject to Disney's board confidentiality policy, which barred present and former directors "from disclosing information entrusted to them by reason of their positions" as well as "'non-public...discussions and deliberations' of the board."[34] The court gave the policy significant weight in finding that the disputed documents were confidential and that the board's interest in maintaining confidentiality outweighed the benefit to shareholders of public disclosure.[35]

Minutes as Evidence in Litigation

Delaware courts have long instructed plaintiffs in derivative actions to utilize their statutory rights as shareholders under Section 220 of the Delaware General Corporation Law to inspect a company's books and records as a discovery technique in order to prepare more particularized complaints that may survive a motion to dismiss for failure to state a claim.[36] Minutes that reflect the directors' compliance with their duties of care and loyalty are therefore a critical defense to such a suit. Courts apply a presumption that board minutes generally serve as the best evidence of the board's actions and intent.[37]

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33. 2005 Del. Ch. LEXIS 94 (Del. Ch. June 20, 2005); *Stroud v. Grace*, 606 A.2d at 90.

34. *Disney v. Walt Disney Co.*, 2005 Del. Ch. LEXIS 94 , at *3.

35. Mr. Disney appealed the original opinion, reported in *Disney v. Walt Disney Co.*, 857 A.2d 444 (Del. Ch. 2004), to the Delaware Supreme Court, which remanded to the trial court for specific findings of fact.

36. *See, e.g., Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040 (Del. 2004) (extensive string citation to decisions from both the Supreme Court of Delaware and the Chancery Court that, in the court's language, encourage the use of, and "downright" admonish the failure to use, Section 220 as a pre-filing discovery tool).

37. Board minutes are presumed to be correct. *Young v. Janas*, 103 A.2d 299 (Del. Ch. 1954); *Phoenix Fin. Corp. v. Iowa-Wisconsin Bridge Co.*, 16 A.2d 789 (Del. Ch. 1940).

Courts do, however, allow the use of evidence outside the board minutes to fill any gaps left by the minutes and/or to supplement the board minutes.[38]

Good minutes cannot cure bad process. But where the board *has* complied with its duty of care, well-crafted minutes documenting the board's actions can increase the likelihood that the company will prevail on a motion to dismiss a claim that the board has breached its fiduciary duties,[39] defeat a plaintiff's argument in a derivative suit that demand is futile because the board is not disinterested or failed to validly exercise its business judgment,[40] or rebut a claim that the directors should not receive the protection of the exculpatory provisions in the company's charter because they failed to act in good faith.[41] Conversely, if the minutes document bad board process,[42] or if they are poorly prepared or missing entirely, they can undermine a board's defense that it acted appropriately.[43]

Bad Minutes *and* Bad Process? – NetSmart. *In re NetSmart Technologies, Inc. Shareholders Litigation*[44] is a poster child for poor minutes preparation practices in connection with a critical decision such as the sale of the company. The case also illustrates how courts focus on relevant minutes to determine whether the board complied

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38. *Cheff v. Mathes*, 199 A.2d 548, 505-06 (Del. 1964); *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431 (Del. Ch. 1972).

39. For example, in *In re Federal National Mortgage Association Securities, Derivatives & "ERISA" Litigation*, 503 F. Supp. 2d 9, 19 (D.D.C. 2007), shareholders claimed that the directors had breached their duty of oversight by failing to maintain adequate internal controls and specifically to ensure adequate compliance with accounting standards related to financial derivatives. In fact, the record reflected both that there was a system of controls in place and that the directors had "responded to each of the 'red flags' cited by plaintiffs." (Emphasis omitted.)

40. *See, e.g., Beam* 845 A.2d at 1056 (court discusses how minutes may establish that a director was not disinterested); *In re Fed. Nat. Mortgage Ass'n. Sec., Derivatives & "ERISA" Litig.*, 503 F. Supp. 2d at 16-17.

41. *See, e.g., In re Walt Disney Co. Derivative Litig.*, 906 A.2d at 62-68 (discussing good faith standard and upholding decision that directors met the standard, *despite* a record that showed their actions fell short of best practices).

42. *See generally In re Tower Air, Inc.*, 416 F.3d 229 (3d Cir. 2005) (discussing minutes, as prepared, that reflected no discussion by the board and referring to approval process as rubber-stamping); *Boyland v. Boston Sand & Gravel Co.*, 22 Mass. L. Rep. 290 (Mass. Super. Ct. Mar. 16, 2007) (noting that summary judgment would be improper because the minutes, as prepared, did not show the board's care and analysis).

43. *See generally In re Prime Hospitality, Inc.*, 2005 Del. Ch. LEXIS 61 (Del. Ch. May 4, 2005) (poorly kept minutes and lack of other evidence in records were problematic); *Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 Del. Ch. LEXIS 122 (Del. Ch. Aug. 24, 2004) (leaving in place various shareholder claims where evidence of the board's care, through the minutes as prepared, was simply absent).

44. 924 A.2d 171 (Del. Ch. 2007).

with the heightened standards that apply to significant corporate transactions, such as a merger, the need for consistency between the minutes and the disclosure documents describing background events in such transactions,[45] and the importance of preparing and approving minutes promptly, while events are still fresh in the minds of the directors who were present.

Responding to overtures from private equity buyers, the NetSmart board formed a special committee to oversee a rapid auction process among identified private equity bidders that led to execution of a cash merger agreement with the winning bidder. Shareholders complained that the merger agreement was the result of a flawed sales process because it excluded strategic buyers and that the proxy statement omitted material information. The Chancery Court noted that, having determined to sell the company for cash, the board had a duty –under *Revlon* – to "undertake reasonable efforts to secure the highest price realistically achievable given the market for the company."[46] Concluding that the plaintiffs had established a reasonable probability of success on the merits of two of their claims that the board had failed this standard, the court preliminarily enjoined the shareholder vote on the merger to provide time for the defendants to amend the proxy statement to respond to the plaintiffs' disclosure claims.

The court was highly critical of the company's minute-taking practices. It pointed to a May 19 meeting, described in the proxy statement as an "informal" board meeting because no minutes were taken, where a determination was made to attempt to sell the company and to focus on private equity buyers without an active canvass of strategic buyers. The proxy statement recited a list of reasons purportedly considered by the board as to why it would be futile or competitively risky to approach strategic buyers. But the court concluded that "there is no credible evidence in the record that buttresses this recollection of events."[47] The court noted that no minutes were taken at a July 13 meeting to consider an acquisition proposal, also referenced in the proxy statement, held by a special committee created by the board. Finally, observing that after announcement of the transaction the special committee approved the minutes

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45. Merger proxy or information statements and tender offer documents are all required to include information on the background of and reasons for the transaction in question. Exchange Act Regulation M-A, Items 1005(b) and 1011(a)(i); Exchange Act Rule 14a-101, Item 14, Instruction 7 (a), (b)(7); Exchange Act Rule 14d-100, Item 5.

46. *NetSmart*, 924 A.2d at 192.

47. *NetSmart*, 924 A.2d at 183.

for ten meetings that occurred during August through November, the court stated that "tardy, omnibus consideration of meeting minutes is, to state the obvious, not confidence-inspiring."[48] Thus, if the board had, in fact, considered carefully and rejected the option of opening the sale process to strategic bidders, the absence of minutes clearly recording such deliberations greatly impaired the directors' ability to make that argument.[49]

Option Backdating – A Special Case. Corporate board and committee minutes and director actions by consent have surfaced as a critical element in a particular category of cases – those involving claims of stock option backdating by publicly traded companies. In these cases, companies purportedly granted stock options with a strike price equal to the fair market value of the company's stock on the date of the option grant, while actually falsifying the grant date. Under generally accepted accounting principles in effect when much of the alleged backdating activity occurred, if the strike price was less than the fair market value of the stock on the actual date of grant, the company was required to recognize the difference as a compensation expense.

The case of Gregory Reyes, former CEO of Brocade Communications, Inc., is one example of how minutes were manipulated in the backdating cases. Mr. Reyes served as the sole member of the compensation committee, empowered to grant options to all non-executive employees. He was provided with a list of option grants, purportedly made at a "meeting," along with Brocade's stock price history for the prior three months. He would then sign the minutes indicating that he had granted the options on the date of the lowest stock price in the period.

Investigations of backdating frequently resulted in restatements of the affected company's financial statements for prior years to reflect the correct amount of compensation expense.[50] Such restatements have led not only to shareholder derivative suits but also to civil and criminal charges by regulators against both the company and its officers,

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48. *NetSmart*, 924 A.2d at 191.

49. *NetSmart*, 924 A.2d at 191.

50. For example, in January 2005, Brocade restated its financial statements for 2004 and prior periods, decreasing net income (or increasing net losses) in every year, including a $304 million total decline for 1999-2001. Without admitting or denying the allegations, Brocade settled for $7 million the SEC's charges that its officers created records "making it falsely appear that options had been granted at a lower price on an earlier date." SEC Litig. Release No. 20137 (May 31, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20137.htm.

most of which center on falsification of minutes or consents. For example, in 2007, the SEC filed charges against Apple's former chief financial officer and its former general counsel in connection with an alleged options backdating scheme.[51] The SEC asserted that they made false or misleading statements to Apple's auditors, falsified books and records and caused the company to falsely report its financial results.[52] In Brocade's case, the government used the Foreign Corrupt Practices Act, along with other securities law provisions, to criminally charge, prosecute and convict Mr. Reyes and the former chief financial officer of fraudulently altering corporate records.[53]

Altered or fabricated minutes are an indication that a company's policies and procedures for the control of its minutes and other legal records are seriously deficient. The option backdating cases illustrate the importance of maintaining the integrity of board and committee minutes and consent actions so that they are prepared accurately in the first instance and, once created, are not subject to alteration for improper purposes.

For more on corporate governance, *see* Corporate Governance: Law and Practice (Matthew Bender).

For more on Delaware corporate law, *see* Delaware Corporation Law and Practice (Matthew Bender); and Corporate and Commercial Practice in Delaware Court of Chancery (Matthew Bender).

For more on officer and director liability, *see* Liability of Corporate Officers and Directors (Matthew Bender).

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51. SEC Charges Former Apple General Counsel for Illegal Stock Option Backdating, SEC Litig. Release No. 20086 (Apr. 24, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20086.htm. Apple and its CEO, former CFO and former general counsel are now defendants in a securities fraud class action lawsuit based on the backdating allegations. *Vogel v. Apple, Inc.*, No. 5:2008cv03123 (N.D. Cal. Filed June 27, 2008).

52. The former Apple CFO, without admitting or denying the SEC's allegations, settled the claims against him by paying approximately $3.5 million in disgorgement and penalties. *Id.*

53. See *United States v. Reyes*, 2007 U.S. Dist. LEXIS 60003 (N.D. Cal. Aug. 7, 2007) (denial of motion for judgment of acquittal following jury verdict finding Mr. Reyes guilty); *United States v. Jensen*, 532 F. Supp. 2d 1187 (N.D. Cal. 2008) (CFO of Brocade convicted in backdating scheme).

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Evelyn Cruz Sroufe, Rebecca H. Hoskins and Scott H. Husbands on
Corporate Minutes: Best Practices Create Best Evidence Part I: Regulatory Framework

Watchdogs Are Awake, CORPORATE GOVERNANCE ADVISOR Oct./Nov. 1993, at 19 (hereinafter "Minutes").

About the Author. Evelyn Cruz Sroufe is a partner at the Seattle law firm, Perkins Coie LLP. Her practice emphasizes corporate finance, securities, and governance matters, primarily for public companies. Ms. Sroufe was the Senior VP of Worldwide Operations for Visio Corporation, where she oversaw Visio's legal department. She is also a former director of Willamette Industries, served as president and CEO for the Websea Group, and is a former vice-president of the Microsoft Corporation. Ms. Sroufe was listed in the *Best Lawyers in America* (recognized for Corporate Law) and in *Washington Law & Politics*, "Washington's Super Lawyers". She serves on the boards of Virginia Mason Health System and the Seattle-Northwest Chapter of the National Association of Corporate Directors. Ms. Sroufe speaks and writes frequently on corporate governance matters, for example: speaker at "Directors and Officers in the Spotlight: Liability, Indemnification and Insurance," (San Francisco, October 2003); author of "Observations of an 'Outside' Outside Director: A Weyerhaeuser Nominee on the Willamette Board," *M&A Lawyer* (June 2002).

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Evelyn Cruz Sroufe, Rebecca H. Hoskins and Scott H. Husbands on

Corporate Minutes: Best Practices Create Best Evidence Part II: The Art of Preparing Minutes

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In *Part I: Regulatory Framework*, the authors provide the legal background of the board's role and their fiduciary duties and requirements to maintain minutes, and in *Part II: The Art of Preparing Minutes*, they provide guidance on preparing and safeguarding accurate and complete minutes that will provide the best evidence that directors complied with their duties in approving significant corporate actions.* Approaches to the drafting of minutes have varied widely over the years, with many advocating a short form, summary record of corporate actions taken, and others (the minority) preferring a lengthy, nearly verbatim transcript of the discussion.[1] The better practice, supported by the *Disney* cases and others such as *Netsmart*, is to provide varying levels of detail depending on the importance of the matter discussed or decided by the board. Thus routine matters approved in the ordinary course of the company's business, such as establishing corporate checking accounts or appointing lower-level officers, do not require extensive background discussion. But for significant matters, the minutes should provide a much more detailed discussion of the decision process.

The objective, in each case, should be to support the application of the business judgment rule to the board's decision. The minutes should be drafted by experienced professionals to reflect that the directors exercised due care by obtaining information and, if necessary, expert advice that allowed them to make an informed decision, free from conflicts of interest, in the best interests of the company's shareholders.

Preamble and Closing Sections. The preamble covers much of the "nuts and bolts" of the meeting: the time, date and location, the persons present (including any members of management, experts or other guests) and whether any participants were present by teleconference or attended only portions of the meeting. The preamble may also evidence compliance with procedural requirements, such as how and when notice was provided to directors. The minutes should end with the time of adjournment to indicate how much overall time directors devoted to the topics discussed during the meeting. This allows courts to assess whether it was sufficient for the importance of the matter.[2]

1. Minutes at 21. From time to time, companies also consider using video or audio recording equipment to record a meeting, a practice we discourage because it is likely to have a chilling effect on deliberations.

2. *See Smith v. Van Gorkum*, 488 A.2d 858, 869 (Del. 1985). Courts may also be influenced by the time of day that the meeting occurred, which could suggest whether the board was alert and engaged or hurried and tired. *See* Minutes at 21 (citing *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 275 (2d Cir. 1986)).

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The closing section may also provide, if available, the date, time and location for the next meeting as a reminder to the directors.

Board Materials. Where materials such as analyses, memoranda or slides are provided to the directors in advance of a meeting or handed out at a meeting, it is helpful to reference in the section devoted to the relevant matter what the materials were and when they were provided to the directors. Barring any attorney-client privilege or other confidentiality concerns, clean copies of those materials should be retained with the related minutes. In addition, if the matter was considered at an earlier meeting or was discussed with individual board members between meetings, it may be helpful to reference the earlier discussions to reflect the board's overall level of attention to, and familiarity with, the matter. When the board is considering matters of significance to the company and the materials are complex, a record indicating that the directors received materials sufficiently in advance of the meeting to study and understand them and that they discussed the matter over time supports the proposition that they were adequately informed.

Management and Expert Reports. If presentations are made to the board or committee by company management or by outside advisors, the minutes should include the names of the presenters, the general nature of the presentation and any materials they referenced. Directors are generally entitled to rely on information, opinions and reports presented by the company's officers or employees, by committees of the board, and by other persons such as accountants, investment bankers, attorneys or consultants.[3] Directors must do so in good faith, in the belief that the matter is within the person's professional or expert competence and that the person was selected with reasonable care by or on behalf of the corporation. In selecting experts or considering management input, directors should also consider whether, in each case, the expert or officer is subject to conflicts of interest that could affect her judgment or bias her input. Minutes should reflect reliance on the officer or expert and, where applicable, the process for selecting the expert that supports the directors' reasonable belief in the expert's competence.

Topics Discussed and Approved. Minutes should include, in reasonable detail, a description of the discussion of each major item considered or acted upon. For routine matters, little board discussion is required, but as the significance of the matter increases, the detail should increase. Courts look to the length of the discussion of a matter reflected in the minutes as an indication of the time spent on the matter by the directors. For example, in the

3. *See, e.g.*, Del. Code Ann. Title 8, § 141(e); *see also In re Walt Disney Co. Derivative Litig.*, 906 A.2d at 59 (Disney compensation committee was entitled to rely on compensation expert's analysis).

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Disney derivative litigation, the court noted that, in a key compensation committee meeting, the directors spent the least amount of time discussing the most important item on the agenda – the hiring of a new president, Michael Ovitz, and his compensation – and significantly more time discussing the fee paid to a director in connection with hiring Mr. Ovitz.[4] The disproportion was a factor in the court's decision to deny Disney's motion to dismiss.

Greater amplification may be needed for decisions involving executive compensation, hiring or terminating key executives, entering into significant or complex financings or derivative transactions, approving public or private debt or equity offerings, launching new products, services or lines of business, approving material acquisitions or divestitures, entering into material agreements or partnerships, approving capital budgets or strategic plans, implementing or waiving of antitakeover provisions and entering into related party transactions with directors, management or significant shareholders. Of course, decisions involving the merger or sale of the company should be prepared with the greatest level of care and relevant detail.

Minutes reflecting a significant corporate decision may include some or all of the following elements:

- a summary of the item and scope of the discussion,
- any director conflicts of interest, as discussed in more detail below,
- the issues presented, including the risks and opportunities associated with the decision,
- the significant factors considered, including input from management,
- any reliance on opinions or presentations of experts or outside consultants (and information about their qualifications and independence),
- alternatives considered and the reasons for rejecting those alternatives,
- reasons why the board believed the proposed action was in the best interest of the company and its shareholders,

4. *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 280 (Del. Ch. 2003).

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- resolutions that reflect the decision made, authority granted or action to be taken,
- whether the resolutions were approved unanimously, or by a split vote, and whether any directors recused themselves, and
- any agreement or consensus that did not result in a formal resolution, such as an agreement to address a matter at the next meeting.

If the transaction involves a sale of control, the board will be subject to the higher *Revlon* standard of care, in addition to the "garden variety" business judgment rule criteria. Thus the minutes should reflect that the board undertook to secure the best transaction reasonably available for the corporation and its shareholders.[5] Similarly, if the board is considering defensive measures, such as the adoption of a shareholder rights plan, or is approving a stock-for-stock merger that does not constitute the sale of control under *Revlon*, it must satisfy the *Unocal*[6] proportionality test. In that case, the minutes should reflect that the directors had reasonable grounds to believe that a danger to corporate policy and effectiveness existed and that the measures taken were reasonable in relation to the threat posed.[7] In either case, *NetSmart* illustrates that the minutes should be consistent with the description of the background of and reasons for the transaction that appears in the proxy statement or tender offer documents. Where they are inconsistent, the minutes are likely to carry greater weight.

Addressing Conflicts of Interest. A director's duty of loyalty requires him or her to disclose any conflicts of interest the director may have in connection with a decision under consideration by the board. A decision tainted by a breach of the duty of loyalty will not receive the protection of the business judgment rule but must be evaluated under the stricter "entire fairness" standard,[8] which requires the board to prove that the action is both procedurally and substantively fair to the shareholders. Under case law and state statutes dealing with interested director transactions,[9] however, the board can approve

5. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); *NetSmart*, 924 A.2d 171, 192 (Del. Ch. 2007).
6. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955-56 (Del. 1985).
7. Minutes at 22 (citing Unocal, 493 A.2d at 955-56).
8. *See Cede v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *modified on re-argument*, 634 A.2d 345 (Del. 1994).

such a transaction and still receive the protection of the business judgment rule, and the transaction will not be void or voidable, if the interested director fully discloses the conflict and all the material facts about the transaction, and the disinterested directors, in good faith, approve the transaction. Accordingly, minutes of such a meeting should reflect that these disclosure requirements were met and that the disinterested directors (with the interested director abstaining) determined in good faith that the transaction was in the best interest of the shareholders, notwithstanding the conflict.

A related concern is conflicts of interest that may affect management or advisors. In selecting financial or legal advisors, for example, directors should inquire about conflicts that could bias the advisors' conclusions. If a potential conflict is identified, the minutes should discuss the directors' judgment whether it is in fact a conflict that should preclude retention of the advisor. In the case of officers, minutes should reflect that the directors sufficiently recognized the impact of the decision on the officers' compensation or employment to assess any bias such factors might introduce into the advice the officers provide. In *NetSmart*, for example, the court suggested that management's preference for a private equity buyer stemmed from the greater likelihood that they would have jobs and an equity interest in the company, post-acquisition, than if the company were sold to a strategic buyer.[10]

Executive Sessions. Executive sessions of independent directors are mandated by the listing requirements of national securities exchanges. These sessions create regularly scheduled opportunities for independent directors to speak candidly with each other without management present. They usually do not have an agenda and often occur at the end of a regularly scheduled board meeting, at which time management and any non-independent members such as the CEO are excused, including the person designated to record minutes of board meetings.

Maintaining the confidentiality of these executive sessions is usually essential to ensuring their effectiveness. Accordingly, it is generally appropriate to record in the board minutes only that the executive session took place, the time at which it began, how long it lasted and who attended. An exception to this approach applies when a quorum exists during the session and formal action is taken. In that case, the chair of the executive session should promptly notify the person in charge of preparing minutes of the action so that it can be properly reflected in the record of that meeting. In the event that an ex-

9. *See, e.g., id.* at 362-64; Del. Code Ann. Title 8, § 144 and similar statutes provide that a contract or transaction with an interested director is not void or voidable solely because the interested director participated in the meeting at which the contract or transaction was approved if the procedures set out in the statute were followed.

10. 924 A.2d at 198-99.

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ecutive session meeting is held separately (i.e., not after a full board meeting), the corporate record should also reflect only the time and location of the meeting, the persons present, and the meeting's duration.

Drafting Style. Use a clear, concise, plain-English style and present basic, factual information in an unbiased manner. Terms used should be well defined and unambiguous. In case of litigation, a court should not have to look to other sources for definitions or explanations. Carefully review and edit the minutes to avoid inadvertent errors that may call the accuracy of the entire minutes in question. Keep in mind that minutes may be quoted in a newspaper or examined by a jury. Avoid recording or otherwise creating a transcript of the entire meeting, which would not only include much unnecessary information, but could also make available quotations that might be embarrassing or even harmful if later taken out of context or otherwise misused. Minutes should reflect more generically the discussion between directors and other participants.

Prompt Drafting of Minutes. Following the *NetSmart* decision, it has become best practice to prepare and circulate draft minutes of any board or committee meeting as soon as possible after the meeting to ensure accuracy. Corporate secretaries can facilitate prompt drafting by creating a template for the minutes in advance of the meeting based on available information and materials, including the agenda, any background materials and proposed resolutions distributed to directors in advance of the meeting, and the persons expected to attend the meeting. Prompt circulation of draft minutes to directors enables the version of the minutes that is later distributed with any other materials prior to the following meeting to already reflect any comments, and minimizes changes noted at the following meeting in connection with approval of the minutes.

Signing Approved Minutes. Signing the minutes indicates that they are final, have been approved and are part of the official corporate records. In smaller companies the corporate secretary may be the sole signer, but for larger companies, especially those that are publicly held, it is better practice to have both the secretary and the chair of the meeting sign the approved minutes. This practice ensures that both have carefully read the minutes, which serves as a control on the minutes' accuracy and integrity. In some cases, the secretary or chair of the meeting for which the minutes are prepared is not the same person as the secretary or chair for the meeting at which the minutes are approved, in which case the secretary and chair for each of these meetings should sign the approved minutes.

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Circulation of Minutes. Companies should also consider providing committee minutes to all directors as a communication tool to ensure effective sharing of information that may be important to future deliberations by the board or other committees.[11] Review of committee minutes in advance of a regularly scheduled board meeting enhances the effectiveness of oral committee reports to the full board and encourages a more robust discussion of any issues raised during the oral report. This practice also helps directors who are not members of a particular committee to understand and evaluate the performance and recommendations of the committee. This is especially important where the board has delegated a critical function to a board committee.

Retention. Once minutes for a board or committee meeting have been approved and signed, the corporate secretary should retain only the final minutes and a clean copy of the informational materials provided to the board in connection with the meeting. At that point, notes taken during the meeting and earlier drafts of the minutes are no longer needed and should be destroyed – unless a specific legal requirement to retain them exists (for example, a pending government investigation or a court order). Clear document retention policies addressing when these types of notes may be destroyed facilitates uniform practice. Directors should be fully informed and periodically reminded of the company's document retention policies.

Maintaining the Integrity of Minutes. Safeguarding the integrity of board and committee minutes usually involves having more than one person manually sign the approved minutes and then restricting access to the minutes. The corporate secretary will often store hard copies of the minutes in a locked, fireproof room and record in a log book who accesses the minutes. An electronic alternative is to prepare the minutes using document management technology that can record any changes made to the initial draft, the dates of such changes and who made them. Such technology also allows for un-editable scans of approved, signed minutes to be saved in a medium that is easily searchable, facilitating the prompt location and production of relevant minutes in response to litigation discovery or due diligence requests.

Conclusion. Well-kept minutes of board and committee meetings provide a reliable record of director decision making. Corporate minutes that reflect attentive, inquisitive and probing deliberations provide the best evidence that directors complied with their duties

11. *See generally* Stewart M. Landefeld, David F. Taylor & Rebecca H. Hoskins, *Cost-Effective Improvements in Governance: Enhancing Communications Among Board Committees*, CORPORATE GOVERNANCE ADVISOR Jan./Feb. 2008, at 1-2. This article provides a set of best practices for companies to enhance the effectiveness of communications among board committees and the board as a whole.

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in approving significant corporate actions. Accordingly, this function should be overseen by someone who understands best practices for preparing minutes and appreciates the variety of purposes for which minutes may be used or reviewed.

Dos & Don'ts for Board and Committee Minutes

Do:	Don't:
• Distribute agenda, background materials and proposed resolutions well in advance of a meeting, reflect in the minutes when and to whom these materials were distributed and keep such materials with the minutes	• Wait to provide important background materials until directors arrive at a meeting
• Ask a skilled professional to prepare the minutes	• Ask a person to draft minutes who may not fully understand their purpose
• Reflect in the minutes any consultation with outside advisors and any relevant consideration of the advisors' qualifications or independence	• Delay preparation of minutes until shortly before the next board meeting
• Begin drafting minutes before a meeting based on agenda, proposed resolutions and background materials	• Prepare "bare bones" style minutes for a meeting at which a significant corporate transaction or decision is discussed
• Summarize in reasonable detail all topics discussed and reflect the types of questions asked	• Rely on informal, undocumented discussions for purposes of informing directors of or having deliberations on any significant corporate issue
• Prepare draft minutes for each board meeting and committee meeting promptly and circulate draft minutes to directors as soon as possible after a meeting	• Record verbatim transcripts of a board or committee meeting
	• Rely heavily on boilerplate language and templates that mask the details of what took place at the meeting
	• Prepare detailed minutes of dis-

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- Once minutes are approved, have the secretary and chair of the meeting sign them
- Use evolving technology to protect integrity of minutes and related materials to prevent tampering
- Seek to protect privileged information or material, nonpublic information contained in the minutes when responding to a third-party request to review minutes

cussions during executive sessions of the independent directors

- Allow employees unrestricted access to minute books
- Keep notes made during the meeting and early drafts of the minutes once the final minutes have been reviewed

For more on corporate governance, *see* Corporate Governance: Law and Practice (Matthew Bender).

For more on Delaware corporate law, *see* Delaware Corporation Law and Practice (Matthew Bender); and Corporate and Commercial Practice in Delaware Court of Chancery (Matthew Bender).

For more on officer and director liability, *see* Liability of Corporate Officers and Directors (Matthew Bender).

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About the Author. Evelyn Cruz Sroufe is a partner at the Seattle law firm, Perkins Coie LLP. Her practice emphasizes corporate finance, securities, and governance matters, primarily for public companies. Ms. Sroufe was the Senior VP of Worldwide Operations for Visio Corporation, where she oversaw Visio's legal

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Sample 2010 Annual Report/Proxy Timetable

Date	Task	Status	Notes
January 1, 2009	Identify top 10 highly compensated individuals and all members of the Board of Directors. Confirm that mechanism is in place to track compensation, perquisites, etc. for disclosure in 2010 proxy		
January 18, 2010	Distribute D&O questionnaires		
January 18, 2010 - April 30, 2010	Discussions with Compensation Committee re compensation philosophy for executive officers		
February 1, 2010	(1) Confirm arrangements with Broadridge for notice/access distribution. (2) Notify art department to design AR cover		
February 25, 2010	Board meeting to, among other things: (1) set record date for annual meeting; and (2) consider any management proposals for proxy		
February 26, 2010	Notify NYSE, transfer agent, Broadridge and DTC of record and annual meeting dates.		NYSE Rule 401.02 requires notification of meeting date and record date. The NYSE must be notified at least 10 days before the record date.
March _, 2010	Deadline specified in 2009 proxy for submission of stockholder proposals		
March 10, 2010	Deadline for return of D&O questionnaires		
March 11, 2010 - April 30, 2010	Meet with directors and executive officers to confirm information in D&O questionnaires		
March 16, 2010 (Tuesday)	Commence brokers' search		At least 20 business days before record date (Rule 14a-13(a)(3)). (NYSE broker search requirement is 10 days)
April 13, 2010 (Tuesday)	Record date		No more than 60 days before meeting (April 11, 2010). (By-laws Section ___ and state law)
February 1 - April 30, 2010	Prepare proxy materials		
Wednesday, April 7, 2010 (preliminary proxy filing) **OR** Monday, April 26, 2010 (no preliminary	Board, Audit, Compensation and Nominating and Governance committee meetings to review/approve proxy and committee reports		

proxy filing)			
Monday, April 12, 2010	File preliminary proxy (if necessary)		The preliminary proxy is subject to a 10 calendar day SEC review period. If reviewed, allow additional time to reply to SEC comments. (Rule 14a-6.)
No later than Friday, April 30, 2010	File definitive proxy.		Filing deadline is April 30, 2010 (120 days after 12/31/09). Filing must be after March __, 2010 (last date in 2009 proxy for submission of stockholder proposals).
No later than Friday, April 30, 2010	Post proxy on website and mail notice and access cards if e-proxy. Consider earlier filing to meet printer/mailing schedule, save mailing costs, etc., especially if e-proxy is not used. Mail AR/proxy/notice of meeting or post via e-proxy		Filing and website posting must be completed by April 30, 2010 (40 days before annual meeting) if notice only delivery is used.
Promptly after filing definitive proxy	Mail AR/proxy/notice of meeting if e-proxy is not used. Print fulfillment documents if e-proxy		Note that NYSE listing agreement no longer requires that the AR be mailed no later than 120 days after 12/31/09.
May 1 - June 9, 2010	Preparation of meeting materials, Q&A, practice sessions, etc.		
June 10, 2010 (Thursday)	Annual Meeting		Location – New York
June 10, 2010 (Thursday)	File FD 8-K (if necessary)		File FD 8-K if anything reportable occurs at meeting because the meeting is not webcast.
June 16, 2010 (Wednesday)	File 8-K reporting voting results		8-K Item 5.07
July 9, 2010 (Friday)	Deadline for NYSE annual written affirmation and CEO certification		Due within 30 calendar days of the annual meeting (Instructions to Section 303A Annual Written Affirmation)

Legal/Stock Exchange Holidays:
February 15, 2010 – Presidents' Day
March 29 - April 6, 2010 – Passover
April 2, 2010 – Good Friday
April 4, 2010 – Easter
May 31, 2010 – Memorial Day
July 4, 2010 – Independence Day (Friday)

[Company Name]

2010 Annual Meeting of Stockholders
[Date]

AGENDA

1) Welcome and opening remarks

2) Introductions of directors and officers

3) Secretary's report of mailing of the notice of annual meeting, proxy statement and proxy card to stockholders

4) Appointment of Inspector of Election and announcement of quorum

5) Vote on proposals:

- Election of directors;
- Ratification of the selection of independent auditors;
- Management proposals; and
- If properly proposed at the meeting, stockholder proposals

6) State of the Company remarks

7) Report by Inspector of Election

8) Adjournment

9) Question and answer period

ANNUAL MEETING SCRIPT

1. Introduction

Chairperson

Good morning. The 2010 Annual Meeting of Stockholders of [Company] will please come to order. My name is [ ], and I am the [Title] of [Company]. I would like to welcome all of you and thank you for your interest in [Company]. The agenda for this morning includes all formal business stated in the Proxy Statement. Following this meeting we will have a period during which we will be happy to answer any questions you may have.

Also present at the meeting today are [name directors and officers]. [ ] will act as Secretary of the Meeting.

Each of you was given the Rules of Conduct when you entered the meeting room this morning. Additional copies are available in the registration area. It is our intention to conduct this meeting in accordance with the agenda and Rules of Conduct. Please remember that an opportunity will be provided immediately following the formal portion of the meeting for questions and discussion.

2. Notice and Stockholder's List

Chairperson

Will the Secretary please report on the mailing of the notice of this Meeting to all stockholders and the availability of the stockholder's list.

Secretary

I have an affidavit of mailing of the notice of internet availability of proxy materials to each stockholder of record as of the close of business on [ ]. I also present an alphabetical list showing all persons who were holders of record of

the Company's common stock at the close of business on [ ], the date the Board of Directors fixed as the date for determining stockholders entitled to notice of and to vote at this meeting. The list has been duly certified by [ ], the transfer agent of the Company's shares. This list has been available for inspection for the 10 days prior to the meeting at the Company's headquarters, and is available for examination by any stockholder of the Company for any purpose germane to this meeting at any time during the meeting.

Chairman — Will the Secretary please file the list of stockholders, the affidavit of mailing and copies of the notice of internet availability of proxy materials transmitted to stockholders with the records of the meeting.

3. Inspector of Election; Report on Quorum

Chairman — [Name] of [ ] has been asked to act as inspector of election at this meeting. [Name] is present and has submitted an oath of office, which will be filed with the minutes of this meeting. I now ask that all those present with proxies who have not already done so to file their proxies with the inspector. If there are any stockholders present in person who did not register at the door and have not filed a proxy, will they please give their names and the number of shares owned to the attendants at the door at this time.

Chairperson — Will the inspector now report whether a quorum is present.

Inspector — The shares outstanding at the record date which are entitled to vote at this meeting consist of [ ]

shares of common stock. From the count of the stockholders present in person or by proxy, a majority of those shares are represented at this meeting either in person or by proxy and a quorum is present.

Chairman

On the basis of the report of the inspector, I declare a quorum present and the meeting duly convened and competent to proceed with the transaction of business.

Votes will be taken on the matters described on the agenda and in the Proxy Statement and the inspector of election will make a report on the outcome of the votes.

4. Formal Business

Chairman

We will now proceed with the formal business of the meeting. Please note that after each of the matters to be considered has been formally proposed, we will circulate written ballots for stockholders who have not already voted by proxy to vote on such matters.

The first order of business is the nomination of [ ] individuals to stand for election to the Board. [All of the Company's nominees are presently directors of the Company.] I would like to introduce them to you at this time. They are: [names].
Discussion? . . . . . .

Chairman

The next order of business is the consideration and ratification of the independent registered public accounting firm selected by the Audit Committee of the Board to audit the books and records of the Company for the year ending December 31, 2010. The Audit Committee of the Board has selected [ ]. I am also pleased to note the presence at the meeting today of [names] of [name of audit firm].

[Names of representatives] are available to answer questions that the stockholders might like to ask.

(PAUSE for questions addressed to [names of representatives] and their responses.)

[**If applicable]** The next order of business is the consideration and acting upon of [management proposal].

Discussion?

[**If applicable]** The next order of business is the consideration and acting upon [stockholder resolution].

Is there a representative from this group to introduce this proposal and make a brief supporting statement regarding this proposal?

. . . (PAUSE) . . .

. . . RECOGNIZE STOCKHOLDER TO SPEAK ON THE PROPOSAL FOR A MAXIMUM OF [5] MINUTES . . . .

Chairman

Thank you for your comments. The Board's response to this proposal begins on page [ ] of the Proxy Statement. The Board recommends that you vote against this proposal.

Discussion? . . . . .

I now declare the polls open for voting by ballot. All those who wish to vote by ballot should obtain a ballot from an attendant. If you have already filed your proxy, it would simplify the count greatly if you would NOT fill out a ballot unless you wish to change your vote. I would also like to point out that most of you who returned proxies

authorized the persons named in the proxy to vote on all proposals coming before this meeting.

Has everyone voted who wishes to vote? . . . (PAUSE) . . . Apparently, everyone has. I therefore declare the polls closed and ask the inspector to prepare a report on the voting.

5. Results of Voting

Chairman — Let us now proceed with the voting results. Is the inspector ready to report?

Inspector — The results of the balloting are as follows:

On the basis of the report of the inspector, I declare that [summarize results].

Will the inspector please prepare a written record to be filed with the records of the meeting?

If there is no other business to come before the meeting, a motion is in order that the meeting be adjourned.

Question and Answer Period

Chairman — At this point, we would be glad to answer any questions that you might have regarding the Company. If you have a question, please rise and identify yourself so that we may have a complete record of the meeting.

[Question and answer period]

SCRIPT NOTES FOR CONTINGENCIES

1. *STOCKHOLDER'S COMMENTS EXCEED TIME LIMIT*

Chairman	I'm sorry, but you have exceeded the time limit set forth in the Rules of Conduct. Please promptly conclude your remarks.
	[IF STOCKHOLDER PERSISTS]
	I'm sorry, but as I've already noted, you have exceeded the time limit set forth in the Rules of Conduct. Time limits have been imposed so that everyone may have a chance to speak and so that we may conduct this session in an orderly manner. Now please take your seat and allow others the chance to ask a question.
	[IF STOCKHOLDER STILL PERSISTS – SEE #2 BELOW, RESPONSE TO DISRUPTIVE STOCKHOLDERS,]

2. *RESPONSE TO DISRUPTIVE STOCKHOLDER CONDUCT*

Chairman	I must request that if you are not recognized, please refrain from speaking out so that we may continue with the orderly conduct of this meeting. [IF NOT IN THE QUESTION AND ANSWER SESSION, ALSO STATE] You will have the opportunity to ask questions about the business and financial condition of the Company after we have conducted the formal items of business of the meeting.
	[IF STOCKHOLDER PERSISTS]

I repeat that if you are not recognized, your conduct is out of order. Please remain quiet so that your fellow stockholders may continue with the meeting in an orderly manner. Otherwise you will be asked to leave the meeting and, if necessary, removed from this room.

[IF STOCKHOLDER STILL PERSISTS]

Sir (or madam), I have repeatedly asked you to stop your disruptive conduct and have advised you that your action is out of order. However, you have chosen not to comply with my request and, as President of this meeting, I must now ask you to leave the meeting. Security, would you please escort this individual from the meeting.

3. *STOCKHOLDER DEMANDING TO BE HEARD ON MATTERS OUTSIDE OF THE AGENDA*

Chairman

We have established an order of business that was set forth in the proxy statement so that we can conduct the meeting in an orderly manner. All discussion at this meeting should be limited to the proposals that are the subject of this meeting.

[IF STOCKHOLDER PERSISTS]

Your comments go beyond the business of the meeting as set forth in the proxy statement and are out of order. If you would like to speak with someone from the Company about this issue, please wait until after the meeting when one of the officers will be happy to discuss the matter with you or arrange a mutually convenient time to discuss the matter.

[IF STOCKHOLDER CONTINUES TO PERSIST AND THE OTHER STOCKHOLDERS ARE NOT INTERESTED OR SEEM ANNOYED]

Rather than debate this point, I will ask the stockholders present to decide whether they agree with me that we follow the order of business as set forth in the proxy statement or depart from that agenda and listen to your remarks at this time.

The question is: Do the stockholders present desire to follow the order of business set forth in the proxy statement? All stockholders in favor say 'aye.' ." . . . (PAUSE) . . . All stockholders opposed 'no.' ." . . . (PAUSE) . . . The 'ayes' have it. We will therefore proceed with the order of business as set forth in the proxy statement.

[IF STOCKHOLDER CONTINUES TO PERSIST AND YOU WOULD LIKE THE STOCKHOLDER TO LEAVE]

Your comments and conduct at this time are out of order, and if you persist, I will be forced to ask you to leave the meeting.

[Company Name]
____ ANNUAL MEETING OF STOCKHOLDERS
[Date]

Ballot

The undersigned hereby votes the number of shares of common stock, par value ____ per share, of _____ (the "Company") held of record on _____ as follows:

Proposal No. 1: Election of Directors

Each of the following individuals has been nominated to serve as a member of the Company's Board of Directors for a ____-year term ending at the ____ Annual Meeting of Stockholders and until his successor is elected and qualified:

NOMINEE	FOR	WITHHOLD

Proposal No. 2: Ratification of Independent Registered Public Accounting Firm:

RESOLVED, that the selection of _____ to audit the books and records of the Company for the year ending December 31, 201_ be, and hereby is, confirmed, ratified and approved in all respects.

FOR the resolution: _____
AGAINST the resolution: _____
ABSTENTIONS: _____

Proposal No. 3: If properly brought before the Annual Meeting, a Stockholder Proposal Regarding [_____].

RESOLVED:

FOR the resolution: _____
AGAINST the resolution: _____
ABSTENTIONS: _____

	Shares Voted in Person*:
Sign: _____	Sign: _____
	Print: _____
Sign: _____	Sign: _____
	Print: _____
Sign: _____	Sign: _____
	Print: _____

* PLEASE SIGN AND PRINT YOUR NAME EXACTLY AS IT APPEARS ON YOUR SHARE CERTIFICATE.

NOTE: This Ballot may be cast in person or by proxy only with respect to shares which were held of record by the stockholder(s) at the close of business on [date]. If this Ballot is cast by the Proxy Holder, it must be supported by Prox(y)(ies) or power(s) of attorney, duly executed.

[COMPANY NAME]
[ ] ANNUAL MEETING OF STOCKHOLDERS
[Date]

CERTIFICATE OF INSPECTOR OF ELECTION

STATE OF [NEW YORK]	**:**	
	:	
	:	**SS**
COUNTY OF [NEW YORK]	**:**	

The undersigned duly appointed and sworn Inspector of Election at the [year] Annual Meeting of Stockholders of [Company name] (the "Company") held on [date] hereby certifies:

(1) The Annual Meeting was held on [date], at _____.

(2) The number of shares of the Company's common stock (the "Common Stock") outstanding as of the close of business on [record date], and therefore entitled to vote at the Annual Meeting, was _____ shares.

(3) There were present at the Annual Meeting, in person or by proxy, stockholders holding of record _____ shares of Common Stock, constituting more than a majority of the outstanding shares and therefore a quorum was present at the meeting.

(4) The undersigned personally collected the ballots cast at the Annual Meeting by the stockholders in person or by proxy.

(5) The undersigned canvassed the votes so cast and the result of the voting was as follows:

(a) Each of the following individuals received at least _____ votes for election as a director, representing a majority of the votes present:

Nominee	For	Withheld	Broker Non-Vote

(b) On the resolution to ratify the appointment of _____ as the Company's independent registered public accounting firm for the year ending December 31, 201_, the votes were as follows:

For	Against	Abstain	Broker Non-Vote

(c) On the resolution regarding _____, the votes were as follows:

For	Against	Abstain	Broker Non-Vote

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Inspector of Election this ____ day of ____, 201_.

[Name of transfer agent or entity providing inspector]

By: _____
Name: _____
Title: _____

Signed and sworn to before me this

____ day of _____, 201_ by _____.

_____
Notary Public

[Company Name]
[ ] ANNUAL MEETING OF STOCKHOLDERS
[Date]

OATH OF INSPECTOR OF ELECTION

STATE OF NEW YORK
:
: SS
COUNTY OF NEW YORK

I, _____, the undersigned duly appointed and qualified Inspector of Election at the 201_ Annual Meeting of Stockholders of [Company name], held on [day, date] at the [location name and address], upon oath, do promise and swear that I will faithfully execute the duties of inspector of election at the 201_ Annual Meeting with strict impartiality and according to the best of my ability and make a true report of the same.

[Name of transfer agent or entity providing inspector]
Inspector of Election

By: _____
Name: _____
Title: _____

Signed and sworn to before me this

___ day of ____, 201_ by _____.

_____
Notary Public

2010 Annual Meeting of Stockholders

Rules of Conduct

We would like to welcome you to the 2010 Annual Meeting of Stockholders of [ ]. In fairness to all stockholders in attendance and in the interest of an orderly meeting, we require that you honor the following rules of conduct:

1. All stockholders and proxy holders must register at the reception table before entering the room for the meeting.

2. The taking of photographs and use of audio or video taping equipment, cell phones, PDAs and cameras or recording equipment of any kind is prohibited.

3. The meeting will follow the Agenda provided to all stockholders upon entering the meeting.

4. Only stockholders of record or their proxy holders may address the meeting.

5. All questions and comments should be directed to the Chairman of the meeting. You may address the meeting only after you have been recognized.

6. If you wish to address the meeting, please raise your hand. Upon being recognized, please clearly state your name, your status as a stockholder or a proxy holder and present your question or comment.

7. Each speaker is limited to a total of no more than two questions or comments, no more than one of which may be on any single topic and each of which must be no more than one minute in length.

8. Please permit each speaker the courtesy of concluding his or her remarks without interruption.

9. The views and comments of all stockholders are welcome. However, the purpose of the meeting will be observed and the Chairman or Secretary will stop discussions that are:

   - irrelevant to the business of the Company or the conduct of its operations;
   - related to proposals that are not included in the Company's Proxy Statement or are otherwise out of order;
   - derogatory references which are not in good taste;
   - unduly prolonged or other inappropriate issues;
   - substantially repetitious of statements made by other stockholders; or
   - related to personal grievances or issues.

[COMPANY]
ANNUAL MEETING REGISTRATION
[DATE]

NAME	ADDRESS and E-MAIL ADDRESS	ATTENDEES STOCKHOLDER / ANALYST / PRESS / COMPANY OFFICIAL	FORM OF I.D. PROXY TICKET / BUSINESS CARD / OTHER	NO. OF SHARES OWNED	HOW SHARES OWNED/HELD DIRECT / BROKER	NO. OF GUESTS

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ANNUAL MEETING HANDBOOK

2010 EDITION

Providing a General Overview of State and Federal Laws and Stock Exchange Rules Relating to Annual Meetings of Shareholders

Latham & Watkins LLP
Craig M. Garner
Michelle M. Khoury

Annual Meeting Handbook 2010 Edition

Providing a General Overview of State and Federal Laws and Stock Exchange Rules Relating to Annual Meetings of Shareholders

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Printed in the United States of America.

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About This Handbook

Craig M. Garner is a partner and Michelle M. Khoury is an associate in the San Diego office of Latham & Watkins LLP, practicing general corporate and securities law. The authors gratefully acknowledge Robin L. Struve, a partner in Latham & Watkins' Chicago office, for her contributions to the sections of this handbook related to executive and director compensation. The authors also wish to thank C. Dan Black, an associate in Latham & Watkins' San Diego office, for his valuable assistance in preparing the materials contained in this handbook. The information and opinions contained in this handbook are those of its authors, do not reflect the opinions of Latham & Watkins and should not be construed as legal advice. All or part of this handbook has been or may be used in other materials published by the authors or their colleagues at Latham & Watkins. Latham & Watkins operates as a limited liability partnership worldwide with an affiliate in the United Kingdom and Italy, where the practice is conducted through an affiliated multinational partnership.

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2010 ANNUAL MEETING HANDBOOK

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INTRODUCTION

Every public company in the United States is required by its charter documents, the corporate law of its state of incorporation and the federal securities laws to hold a meeting of shareholders at least once each year. Holding an annual meeting of shareholders, however, is much more than merely fulfilling a legal requirement. The annual meeting allows shareholders to express a judgment on management's stewardship of their company, allows management to obtain shareholder approval of important matters and provides a forum for management and shareholders to discuss the progress and direction of the company's business.

This handbook is intended to assist companies in preparing for the annual meeting. It provides a general outline of the key legal requirements contained in the federal securities laws and state corporate laws, as well as the requirements of the stock exchanges and other trading markets. In addition, a discussion of some practical tips relating to the preparation and conduct of an annual meeting is included. Although this handbook addresses issues primarily of concern to companies with publicly traded securities, many of the same issues are also relevant to annual meetings of privately held companies.

This handbook is not intended as a substitute for a careful review of the relevant provisions of: the federal securities laws, rules and regulations; the state corporate law applicable to the company; stock exchange or stock market rules and regulations; the company's charter and bylaws; and any resolutions of the board of directors of the company that may affect the annual meeting. Readers should review the laws, rules and regulations that govern their company and its charter and bylaws in preparing for and conducting any meeting of shareholders, whether an annual meeting or a special meeting, and in preparing the required proxy solicitation materials.

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DEVELOPMENTS IN THE LAW FOR THE 2010 PROXY SEASON

New laws are enacted each year that impact the proxy solicitation process and conduct of the annual meeting of shareholders. In addition, the Securities and Exchange Commission (SEC) issues new rules and interpretations from time to time and, on occasion, certain trends and other developments emerge, which influence proxy materials and annual meeting preparations. A description is provided below of the more significant legislative and regulatory developments that are expected to significantly impact the 2010 proxy season. The information provided is not, however, intended to be an exhaustive examination of the relevant statutory changes and other developments that may concern any particular company. In addition to statutory changes, decisions rendered in court cases often impact shareholder meetings and related proxy materials. There may also be significant changes at the Commission and staff level of the SEC during 2010, which may impact policies. Readers are urged to discuss their specific situations with legal counsel to ascertain the changes that may influence their annual meeting preparations.

I. EXECUTIVE COMPENSATION

In December 2009, the SEC adopted final rules that require public companies to provide enhanced disclosure in proxy statements and other reports filed with the SEC concerning risk, compensation and corporate governance. The new rules, which generally apply to proxy statements that are filed on or after February 28, 2010 for companies with fiscal years ending on or after December 20, 2009, include: (1) enhanced disclosures concerning a company's compensation policies and the risks associated therewith; (2) changes in the manner in which the value of stock and option awards are reported; (3) disclosures concerning director qualifications; (4) disclosures concerning a company's leadership structure; (5) disclosures concerning potential conflicts of interest of compensation consultants; (6) disclosures of the board of directors' role in risk management; (7) accelerated timing in the reporting of shareholder voting results; and (8) clarifications relating to proxy solicitations.

A. GENERAL COMPENSATION POLICIES

The SEC amendments to Item 402 of Regulation S-K will require disclosure concerning how a company's overall compensation policies for employees create incentives that can affect the company's risk and management of that risk. Separate from the Compensation Discussion and Analysis (CD&A), the amendments require a company to discuss and analyze its broader compensation policies and practices for employees generally, including non-executive officers, if risk arising from those compensation policies or practices are reasonably likely to have a material adverse effect on the company. Although the amendments do not specify a location for the disclosure, companies may place it with other disclosures about compensation committee activities.

The SEC has put together a non-exhaustive list of situations that potentially could trigger discussion and analysis:

- a business unit of the company carries a significant portion of the company's risk profile;
- a business unit has a compensation structure significantly different than other units of the company;
- a business unit is significantly more profitable than other units of the company;
- a business unit's compensation expense is a significant percentage of that unit's revenues; or
- any compensation or plan that varies 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.

If disclosure is required, the rules identify some of the issues that companies may need to address, including:

- the general design philosophy of the company's compensation policies for employees whose behavior would be most affected by the incentives established by the policies, as such policies relate to or affect risk taking by those employees on behalf of the company, and the manner of its implementation;

- the company's risk assessment or incentive considerations, if any, in structuring its 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 its 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.

B. SUMMARY AND DIRECTOR COMPENSATION TABLES

The SEC amendments also revise the Summary Compensation and Director Compensation Tables. The amendments require disclosure of stock awards and option awards based on the aggregate grant date fair value of awards computed in accordance with FASB Accounting Standards Codification Topic 718 (ASC Topic 718) granted in the applicable fiscal year, instead of the dollar amount recognized for financial statement reporting purposes for the fiscal year in accordance with ASC Topic 718.

Because the Summary Compensation Table requires disclosure for each of the registrant's last three completed fiscal years, the amendments require companies providing disclosure for a fiscal year ending after December 19, 2009 to present recomputed disclosure for each preceding fiscal year required to be included in the Summary Compensation Table, so that the Stock Awards and Option Awards columns present the applicable full grant date fair values, and Total Compensation would be recomputed correspondingly. If a person who would be a named executive officer for the most recent fiscal year (2009) also was disclosed as a named executive officer for 2007, but not for 2008, the SEC will require the named executive officer's compensation for each of those three fiscal years to be reported pursuant to the amendments.

C. ADDITIONAL AMENDMENTS

1. Qualifications of Directors

The SEC amended Item 401 of Regulation S-K to expand the disclosure requirements regarding the qualifications of directors and nominees, past directorships held by directors and nominees, and the time frame for disclosure of legal proceedings involving directors, nominees and executive officers.

2. Leadership Structure

The SEC enacted a new disclosure requirement to Item 407 of Regulation S-K and a corresponding amendment to Item 7 of Schedule 14A that requires disclosure of the company's leadership structure and why the company believes it is the best structure for it at the time of the filing.

3. Risk and the Board of Directors

The SEC enacted a new disclosure requirement to Item 407 of Regulation S-K and a corresponding amendment to Item 7 of Schedule 14A that requires disclosure concerning the board of directors' role in the company's risk management process.

4. Compensation Consultant

The SEC amended Item 407 of Regulation S-K requiring certain additional disclosures if a compensation consultant or its affiliates played a role in determining or recommending the amount or form of executive or director compensation, and also provided additional services.

II. NYSE RULE 452

In July 2009, the SEC approved a change to New York Stock Exchange (NYSE) Rule 452, eliminating broker discretionary voting of uninstructed shares in uncontested director elections. This amendment to NYSE Rule 452 applies to shareholder meetings held on or after January 1, 2010. The previous rule required that brokers deliver proxy materials to the beneficial owners of shares held by them and request instructions from each beneficial owner as to how to vote such shares at each shareholder meeting. However, brokers were permitted to exercise discretionary voting authority on "routine" matters when voting instructions were not received from a beneficial owner ten days prior to the shareholder meeting. Uncontested director elections were considered routine matters under the previous version of NYSE Rule 452. The new rule provides that the election of directors is a "non-routine matter," meaning that brokers are no longer permitted to vote the shares of beneficial owners who do not give specific voting instructions with respect to the uncontested election of directors.

The direct effect of the amendment will be to reduce the number of votes cast in favor of the board's nominees, by preventing brokers who have not received voting instructions from their customers from exercising discretionary authority to vote those shares as was previously permitted under NYSE Rule 452. The amendment affects director elections of companies with securities listed on the NYSE and The Nasdaq Stock Market (Nasdaq), since the NYSE rules affect how brokers licensed by the NYSE that hold stock of a Nasdaq-listed company on behalf of a client could vote in a director election of that Nasdaq-listed company. The effect of the amendment will be significant, especially for companies that have adopted majority voting for uncontested director elections and companies with a large retail ownership base. Companies have a short time-frame to consider how this change will affect them in the upcoming proxy season and the ways in which they can encourage investors to vote for their board's nominees.

III. SHAREHOLDER ACCESS AND OTHER PROPOSALS

Activist investors are continuing to focus their efforts on implementing binding bylaw amendments to implement corporate governance reforms in addition to utilizing non-binding proposals recommending specific board action. This trend has been supported by a number of related developments, including increased frustration by shareholder proponents with boards of directors that fail to act, or act less vigilantly than desired, on successfully passed non-binding shareholder proposals, academic and investor initiatives for more responsive corporate governance, the SEC's unwillingness to grant no-action requests for exclusion of shareholder proposals in areas where the underlying law is unsettled and the SEC's recent pronouncement in SEC Staff Legal Bulletin No. 14E (SLB No. 14E) where the SEC reversed its historical position and stated that it would allow proposals relating to risk assessment and CEO succession planning.

A. SHAREHOLDER ACCESS GENERALLY

What Is Shareholder Access. Under the current SEC rules, only the company's director nominees are included in the company's proxy statement and proxy card. If shareholders wish to nominate their own candidates, they must prepare their own proxy statement and proxy card. Shareholder access refers to an alternative regime in which shareholders could include director nominees in the company's proxy materials in opposition to the company's nominees.

Historical Background. Rule 14a-8 of the Securities Exchange Act of 1934, as amended (Exchange Act), requires a public company to include a shareholder proposal in its proxy statement if the proponent meets modest share ownership, timeliness and length of proposed submission requirements. If a company seeks to exclude a shareholder proposal from its proxy statement, the company must, following receipt of a qualifying shareholder submission, establish that the proposal satisfies an SEC established justification for exclusion. With respect to the election of directors, in November 2007 the SEC amended Rule 14a-8(i)(8) to codify the SEC's longstanding position that companies may exclude from

their proxy materials any shareholder proposal that would result in an immediate election contest or set up a process for shareholders to conduct a future election contest by requiring the inclusion of a shareholder nominee in subsequent proxy materials.

Proposed Rules. There are currently two primary changes proposed by the SEC. The first change would add a new Rule 14a-11. This change would require a company to include in its proxy materials director nominees proposed by shareholders who satisfy certain ownership and other requirements, including that the nominating shareholder or group hold at least one percent of the stock of the company for at least one year. Second, the SEC proposed an amendment to Rule 14a-8(i)(8) that would narrow the circumstances under which a company may exclude proposals related to elections and nominations for directors.

If adopted, the SEC's rules would subject nearly all U.S. public companies to the cost of including shareholder nominees in proxy materials to stand for election against the director nominees recommended by the company's board of directors. In this respect, the proposed rules are likely to have a significant impact on the director nomination process. They will also increase the number of contested elections in which shareholder nominees stand for election against those recommended by a company's board of directors.

Current Rules. In October 2009, the SEC announced that it will not vote on its proxy access proposals until early 2010. The SEC's delay in taking action means that final rules will not be in place for 2010 shareholder meetings of calendar year-end companies.

The SEC's delay in approving final proxy access rules suggests that the SEC may want to finalize changes to Rules 14a-8 and 14a-11 at the same time. However, both companies and investors should benefit from the additional time. Investors will have additional time to consider the types of proxy access proposals that they would like to submit to companies and the types of director candidates that they would like to nominate under a proxy access regime. Companies will have more time to educate their management teams and boards about proxy access and to continue to engage their investors constructively so as to minimize the chances of having to face a proxy access election.

B. SAY ON PAY PROPOSALS

What Are Say on Pay Proposals. So-called "say on pay" proposals allow shareholders an annual advisory vote on a company's executive compensation practices. These proposals first appeared in the United States in 2006 out of growing frustration with executive compensation practices, partly due to certain highly publicized excesses in compensation and also due to a perceived disconnect between corporate pay and company performance. Shareholder activists claim that say on pay proposals are a means of ensuring transparency and accountability and encouraging constructive dialogue regarding executive compensation practices.

Say on Pay in 2009. In July 2009, the SEC proposed an amendment to the proxy rules to implement legislation requiring companies that have received financial assistance under the Troubled Asset Relief Program (TARP) to hold an advisory shareholder vote on say on pay.

Section 111(e) of the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009 (EESA), sets forth certain requirements for companies receiving financial assistance under TARP, including a requirement to allow shareholders an annual advisory vote on certain executive compensation matters. EESA directed the SEC to adopt final rules and regulations regarding this advisory vote requirement. Accordingly, the SEC has proposed the following changes to the proxy rules:

- New Rule 14a-20, which would require companies that are TARP recipients to provide shareholders with an advisory vote on the compensation of executives (as disclosed pursuant to Item 402 of Regulation S-K) during the period in which financial assistance under TARP remains outstanding. The proposed rule would make clear that the advisory vote is required only in connection with an annual meeting of shareholders (or a special meeting in lieu thereof) at which directors are to be elected. This language mirrors the language in EESA.

- An amendment to Item 20 of Schedule 14A to require TARP recipients to disclose in their proxy statements that they are providing the advisory vote pursuant to EESA and to describe briefly the general effect of the vote, including whether the vote is non-binding.

The SEC made clear that, in order to give companies flexibility to decide how to comply with EESA, the SEC is not proposing specific detailed disclosure requirements regarding the advisory vote. The SEC clarified that the new rules regarding the advisory vote on compensation do not make substantive changes to the SEC's executive compensation disclosure rules. In addition, the SEC clarified that the amendments would not require smaller reporting companies to include a CD&A in their proxy statements in order to comply with proposed Rule 14a-20.

IV. EXECUTIVE COMPENSATION ISSUES ARISING OUT OF THE RECENT FINANCIAL CRISIS

EESA includes new standards relating to the executive compensation practices of certain financial institutions participating in TARP. These restrictions primarily relate to incentive compensation and "golden parachute payments," and generally apply to a participating institution's top-five senior executive officers. TARP also requires participating financial institutions to have limits on compensation incentives that would encourage senior executive officers to take unnecessary and excessive risks which threaten the value of the financial institution. In addition, certain tax provisions related to compensation and deferred compensation also apply.

The executive compensation restrictions primarily apply to financial institutions participating in TARP. However, Congressional commentary suggests that these provisions will have broader implications. This point was amplified in an October 2008 speech on executive compensation disclosure by John White, the Director of the SEC's Division of Corporation Finance, in which he noted that the unusual market events which led to TARP's enactment will introduce new compensation disclosure challenges generally. All companies are encouraged to consult with legal counsel regarding the effects of the financial crisis on executive compensation disclosure for the 2010 proxy season.

In the same speech, Mr. White shared his observations from the second year of the amended proxy compensation disclosure rules in which the major areas of SEC concern and criticism related to disclosure of performance targets and metrics, benchmarking and peer group data, compensation consultant independence, the role of officers in the compensation setting process and the need for more analysis in general. In her November 2009 speech, Deputy Director of the SEC's Division of Corporation Finance, Shelley Parratt, echoed Mr. White's sentiments from his October 2008 speech. Ms. Parratt also provided guidance on the SEC's areas of focus for the 2010 proxy season. For further information regarding Mr. White's and Ms. Parratt's speeches, *see* "Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Executive Compensation Disclosure" below.

THE LEGAL REQUIREMENT THAT AN ANNUAL MEETING BE HELD

The legal requirement that an annual meeting of shareholders be held and the rules and regulations governing preparation of proxy solicitation materials are found generally in the law of the company's state of incorporation, in Section 14(a) of the Exchange Act, in the rules and regulations promulgated by the SEC under the Exchange Act, in the rules and regulations promulgated by the stock exchange or stock market on which the company's stock is listed and in the company's charter or formation documents.

I. STATE CORPORATE LAWS

The requirement that a meeting of shareholders be held each year is initially a matter of the corporate law of the state in which the company is incorporated. Every state requires that a meeting of shareholders be held annually to elect directors and to transact other appropriate business, including, in many cases, obtaining the approval of the shareholders for fundamental corporate changes, such as mergers, dissolutions or amendments of the company's articles or certificate of incorporation. Examples of state corporate statutes requiring annual meetings of shareholders include Section 602 of the New York Business Corporation Law and Section 600 of the California Corporations Code (CCC). In addition, Section 211 of the Delaware General Corporation Law (DGCL) requires an annual meeting be held to elect directors if they are not elected by written consent.

State law also governs many of the procedural aspects of the annual meeting of shareholders, including, among others, location, notice and record date requirements, quorum requirements, number of votes required for approval of matters about which state governments are concerned, the ability of shareholders to vote by proxy, the right of shareholders to review the company's shareholder list, the duties and powers of inspectors of election and the procedures for adjourning the meeting.

Although annual shareholders' meetings are usually held in person, most state statutes allow actions required or permitted to be taken at an annual meeting, including the election of directors, to be taken without a meeting upon the written consent of the shareholders. These statutory provisions typically provide that action may be taken without a meeting only if a consent in writing, setting forth the action to be taken, is signed by the holders of outstanding shares having at least the minimum number of votes required to take such action at the meeting. If a matter is approved by less than unanimous consent of shareholders without a meeting, these statutes typically also require that notice of the action be provided to the shareholders who did not consent to the matter. If a public company wishes to take action by written consent (and its charter or bylaws do not prohibit such action), it must provide its shareholders with an information statement containing much of the same information included in the proxy statement described below.

If an annual meeting of shareholders is not held, state statutes generally provide that the directors must call a special meeting for the purpose of electing directors. A company's failure to hold an annual meeting also may trigger the rights of other parties. In Delaware, pursuant to Section 211 of the DGCL, the Court of Chancery, upon the application of any shareholder or director, may order a meeting if no annual meeting for the election of directors has been held for 13 months after the last annual meeting or for a period of 30 days after the date designated for the annual meeting. Other states provide that a specified percentage of the shares entitled to vote in the election of directors may demand the calling of a meeting for the election of directors.

II. FEDERAL SECURITIES LAWS

Federal regulation of the proxy solicitation process focuses on the proxy solicitation materials rather than the annual meeting itself. In Section 14 of the Exchange Act, Congress conferred on the SEC broad authority to enact appropriate rules and regulations to govern the proxy solicitation process. The SEC has used this authority to enact a comprehensive set of rules and regulations, also known as the proxy rules, intended to increase the availability of accurate information to assist shareholders in making informed decisions on whether or not to approve, reject or abstain from voting on matters

presented at the annual meeting. The federal government has extended its regulation of proxy solicitations through the enactment of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).

The proxy rules establish the legal framework for the solicitation of proxies under the federal securities laws by regulating the form and substance of the proxy statement, the form of proxy and the annual report that are distributed to shareholders in connection with annual meetings of publicly held companies. They also impose filing requirements on companies or others engaged in proxy solicitations and regulate the distribution of proxy materials to the company's shareholders.

III. STOCK EXCHANGE RULES

Companies with securities listed on the NYSE, Nasdaq or the American Stock Exchange (AMEX) must also comply with the applicable listing requirements of the relevant exchange. Each of these entities has requirements that listed companies hold annual meetings—found in Section 302 of the NYSE Listed Company Manual, Rule 5620 of the Nasdaq Marketplace Rules, and Section 704 of the AMEX Company Guide—as well as requirements relating to notice of the record date for the meeting, the filing and distribution of the proxy material and the reporting to the entity of actions taken at the meeting.

The national stock exchanges also regulate the types of matters that are required to be submitted to shareholders for approval and the communications between beneficial owners and street name owners, including the authority and procedures for some street name owners to vote proxies on behalf of beneficial owners. For additional information, readers are encouraged to review the relevant sections of the manual or guide of the exchange on which their stock is traded.

IV. CORPORATE CHARTER AND BYLAWS

Most companies also have charter and bylaw provisions that address a host of matters related to the annual meeting of shareholders. The more typical of these provisions include requirements as to the appropriate location, date and time of the annual meeting, the manner for calling the annual meeting, the proper notice required to be given to shareholders and the procedures for establishing a record date for the annual meeting.

Some less typical charter and bylaw provisions that may impact the annual meeting include supermajority voting requirements for some matters submitted to the shareholders, which may make it more difficult to obtain approval of the matter, and so-called "advance notice" provisions, which require director nominations and shareholder proposal submissions to be received by the company for consideration at the annual meeting prior to a specified date. These provisions allow the company to plan and conduct a more orderly annual meeting with fewer surprises.

Approximately 77 percent of public companies had an "advance notice" bylaw requirement according to a 2003 study conducted by the Investor Responsibility Research Center. Two recent court decisions in Delaware, *JANA Master Fund, Ltd. v. CNET Networks, Inc.* and *Levitt Corp. v. Office Depot*, highlight the importance of careful drafting of the advance notice and related bylaw provisions with respect to procedures for shareholders to call special meetings and to act by written consent in lieu of a meeting. In these cases, the Delaware courts allowed insurgent shareholders to nominate an alternative slate of directors despite the proponents' failure to satisfy the intended requirements of the respective companies' advance notice bylaws.

A recent decision by the U.S. District Court for the Southern District of New York, *CSX v. The Children's Investment Fund*, also has implications for advance notice bylaws. Typical advance notice bylaws require proponents to provide information about the proponent, including its stock ownership and the proposals it intends to bring before a shareholders meeting. In the *CSX* case, the court ruled that two hedge funds had violated the federal securities laws by evading disclosure requirements through the use of equity swaps to avoid obtaining beneficial ownership of the underlying shares. Many companies are now expanding the information required by proponents in their advance notice bylaws to include all stock ownership, including derivatives, hedges, swaps and other types of synthetic securities, to address the *CSX* case. In light of these cases, companies should carefully review their advance notice and related bylaw provisions to eliminate ambiguities and conform to applicable law.

2010 ANNUAL MEETING HANDBOOK

FEDERAL PROXY RULES AND THE PROXY STATEMENT

I. APPLICATION OF THE PROXY RULES

A. BACKGROUND

The right of shareholders to appoint an agent to vote on their behalf at an annual meeting developed within the United States in the early 1800's. The right to proxy representation has since become an essential element in the progress of corporate democracy that has facilitated the tremendous growth in the size and number of publicly held companies. This right is governed by state corporate law and the company's charter documents, nearly all of which now permit proxy voting.

By authorizing another person to act as an agent of the shareholder to vote on the proposals submitted at the annual meeting, proxy representation allows shareholders to participate in the corporate decision-making process even if they are unable to attend the annual meeting in person. Due to the broad geographic shareholder base of most public companies, which makes it difficult for shareholders to attend and participate in the annual meeting in person, in recent years the proxy solicitation process, rather than the annual meeting, has become the primary means by which corporate governance by shareholders is conducted and fundamental shareholder actions by the company are considered and approved. This process allows the company's management to seek approval of matters that require shareholder approval and compels them to make a yearly accounting of their operation of the company's business to the company's owners.

State corporate law and provisions found in corporate charter documents are generally silent on disclosure requirements for proxies and proxy solicitation materials, and until the 1930s, the federal government did not involve itself in the proxy solicitation process. The federal government first became involved in the proxy solicitation process with the adoption of the Exchange Act in 1934. In the Exchange Act, Congress authorized and required the SEC to, among other things, design appropriate rules and regulations regarding the solicitation of proxies "in the public interest and for the protection of investors."

In response to the broad rulemaking authority provided in the Exchange Act, the SEC promulgated Regulation 14A, "Solicitation of Proxies," and Schedule 14A, "Information Required in Proxy Statement"—the proxy rules. Readers should be aware that a review of Regulation 14A and Schedule 14A alone will not provide all of the information required to prepare proxy solicitation materials in compliance with the federal securities laws. Like other rules and regulations of the SEC, the proxy rules are part of the SEC's integrated disclosure system and reference various items found in other SEC regulations, including Regulation S-K. Since the adoption of the Exchange Act and the initial proxy rules, the SEC has played an active role in the proxy solicitation process by reviewing solicitation materials and adopting new rules or amending the current rules. The federal securities laws also give the SEC broad enforcement tools, including monetary penalties for noncompliance and cease-and-desist orders.

B. SOLICITATION

The proxy rules do not apply to all proxy solicitations. The rules extend only to solicitations to holders of securities registered under Section 12 of the Exchange Act, regardless of whether such securities are actively traded at the time of the solicitation.

Entities whose securities are exempt from registration under Section 12 of the Exchange Act are generally also exempt from requirements of the proxy rules. Such entities include any of the following entities that do not have equity or debt securities traded on any stock exchange or market:

- savings and loan associations (and similar institutions subject to state or federal supervision);
- specified foreign corporations;
- agricultural and other similar cooperatives;
- insurance companies;
- banks; and
- non-profit corporations.

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In determining what communications are governed by the proxy rules, it is first important to determine what is a "proxy" and what is a "solicitation" under federal securities law. The proxy rules contain a broad definition of proxy that includes any assignment of the power to vote or express consent or dissent with respect to any securities on behalf of the record owner of such securities. The proxy rules also define the term "solicitation" broadly in Rule 14a-1 of Regulation 14A to include any request for a proxy and any request to execute or not execute, or to revoke, a proxy. Thus, any communication requesting that shareholders execute, withhold or revoke a proxy will be treated as a solicitation within the meaning of the proxy rules. The definition of solicitation also includes any communication furnished to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

1. Actions not within the definition of solicitation

The proxy rules also exclude some activities from the definition of solicitation, such as furnishing a form of proxy to a shareholder upon an unsolicited request, performing actions required by the proxy rules relating to shareholder lists, mailing proxy materials and performing ministerial acts on behalf of a soliciting person. The SEC has also removed from the coverage of the proxy rules a public announcement by a shareholder of how the shareholder intends to vote on a particular matter and the reasons for such vote; provided that the shareholder is not otherwise soliciting proxies; and provided further that the communication is made publicly, or is directed to persons to whom the shareholder owes a fiduciary duty in connection with voting, or is made in response to an unsolicited request for information. *See* Rule 14a-1(l) of Regulation 14A.

2. Solicitations exempt from one or more of the proxy rules

Although the definitions of proxy and solicitation have been broadly interpreted, the SEC has adopted amendments to the proxy rules to create safe-harbor exemptions for some solicitations and to exclude others from the definition of solicitation altogether. Private solicitations meeting the following requirements have been exempted from the application of the proxy rules:

- solicitations by persons with respect to securities carried in the person's name, in the name of the person's nominee (except as a voting trustee) or held in the person's custody;
- solicitations by persons in respect of securities of which the person is the beneficial owner;
- some solicitations in connection with offers and sales of securities registered under the Securities Act of 1933, as amended (Securities Act);
- solicitations in connection with actions taken under specified laws of the United States (such as the Public Utility Holding Company Act, the Bankruptcy Reform Act and others); and
- solicitations via newspaper advertisement that provide to shareholders nothing more than information regarding how to obtain the proxy statement, form of proxy and other proxy materials.

To qualify for these exemptions, the person making the subject solicitation must comply with additional conditions and requirements found in the proxy rules.

In an effort to increase participation in the proxy solicitation process by interested third parties, specifically institutional investors who the federal government determined to be well equipped to provide some protection to all security holders, the SEC has excluded the following types of solicitations from all of the proxy rules other than the anti-fraud provisions found in Rule 14a-9 of Regulation 14A and the shareholder list requirements of Rule 14a-7 of Regulation 14A:

- solicitations by persons not seeking the power to act as proxy for the shareholder at any time during the solicitation;
- the rendering of voting advice by financial advisors to persons with whom the financial advisor has a business relationship;
- solicitations made (other than by the company) to no more than ten persons;
- solicitations in connection with roll-up transactions in which the soliciting party is engaging in preliminary communications with other security holders to determine whether or not to solicit proxies in opposition to such transaction;

- publications or distributions by a broker or dealer of a research report during a transaction in which the broker or dealer or its affiliate participates or acts in an advisory role; and
- certain solicitations made in electronic shareholder forums as discussed more fully below. *See* "Federal Proxy Rules and the Proxy Statement-Application of Proxy Rules-Electronic Shareholder Forums."

These exemptions also require compliance with numerous conditions. Persons wishing to take advantage of any of the exemptions discussed above should thoroughly review the proxy rules for more information on use of these exemptions, particularly Rule 14a-2 of Regulation 14A, "Solicitations to Which §240.14a-3 to §240.14a-15 Apply."

3. Solicitation before furnishing a proxy statement

The proxy rules generally require the delivery of a proxy statement prepared in compliance with the proxy rules at or before any solicitation is made for a shareholder's proxy. The proxy rules also include a safe harbor exemption from the proxy delivery requirements that allows more communication among management and shareholders regarding matters submitted for consideration at an annual meeting so long as no proxy is solicited until a proxy statement is delivered. Under this safe harbor, written solicitations may be made prior to furnishing a proxy statement if the communication:

- is filed with the SEC on the date it is first used;
- identifies the soliciting parties and provides other specified information about the soliciting parties; and
- contains a prominent legend which, among other things, advises shareholders to read the proxy statement when it becomes available.

To take advantage of this safe harbor, additional requirements must be met. Among others, the soliciting party may not deliver a proxy before a definitive proxy statement complying with the proxy rules is also delivered to the shareholders. *See* Rule 14a-12 of Regulation 14A.

4. Prohibited solicitations

While establishing requirements relating to permitted proxy solicitation activities, the proxy rules entirely prohibit the solicitation of any undated or post-dated proxies or any proxies that provide for a deemed effective date that is subsequent to the date on which the proxy is signed by the shareholder. *See* Rule 14a-10 of Regulation 14A.

C. ELECTRONIC SHAREHOLDER FORUMS

In addition to the solicitations exempted from the proxy rules discussed above, effective February 2008, the SEC amended the proxy rules to facilitate the use of electronic shareholder forums to improve the free flow of information, ideas and opinions among shareholders and between shareholders and companies. The amendments permit both companies and shareholders to establish and maintain electronic shareholder forums under the federal securities laws, provided persons using the forum do not seek, directly or indirectly, the power to act as a proxy for a shareholder and do not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of proxy or revocation, abstention, consent or authorization regarding voting, and further provided that the forum is otherwise conducted in compliance with applicable state law and the company's charter and bylaws. Additionally, to be exempt, any solicitation using an electronic forum must occur more than 60 days prior to the date announced by the company for its meeting, or if the company announces the meeting less than 60 days before the meeting, then not later than two days after the company's announcement. The amended rules also provide that neither a company nor a shareholder who established, maintained or operated the electronic shareholder forum would be liable under the federal securities laws for any statement or information provided by another person to the forum. In recent guidance, the SEC reiterated that the anti-fraud provisions do apply to statements made by companies in these forums, but that companies do not have a duty to respond to or correct misstatements made by third parties. *See* Rules 14a-2(b)(6) and 14a-17 of Regulation 14A.

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II. THE PROXY STATEMENT

Rule 14a-3 of Regulation 14A requires that each shareholder receive a proxy statement in connection with any solicitation of the shareholder's proxy. The proxy rules contain detailed requirements concerning the contents and form of a proxy statement. Although the proxy rules contain line item requirements as to information that must be included, only responses to the line items concerning matters to be acted upon at the annual meeting must be included.

A. NOTICE OF THE MEETING

State corporate law establishes the requirement that shareholders receive adequate notice of the annual meeting and that a record date be fixed for the meeting. Under state corporate law, written notice of the meeting must generally be given to all shareholders not more than nor fewer than a fixed number of days before the date of the meeting. For example, Delaware and California corporate laws require notice of an annual meeting be provided not more than 60 nor fewer than ten days prior to the annual meeting. *See* DGCL Section 222 and CCC Section 601.

The same or a similar time period applies to the fixing of the record date by the company's board of directors. Many state corporate laws also allow a company to close the transfer books of the company some number of days prior to the annual meeting in lieu of setting a record date. Closing the transfer books interferes with trading markets, so most companies choose to establish a record date instead. The corporate laws of some states now allows companies to deliver a single notice to numerous shareholders that reside at the same address if specified conditions are met. *See* "Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders—Householding."

In addition to the state corporate law issues discussed above, the proxy rules also bear on the notice requirement. Several factors should be considered in determining the amount of advance notice given to shareholders, including:

- if the company is adopting the traditional full set delivery method under the e-proxy rules, the dates required by stock exchange organizations for mailing the annual report (because most companies mail the proxy materials and the annual report together to reduce expenses, the date for mailing the annual report often influences the notice date for the annual meeting);
- if the company is adopting the notice only option under the e-proxy rules, the requirement that the notice of internet availability of proxy materials be sent at least 40 days prior to the annual meeting and the amount of time needed to post and properly format all materials on the company's website;
- the types of matters to be considered at the annual meeting (the consideration of controversial matters may require additional time to solicit proxies); and
- the requirement that companies ensure that soliciting materials be provided to beneficial owners: (1) broker-dealers and banks are obligated to forward proxy materials to beneficial owners within five business days of receipt if the company meets requirements specified in the proxy rules and provides reasonable assurance of reimbursement of expenses; and (2) companies must send broker-dealers and banks the notice of internet availability of proxy materials required under the new e-proxy rules in sufficient time for those intermediaries to send their own notice to beneficial owners at least 40 days prior to the annual meeting (intermediaries are likely to require at least five days for the process involved in compiling and distributing their own notice of internet availability of proxy materials).

For more information on the foregoing, *see* "Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders."

The bylaws of the company may also contain provisions governing the delivery of notice and establishment of a record date for an annual meeting, some of which may be more restrictive than the requirements of state law. Stock exchange or stock market listing rules also should be consulted as they often require notice to the exchange or market of the record date and annual meeting date. These provisions should be reviewed in preparing the notice section of the proxy statement.

It is common to begin the proxy statement with the official notice of the annual meeting. The notice of the annual meeting and the section immediately following the notice usually provide the following information required to be included in the proxy statement:

- the date, time and place of the annual meeting (or if action is to be taken by written consent, the date by which consents are to be submitted) (Item 1 of Schedule 14A);
- the mailing address of the principal executive office of the company (Item 1 of Schedule 14A);
- the date on which the proxy statement and form of proxy are first sent or given to shareholders (Item 1 of Schedule 14A);
- whether the proxy may be revoked and the procedure for revoking it (Item 2 of Schedule 14A);
- whether the shareholder has dissenter or appraisal rights and, if so, the procedures for exercising such rights (Item 3 of Schedule 14A);
- information relating to the person making the solicitation (Item 4 of Schedule 14A);
- the method by which the solicitation will be made, the anticipated costs of the solicitation and how such costs will be borne (Item 4 of Schedule 14A);
- the number of shares outstanding of each class of voting securities entitled to be voted at the annual meeting, as well as the number of votes to which each class is entitled (Item 6 of Schedule 14A);
- the record date for the meeting (Item 6 of Schedule 14A); and
- whether cumulative voting rights are involved and, if so, information describing the cumulative voting rights, the conditions precedent to their exercise, and whether discretionary authority to cumulate votes is solicited (Item 6 of Schedule 14A).

As an alternative, some companies prepare a separate notice that accompanies the proxy statement in the mailing to shareholders.

B. VOTING INFORMATION

The proxy rules also require a description of the voting procedures relating to each matter submitted to shareholders for vote. Specifically, the proxy statement must state the vote required for approval or election (other than for the approval of auditors) of each proposal and the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state corporate law and the company's charter and bylaws. A "broker non-vote" occurs when a broker is unable to vote on a particular matter without instructions from the beneficial holder and such instructions are not received. Typically, abstentions and broker non-votes are not considered "votes cast" on the proposal, and therefore, they do not affect proposals that require the affirmative vote of a majority of the votes cast on the proposal, whereas they have the effect of votes "against" proposals requiring the affirmative vote of a majority of outstanding shares. Abstentions and broker non-votes are generally considered present at the meeting for purposes of determining whether a quorum is present. *See* Item 21 of Schedule 14A.

NYSE Rule 452 allows brokers to vote on "routine" items if the beneficial owner of the stock has not provided specific voting instructions to the broker at least ten days before a scheduled meeting. NYSE Rule 452 lists 18 items that are considered "non-routine," including a contested director election, approval of a stock plan or any matter that may affect substantially the privileges of shareholders. On such "non-routine" matters, brokers are prohibited from voting in the absence of instructions from the beneficial owners. Uncontested director elections have long been considered routine matters, thus allowing brokers to vote uninstructed shares in such elections. In casting votes on routine matters, brokers have generally voted as recommended by the board of directors (*i.e.*, for the board's nominees). The amendment of NYSE Rule 452 in July 2009, which will make every election of directors a non-routine matter, is likely to have a considerable impact on the dynamics of director elections in uncontested elections. For example:

- *Majority Voting*. For a company that has adopted majority voting, a director nominee would need to receive at least a majority of the number of votes cast with respect to that director's election in order to be elected to the board of directors. Since brokers generally vote with management, the elimination of discretionary voting in the election of directors by brokers will mean the loss of a

significant block of votes "for" nominees proposed by management and will make it more difficult for directors to achieve the majority support needed for election.

- *Disenfranchisement of Retail Investors.* Retail voters who do not provide voting instructions to their brokers will no longer have such uninstructed shares voted. Therefore, institutional investors who do vote will have more influence over the election of directors, while the retail owners will be effectively disenfranchised to the extent they had believed their brokers would be voting their shares.
- *Influence by Activist Shareholders.* Activist shareholders with a precise agenda will have an enhanced ability due to low voting turnouts to challenge an incumbent board member by instituting "vote no" campaigns.

It is estimated that as much as 70 to 80 percent of the shares of U.S. public companies are held in "street name" and managed by brokers and in 2008, 16.5 percent of shares were voted by brokers exercising discretionary voting in uncontested director elections. As brokers generally vote for the board's nominees, this change is expected to strengthen the influence of institutional investors and activist shareholders and to magnify the significance of "vote no" campaigns.

C. INFORMATION ABOUT DIRECTORS, DIRECTOR NOMINEES AND EXECUTIVE OFFICERS

If action is to be taken at an annual meeting with respect to the election of directors, the proxy rules require a variety of information about the company's directors, executive officers and persons nominated to become a director or executive officer to be provided in tabular form to the extent practicable. Item 7 of Schedule 14A cross references Item 401 of Regulation S-K, which requires a description of:

- each person's name, age and position(s) and/or office(s) held within the company;
- the term of office and the period the office has been held;
- any arrangement between the director, executive officer or person nominated to become a director or executive officer and any other person(s) pursuant to which the director, executive officer or person nominated to become such was or is to be selected to his or her position or office;
- any family relationship between a director, executive officer or person nominated to become such;
- a brief five-year history of the business background of each director, executive officer or person nominated to become such, including any other public company directorships held by the person; and
- a description of any legal proceedings that (1) would be material to an evaluation of the ability or integrity of any director, director nominee or executive officer and (2) occurred within the five years prior to the time of the proxy solicitation.

It should also be noted that the amended rules discussed above in Section I.C "Additional Amendments" require, among other additional disclosures, company disclosures detailing director and director nominee's particular experience, attributes or skills that qualify the person to serve as a director of the company.

If the company provides this information regarding executive officers in its Annual Report on Form 10-K under the caption "Executive Officers of the Registrant," the information need not also be provided in the proxy statement. Alternatively, such information may be incorporated by reference into the company's Annual Report on Form 10-K if it is contained in a definitive proxy statement that involves the election of directors and is filed with the SEC within 120 days after the end of the fiscal year covered by the Form 10-K. *See* Instruction G to Form 10-K.

The proxy rules also require that the proxy statement describe any transactions or relationships between the company and any director, director nominee, executive officer or principal shareholder or between the company and entities affiliated with these persons. *See* Item 7 of Schedule 14A.

D. VARIOUS MANNERS OF ELECTION OF DIRECTORS

What Is Majority Voting for Directors. Historically, most companies employed plurality voting for electing directors. Under a plurality voting system, directors receiving the largest number of votes "for" their election are elected and, in an uncontested election, a director receiving at least one "for" vote would be elected. In contrast, under a majority voting system, a director nominee is elected only if such nominee receives at least a majority of the "for" votes cast in his or her election.

There are two principal versions of majority voting, often referred to as "plurality plus" and "true majority" voting. The plurality plus regime is essentially the plurality voting system accompanied by a director resignation policy which requires a director to submit his or her resignation if he or she does not receive a majority of the votes cast. The company's board then determines whether to accept the director's resignation within a specified period and typically publishes the reasons for its decision in a press release. In contrast, under true majority voting, companies typically adopt a bylaw or charter provision which provides that a director must receive a majority of the votes cast to be elected in an uncontested election, i.e. an election in which the number of nominees does not exceed the number of vacant seats on the board of directors. An incumbent nominee who fails to secure the required majority vote would remain in office under the so-called "holdover rule," under which an incumbent director who is not reelected remains in office until his or her successor is duly elected and qualified. To address the holdover rule, true majority voting typically also features a director resignation policy, which generally requires each director, as a condition of his or her nomination, to execute and deliver a resignation effective upon the director's failure to garner a majority of votes in an uncontested election.

Legal Developments Facilitating Majority Voting. Developments have changed the landscape regarding director voting systems, resulting in an increased number of shareholder proposals seeking to adopt bylaws requiring majority voting for directors. Delaware law was amended in 2006 to facilitate majority voting in the election of directors. The two key aspects of those amendments provide that (1) a shareholder-adopted majority voting bylaw cannot be amended by subsequent action of the board of directors, and (2) a director's resignation may be made effective upon the occurrence of a future event or events (such as failure to receive a majority of votes cast). Other states also now permit the adoption of a majority voting structure through bylaw or charter amendment, including California (as discussed below), Virginia and Washington. In addition, the Model Business Corporation Act was amended in 2006 to permit implementation of majority voting through bylaw amendment (rather than via charter amendment, as had previously been the case), thereby providing a vehicle in most states for activist shareholders to propose binding bylaw adoption of a majority voting structure and eliminating the basis historically used by companies for exclusion of such proposals from proxy statements.

Effective January 1, 2007, California domestic "listed corporations" which have eliminated cumulative voting may amend their bylaws or articles of incorporation to require that directors be elected by "approval of the shareholders" in uncontested elections. Listed corporations are those companies with outstanding shares listed on the NYSE, the AMEX or Nasdaq. The "approval of the shareholders" voting system is similar, though not identical, to a majority voting standard as the law requires both that director nominees receive the affirmative vote of a majority of the shares represented and voting at a duly held meeting at which a quorum is present and that the shares voting affirmatively constitute at least a majority of the quorum required for the meeting. The term of a director who fails to meet this standard ends at the earlier of 90 days after the vote is determined or the date on which a successor is appointed by the company's board, effectively eliminating the holdover rule.

Where Does Majority Voting Stand. According to the November 2007 edition of the *Study of Majority Voting in Director Elections*, majority voting has evolved into the prevailing standard at S&P 500 companies. Of the two majority voting systems, true majority voting is typically favored by shareholder activists because it adopts an actual majority-vote standard rather than just a resignation policy and, with the majority voting provisions included in the company's charter documents, is more difficult to change or eliminate than a corporate governance principle adopted by the company's board. Institutions have pressed hard for implementation of the true majority voting standard combined with a director resignation policy.

Withhold Vote Campaigns and Majority Voting. Under a plurality voting system, withheld votes are largely symbolic because even if 99 percent of the votes for a particular director are withheld, as long as that director receives at least one "for" vote, the director would be elected. As a result, under a plurality system, the likelihood of a failed election is quite low and the principal negative effect of withheld votes is public embarrassment. However, under plurality plus or true majority voting systems, a so-called "withhold vote campaign" has significant legal consequences because a large number of withheld votes may result in a failed election. In 2009, 91 directors failed to receive majority support, as compared to 31 directors in 2008, 20 directors in 2007 and eight directors in 2006, according to RiskMetrics Group (formerly Institutional Shareholder Services).

E. BOARD OF DIRECTORS AND COMMITTEE INFORMATION

Proxy statements also must include information regarding the function of the board of directors of the company. The proxy statement must state (1) the total number of board meetings (including regularly scheduled meetings and special meetings) held during the preceding fiscal year, whether or not any director attended fewer than 75 percent of the board meetings and meetings of committees of the board on which the director served and (2) the name of any director failing to attend 75 percent of such meetings. The proxy statement also must indicate whether the company has standing audit, nominating and compensation committees, or committees performing similar functions. If such committees exist, the company must provide a description of the functions performed by each such committee, the identity of each committee member and the number of committee meetings held during the preceding fiscal year. In the case of the nominating or similar committee, the proxy statement must state whether the committee will consider nominees recommended by security holders, and, if so, describe the procedure for submitting recommendations. *See* Item 7 of Schedule 14A. One item to keep in mind is the related disclosures in quarterly and annual reports if there has been a material change to the company's procedures for security holder director nominations. Such a change will need to be reported in the company's Quarterly Report on Form 10-Q or Annual Report on Form 10-K. The SEC has stated that the adoption of procedures by which security holders may recommend director nominees, where the company previously disclosed that it did not have in place such procedures, will constitute a material change.

The composition and duties of audit committees and nominating committees were modified by the adoption of Sarbanes-Oxley and the amended corporate governance standards of the NYSE and Nasdaq. Although Sarbanes-Oxley does not directly modify proxy disclosure requirements, several of its provisions required new or modified disclosures under the proxy rules. This impact is discussed briefly below under "Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Audit Committee Disclosure; Nominating Committee Disclosure." For a full understanding of the impact of Sarbanes-Oxley on corporate governance and proxy disclosure obligations, readers should thoroughly review the provisions of Sarbanes-Oxley and consult with legal counsel regarding its impact on their particular company.

F. EXECUTIVE COMPENSATION DISCLOSURE

In response to investor concerns regarding the quality and transparency of executive compensation disclosure, the SEC adopted new rules in 2006 regarding disclosure of executive and director compensation required in public company proxy statements, annual reports and registration statements. These rules, referred to herein as the amended rules, became effective for the 2007 proxy season and comprehensively revised and expanded existing executive and director compensation disclosure rules. This was accomplished by both enhanced narrative disclosure relating to companies' compensation policies and practices in a new CD&A section, increased tabular disclosure contained in the Summary Compensation Table and the addition of new tabular presentations addressing equity related holdings, post-employment compensation and director compensation.

The proxy rules require extensive disclosures about the compensation paid by public companies to certain of their executive officers. These so-called "named executive officers" are defined in the proxy

rules to include: (1) any person who served as the principal executive officer (PEO) of a company at any time during the prior fiscal year; (2) any person who served as the principal financial officer (PFO) of a company at any time during the prior fiscal year; (3) the company's three most highly compensated executive officers, other than the PEO and PFO, serving as of the end of the preceding fiscal year; and (4) up to two additional individuals who would have been included under (3) above, but for the fact that they were not executive officers at the end of the preceding fiscal year. The determination of who qualifies as a named executive officer is based on total compensation (rather than just base salary and bonus as was previously the case), except that pension value and non-qualified deferred compensation earnings are excluded when making this determination.

The information relating to the named executive officers' compensation must be presented, to the extent applicable, in narrative form and tabular form as described below. However, the proxy rules allow disclosure not to be made in response to the requirements of Item 402 of Regulation S-K if the disclosure relates to a transaction between the company and a third party with the primary purpose of furnishing compensation to a named executive officer and if the disclosure is provided elsewhere in the proxy statement in accordance with Item 404 of Regulation S-K. *See* "Federal Rules and the Proxy Statement—the Proxy Statement—Certain Relationships and Related Transactions." The information presented below is a summary of the general provisions of the proxy rules related to compensation disclosure. Because these terms and provisions are complex and often difficult to understand, readers are urged to review the proxy rules (specifically Item 8 of Schedule 14A and Item 402 of Regulation S-K) for more information relating to executive compensation disclosure in proxy statements.

1. Compensation discussion and analysis

The CD&A provides a narrative general overview and analysis of a company's compensation policies, programs and practices for named executive officers during the last fiscal year and, if appropriate, any actions taken since the end of such fiscal year and prior to the filing of the proxy statement which relate to compensation paid for the last fiscal year. The CD&A should identify the principles underlying the company's executive compensation policies and decisions. It must be comprehensive in scope and should provide perspective on the compensation policies underlying the numerical disclosure and other information contained in the tabular disclosure, and it should not simply repeat such disclosure. This section must contain disclosure regarding the material elements of a company's executive compensation program and how compensation is determined and paid. Such disclosure must specifically answer the following six questions:

1. What are the objectives of the company's compensation program?
2. What is each compensation program designed to reward?
3. What is each element of compensation?
4. Why does the company choose to pay each element?
5. How does the company determine the amount (and, where applicable, the formula) paid for each element?
6. How does each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

To aid in formulating responsive disclosure, the SEC has identified 15 topics that may be appropriate for inclusion in this section, depending on the company's facts and circumstances. *See* Item 402(b) of Regulation S-K. Discussion of each topic is not required; however, discussion should be included if material to the company's executive compensation policies in light of the company's particular facts and circumstances.

Applicable disclosure must also include specific statements outlining corporate policies or practices in effect regarding the timing of stock option grants and the release of material information, the reasons the company chose a particular grant date for option awards and the methodology for selecting exercise prices and other terms of options, including, if applicable, the method for determining the price of the option award if not based on the stock's closing trading price on the applicable grant date. With respect to performance-based compensation, the CD&A must discuss the performance factors

considered in setting executives' pay. In addition, if the compensation decisions or policies applicable for any named executive officer differ from those applicable to other named executive officers, such differences, and the reasons for such differences, must be discussed.

Notably, the CD&A will be deemed "filed" with the SEC and therefore subject to the general disclosure and liability provisions of the Securities Act and the Exchange Act. Because the CD&A will be incorporated by reference or in some cases directly included in the Form 10-K, the CD&A will be subject to the Chief Executive Officer and Chief Financial Officer certifications required by Sarbanes-Oxley. The SEC has indicated that the CD&A is a company disclosure and, in making such certifications, a company's Chief Executive Officer and Chief Financial Officer are not being called upon to certify any deliberations of the company's compensation committee and are permitted to rely on the "furnished" compensation committee report discussed below.

2. Summary compensation table

The "Summary Compensation Table" is the principal table prescribed for use in presenting compensation information for the named executive officers. Under the amended rules, the Summary Compensation Table, which remains the centerpiece of a company's tabular disclosure of executive compensation and provides a comprehensive overview of executive compensation, must include, in addition to the name and other descriptive information, a description of the salary, bonus, stock awards, option awards, non-equity incentive plan compensation, change in pension value and non-qualified deferred compensation earnings, all other compensation and total compensation paid to or earned by the named executive officers during the three preceding fiscal years. *See* Item 402(c) of Regulation S-K. In addition, the amended rules require that the Summary Compensation Table be supplemented by a number of additional tables which are discussed in further detail below.

All compensation included in the Summary Compensation Table must be included in the fiscal year in which it was earned (rather than actually paid), even if subject to forfeiture conditions. In addition, all columns in the Summary Compensation Table are to be denominated in dollar values (rather than share or unit numbers).

Salary and Bonus. Under the proxy rules, all earned salary and bonus (cash and non-cash, including salary and bonus that is deferred) is included in the fiscal year in which it is earned in the appropriate column. If earned but deferred salary or bonus compensation is not calculable at the time of disclosure, the company must include footnote disclosure and is obligated to update its disclosure with a Form 8-K when such compensation becomes calculable (either through a payment, a decision to make a payment or another occurrence of which the amount becomes calculable in whole or in part). Furthermore, bonuses received by a named executive officer under a company's performance-based bonus plan will generally be included in the Non-Equity Incentive Plan Compensation column, rather than the Bonus column.

Stock Awards. The aggregate grant date fair market value for all stock awards (*e.g.*, restricted stock, restricted stock units, phantom stock, phantom stock units, common stock equivalent units or other similar awards which do not have option-like features) is required to be included in the Stock Awards column. The amended rules require that the aggregate grant date fair market value of such awards be computed in accordance with ASC Topic 718. In addition, footnote disclosure is required of the assumptions used in the fair value determination.

Option Awards. The amended rules require that the aggregate grant date fair market value of all stock option awards (including stock appreciation rights), as determined in accordance with ASC Topic 718, be disclosed in the Option Awards column. Footnote disclosure is also required of the assumptions used in the fair value determination.

Non-Equity Incentive Plan Compensation. The Non-Equity Incentive Plan Compensation column requires the disclosure of all awards earned during a fiscal year pursuant to non-equity incentive plans. It includes all incentive awards that are not included in the Stock Awards or Option Awards column. Most significantly, the Non-Equity Incentive Plan Compensation column will include amounts earned under performance-based cash bonus plans (whether single or multi-year) that previously would have

appeared in the Bonus column. If the performance measure for an award is satisfied in a fiscal year, the award must be disclosed even if payment of the award is deferred. Also, earnings on the outstanding awards must be disclosed. Footnote disclosure must identify and quantify awards and payment terms.

Change in Pension Value and Non-Qualified Deferred Compensation Earnings. Under the amended rules, the aggregate increase in the actuarial value of any defined benefit pension plan must be disclosed. This disclosure applies to both tax-qualified defined benefit plans and non-tax-qualified supplemental executive retirement plans. In addition, for plans that are not defined benefit plans, above-market earnings on non-qualified deferred compensation must be disclosed (and disclosure may be limited to the above-market or preferential portion). Footnote disclosure must separately identify and quantify these amounts.

All Other Compensation. All other compensation not disclosed in any other column of the Summary Compensation Table is required to be disclosed in the All Other Compensation column. Included in this column is the value of any severance payments, change in control payments, contributions by the company to defined benefit contribution plans, company-provided insurance premiums, company-provided tax gross-ups and all perquisites and other personal benefits (unless all such perquisites and other personal benefits have an aggregate value of less than $10,000). Perquisites and other personal benefits must be described in the footnotes in a level of detail sufficient for a shareholder to identify the particular nature of the benefits received. The SEC has provided guidance in evaluating when a particular item is a perquisite or personal benefit. In particular, an item is *not* a perquisite or personal benefit it if is integrally and directly related to the performance of the executive's duties. For example, the provision to a named executive officer of a "Blackberry" or laptop computer may be integrally and directly related to the performance of the executive's duties and thus not a perquisite. Otherwise, an item is a perquisite or personal benefit if it confers a direct or indirect benefit that has a personal aspect, regardless of whether it is provided for some business reason or for the convenience of the company, unless it is generally available on a non-discriminatory basis to all employees.

Total Compensation. The Total Compensation column, which under the amended rules appears on the far right hand side of the Summary Compensation Table, sets forth the sum total of all of the preceding columns of the table. As the name suggests, it is intended to provide a single aggregate dollar value for compensation of each named executive officer with respect to a fiscal year.

3. Companion compensation tables

The amended rules require proxy statements to also disclose in several additional tables other compensation paid to or earned by the named executive officers.

Grants of Plan-Based Awards Table. The rules have consolidated all disclosure for plan-based awards (including stock awards, option awards and non-equity incentive compensation awards) into a single table called the Grants of Plan-Based Awards Table. As discussed above, non-equity incentive compensation awards will include performance-based awards which, under the current rules, were included in the Bonus column of the Summary Compensation Table. The Grants of Plan-Based Awards Table includes each award's (1) grant date, (2) estimated future payouts, (3) the number of shares of stock or units underlying a stock or option award, and (4) the exercise or base price of an option award. Estimated future payouts must be disclosed at threshold, target and maximum amounts (shown in dollars for non-equity incentive plan awards and shares for equity incentive plan awards). *See* Item 402(d) of Regulation S-K.

In conjunction with the Grants of Plan-Based Awards Table, additional tabular disclosure is required with respect to options if (1) the exercise or base price is different than the closing market price as of the date of the grant (in which case an adjoining column showing the closing market price as of the date of the grant would be required) or (2) the grant date is different from the date on which the compensation committee or full board of directors took action to grant the option or was deemed to have taken such action (in which case an adjoining column showing such date would be required). Additionally, if the exercise or base price is different than the closing market price as of the date of the grant, narrative disclosure including a description of the methodology for determining such price is required.

Outstanding Equity Awards at Fiscal Year-End Table. The Outstanding Equity Awards at Fiscal Year-End Table discloses all equity-based compensation awards outstanding at fiscal year-end, whether or not performance based. It is designed to provide a method of estimating potential amounts realizable by each named executive officer with respect to outstanding equity-based awards. With respect to option awards, the table requires disclosure on an award-to-award basis regarding (1) the number of securities underlying unexercised options (with separate columns for options that are unexercisable), (2) the number of securities underlying unexercised unearned options issued pursuant to an equity incentive plan, (3) the exercise price and (4) the expiration date. With respect to stock awards, this table requires disclosure regarding the number of shares that have not vested and the market value of shares that have not vested (in both cases, distinguishing between those granted pursuant to an equity incentive plan and those which were not). Footnote disclosure must include a description of the vesting dates of awards. *See* Item 402(f) of Regulation S-K.

Option Exercises and Stock Vested Table. This table summarizes all amounts realized on the vesting and exercise of any equity-based compensation awards in the latest fiscal year. With respect to both option and stock awards, this table requires disclosure of the number of shares acquired and the value realized upon exercise or vesting. *See* Item 402(g) of Regulation S-K.

Pension Benefits Table. The Pension Benefits Table requires disclosure of the actuarial present value of each named executive officer's accumulated benefit under any of the company's defined benefit plans (including tax-qualified and non-qualified defined benefit plans). The present value is calculated as of the measurement date used in the financial statements for the company's last completed fiscal year, taking into account the executive's current compensation, the plan's normal retirement age, and the same actuarial assumptions used for financial reporting purposes under Generally Accepted Accounting Principles (GAAP). However, disclosure is made without regard to the forms of benefits available under the plan. The table also requires disclosure of each named executive officer's years of credited service and payments received during the company's last fiscal year under each plan. A separate row of disclosure is required for each defined benefit plan in which the named executive officer participates. In addition, the table must be accompanied by a narrative description of all material factors necessary to interpret the table. *See* Item 402(h) of Regulation S-K.

Non-Qualified Deferred Compensation Table. This table requires disclosure, with respect to each named executive officer during the prior fiscal year, of such named executive officer's and the company's contributions and all earnings, withdrawals and distributions under any non-qualified defined contribution plans (including non-qualified deferred compensation plans). Disclosure of each named executive officer's last fiscal year-end balance under such plans is also required. Narrative disclosure of all material facts necessary to understand the table must also be included. *See* Item 402(i) of Regulation S-K.

Severance and Change of Control Payments. The amended rules require companies to provide specific narrative disclosure of the amount of any payment or benefit that a named executive officer may receive upon termination of employment, change in responsibilities, or upon a change of control, including any tax gross-up payments and post-termination health care benefits. Specifically, the amended rules require disclosure of the following regarding such payments and benefits:

- the specific circumstances that would trigger the payment;
- quantitative and narrative disclosure regarding the estimated payments and benefits, even where uncertainties exist as to amounts payable under the particular arrangement;
- disclosure regarding when the payments and benefits are paid (*e.g.*, lump sum or over time);
- how the payments and benefits are determined;
- the material conditions and obligations applicable to the receipt of the payments and benefits (*e.g.*, non-competition restrictions), including any provisions regarding waiver or breach of these provisions; and
- any other material factors regarding the agreement governing such payments.

Companies are not required to disclose payments or benefits that do not discriminate in favor of a company's executive officers and are available generally to all salaried employees. *See* Item 402(j) of Regulation S-K.

4. Recent developments regarding the CD&A

In October 2007, the staff of the SEC's Division of Corporation Finance (the Staff) published a report summarizing its observations from its initial review of the executive compensation disclosures in proxy statements filed in 2007 by 350 public companies. The report completes the second phase of the Staff's "targeted review project" on the implementation of the amended proxy compensation disclosure rules.

In the first phase of the project, the Staff issued comment letters to these companies concerning the executive compensation disclosures in their 2007 proxy statements. The report discusses the principal areas on which the Staff commented. Two main themes emerged from the Staff's report. First, the Staff continues to believe that the CD&A section needs to be clear, concise and understandable with a focused analysis on how and why compensation committees make specific compensation decisions. Second, the manner of presentation is key. The compensation disclosure needs to be in plain English and techniques such as executive summaries, overviews and layered disclosure should be used in tandem with charts and graphs to present executive compensation information in a way that helps readers better understand the company's plans, policies and practices.

In connection with the publication of the Staff's report, John White, the Director of the Division of Corporation Finance, gave a speech expanding on the report, in which he stated his overall assessment that "the positives are substantial" and that "investors have been provided with the most comprehensive disclosure ever regarding how much public companies pay their executives and directors." However, Mr. White also stated that there was a need for improvement in "some very important areas" and that the greatest shortcoming of the disclosures was in their failure to provide "meaningful analysis."

In October 2008, Mr. White gave a follow-up speech in which he assessed executive compensation disclosure in proxy statements filed in 2008. Mr. White reported that the second year of executive compensation disclosure revealed many of the same issues that were reported by the Staff in 2007. The primary areas of comment include the need for more analysis, disclosure of performance targets and disclosure relating to benchmarking. He urged companies to review the SEC's revised Compliance and Disclosure Interpretations for guidance in these areas. In November 2009, Shelley Parratt, Deputy Director of the Division of Corporation Finance, gave a speech echoing the speeches given by Mr. White in 2008 and 2007. In her speech, Ms. Parratt once again emphasized the need for more analysis and clear disclosure regarding performance targets. Since the 2006 proxy season, the SEC has been reviewing proxies and providing comments. However, Ms. Parratt did emphasize in her speech that after three years of these futures comments, the SEC expects companies to understand the disclosure rules and to apply them thoroughly. Accordingly, a company should be prepared to amend its filings if it receives SEC comments indicating that its CD&A disclosure does not materially comply with the rules.

(a) Increased analysis

The overarching message from the Staff's report, Mr. White's speeches and Ms. Parratt's speech is that analysis is "of paramount importance" and therefore more is needed in the CD&A.

Analysis. Companies have been asked to focus their CD&As on how they analyzed compensation information and why their analysis resulted in particular forms and amounts of compensation. The key points of such an analysis and disclosure, as discussed by Mr. White in his speeches, include, as appropriate: (1) the key analytic tools used by the compensation committee; (2) the findings that emerged from the analysis; and (3) the resulting actions taken impacting executive compensation in the prior year.

Performance Targets. With respect to the disclosure of performance targets, a company first needs to determine whether performance compensation is a material element of its compensation program. If not, then performance targets do not need to be discussed. But then the company should not describe its compensation policy as one that is pay for performance. If performance compensation is a material

element of its compensation program, the company is required to disclose performance targets unless it is able to demonstrate that disclosure of these targets would result in competitive harm. The company need only disclose the performance targets for the prior fiscal year, unless current year targets impact the compensation reported for prior years, in which case current year targets must also be disclosed. If the company withholds disclosure of these targets on the basis of competitive harm, it needs to disclose with specificity the difficulty or likelihood of achieving the targets. Companies are advised to draft a written analysis contemporaneous with the decision to omit disclosure on the basis of competitive harm to better substantiate the legal basis why such disclosure is excluded.

Difference in Compensation Policies and Decisions. Where policies or decisions for individual named executive officers appear to be materially different based on the disclosure, companies have been asked to discuss these differences and the rationale for such differences.

Benchmarks. Where companies state that they use comparative compensation information, they have been asked to provide a more detailed explanation of how they used this information and how the information affected their compensation decisions, how the peer group was selected and in some circumstances specifically identify the companies which were used in the benchmark analyses. The use of broad-based third-party surveys to obtain a general understanding of current compensation practices is not considered benchmarking for this purpose.

Change-in-Control and Termination Arrangements. Companies have been asked to disclose the basis for the material terms and payment provisions in their change-in-control and termination arrangements.

Corporate Governance. Companies have been asked to describe more specifically the role of their principal executive officers in making compensation decisions, as well as the role of, and any material instructions provided to, their compensation consultants.

(b) Manner of presentation

Companies have been asked to make material information more prominent and de-emphasize less important information. For example, companies should emphasize how and why they established certain compensation levels and shorten discussions of compensation program mechanics. The report also stated that additional charts, tables and graphs, not specifically required by the revised rules, were helpful and that careful drafting with plain English principles can result in shorter, more concise and effective disclosures. Where companies use boilerplate disclosure, they have been asked to provide a clear and concise discussion of their own facts and circumstances, and where companies repeat information from the compensation tables in the CD&A, they have been asked to replace the repetitive disclosure with analysis.

(c) Effects of recent financial crisis

TARP provides for the purchase of troubled assets from financial institutions. EESA, which established TARP, includes new standards relating to the executive compensation practices of certain financial institutions participating in TARP. These restrictions primarily relate to incentive compensation and "golden parachute payments," and generally apply to a participating institution's top-five senior executive officers. TARP also requires participating financial institutions to have limits on compensation incentives that would encourage senior executive officers to take unnecessary and excessive risks which threaten the value of the financial institution. In addition, certain tax provisions related to compensation and deferred compensation also apply.

Mr. White's 2008 speech noted that while TARP primarily applies to financial institutions, non-participating companies may also be affected. For example, Mr. White stated that in establishing executive compensation targets and incentives, to the extent that a compensation committee considers the risks that an executive might be incentivized to take to meet such targets, and such considerations become a material part of a company's compensation policies or decisions, the company would be required to discuss such considerations in its CD&A. Also the effect of current market events on

executive compensation disclosure may lead to new material disclosures, in which case companies "should not merely be marking up last year's disclosure." Mr. White advised that companies should be carefully considering if and how recent economic and financial events affect a company's executive compensation arrangements.

G. COMPENSATION COMMITTEE REPORT

Under the amended rules, the proxy statement must continue to include a report by the compensation committee of the board of directors (or, in the absence of such committee, the entire board of directors). However, the compensation committee report has been shortened significantly and must now only contain a statement as to whether the compensation committee has reviewed and discussed the CD&A with management and whether it has recommended that the CD&A be included in the company's annual report and proxy statement.

The proxy rules require the compensation committee report to be included only in proxy statements for meetings at which directors are to be elected. Further, the compensation committee report must be presented over the names of the committee members. *See* Item 407(e) of Regulation S-K. Because directors are ordinarily elected at annual meetings, the compensation committee report is generally included in proxy statements for the annual meeting of shareholders.

The compensation committee report is considered "furnished" and not "filed" with the SEC and therefore will be subject to less stringent liability standards under applicable securities laws than the CD&A.

H. DIRECTOR COMPENSATION DISCLOSURE

The amended rules substantially revise discussion of directors' compensation and require the inclusion of a Directors Compensation Table with accompanying narrative disclosure. The Directors Compensation Table resembles the Summary Compensation Table for executive officers discussed above, but only presents information with respect to the company's last fiscal year. Columns in the table include the following:

- fees earned and paid in cash;
- stock awards;
- option awards;
- non-equity incentive plan compensation;
- change in pension value and non-qualified deferred compensation earnings;
- all other compensation; and
- total compensation.

The All Other Compensation column includes items similar to those included in the Summary Compensation Table for executive officers. The final rules identify several items that must be included in that column, the most significant of which are:

- value of perquisites and other personal benefits unless the aggregate amount of such compensation is less than $10,000;
- awards under director legacy or charitable award programs;
- consulting fees;
- tax reimbursements;
- discount stock programs not generally available to employees;
- contributions or allocations to defined contribution or other deferred compensation plans;
- actuarial increases in defined pension plans;
- value of life insurance premiums paid by the company for the director's benefit; and
- payments in connection with the director's resignation, retirement, termination or change in control of the company.

Similar rules apply to completing the Directors Compensation Table as apply to the corresponding column of the Summary Compensation Table. In addition, any material information necessary to

understand the amounts disclosed in the table must be described in narrative format following the table. *See* Item 402(k) of Regulation S-K.

I. BENEFICIAL OWNERSHIP INFORMATION

The proxy statement must also include information relating to the beneficial ownership of securities of the company by the named executive officers, the company's directors and director nominees (naming them), holders of more than five percent of any class of the company's voting securities and all directors and executive officers of the company as a group (without naming them). *See* Item 5 of Schedule 14A and Item 403 of Regulation S-K. The required information regarding beneficial ownership of the company's securities includes:

- the title of the class of securities;
- the name and address of the beneficial owner;
- the amount and nature of the beneficial ownership; and
- the percentage of the class of securities so owned.

Under the proxy rules, "beneficial ownership" is determined in accordance with Rule 13d-3 promulgated under the Exchange Act, which defines a beneficial owner as a person with possession of sole or shared voting power or investment power with respect to the securities. "Voting power" is defined to include the power to vote or direct the vote of a security, and "investment power" is defined to include the power to dispose or direct the disposition of a security. A person is also deemed to have beneficial ownership of all securities that the person has the right to acquire within 60 days of the determination date through the exercise or conversion of an option, warrant or other security. Securities that are the subject of a voting trust, proxy, power of attorney or other similar agreement are also deemed to be "beneficially owned" for purposes of proxy statement disclosure.

Although the company collects the required information about directors and executive officers through the use of annual questionnaires sent to them by the company, the information regarding five percent holders may be more difficult to obtain if the five percent holders are not officers or directors. In such an event, the company can obtain this information from statements filed with the SEC by such parties. The proxy rules specifically provide that the company may rely upon information set forth in such statements unless the company knows or has reason to believe that the information is not complete or accurate, or that a statement or amendment should have been filed and was not.

J. SECTION 16 REPORTS

The federal securities laws contain requirements that each director, executive officer and holder of ten percent or more of any class of a company's equity securities file with the SEC reports disclosing transactions by such persons in the company's securities. A failure to file these reports on a timely basis during the company's last completed fiscal year must be disclosed in the proxy statement under a caption entitled "Section 16(a) Beneficial Ownership Reporting Compliance." In addition, where a company is incorporating by reference certain information disclosed in the proxy that is required in the company's Annual Report on Form 10-K, the company may have to disclose on the front page of its Annual Report on Form 10-K that it will be reporting such delinquency. The disclosure must include the identity of each person failing to make a report, the number of reports filed late, the number of untimely reported transactions and any known failure to file a required report. The proxy rules specifically allow the company to rely upon a review of Forms 3, 4 and 5, and amendments thereto, submitted to it, as well as any written representations from the persons required to make such filings that no Form 5 is required. *See* Item 7 of Schedule 14A and Item 405 of Regulation S-K.

Sarbanes-Oxley, and the rules issued by the SEC thereunder, accelerated the dates by which Section 16 reports must be filed following most transactions in the company's securities by directors, executive officers and ten percent holders to two business days following the transaction and require that all Section 16 reports be filed with the SEC electronically. Persons responsible for preparing the company's proxy materials should review insiders' transactions carefully to ensure compliance with the accelerated filing requirements and report in the proxy statement any failures.

K. AUDIT COMMITTEE DISCLOSURE

The proxy rules require significant disclosures about the composition and function of the audit committee, including the following:

- if the company's securities are listed, a statement whether the members of the audit committee are "independent," within the meaning of the listing standards applicable to the company;
- if the audit committee includes a director who is not independent, the company must disclose the nature of the relationship that makes the individual not independent and the reasons the board appointed such person to the audit committee;
- if the company's securities are not listed, a statement whether the company has an audit committee established in accordance with the Exchange Act, and if so, whether the members of the committee are "independent," within the meaning of the listing standards of any registered national securities exchange or association; provided that the listing standards used are applied consistently to all members of the committee; and
- whether the board of directors has adopted a written charter for the audit committee (if so, the company is required to disclose whether a current copy of the charter is available to shareholders on the company's website, and if so, to provide the website address. If a current copy of the charter is not available on the company's website, the company must include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years. If a current copy of the charter is not available on the company's website and is not included as an appendix to its current proxy statement, the company must identify in which of the prior proxy statements the charter was included).

Pursuant to the requirements of Sarbanes-Oxley, the SEC enacted Rule 10A-3 promulgated under the Exchange Act. Rule 10A-3 requires national securities exchanges and associations such as the NYSE and Nasdaq to decline to list securities of any company that fails to comply with certain audit committee requirements mandated by Sarbanes-Oxley. The NYSE and Nasdaq have adopted corporate governance rule changes that parallel and expand the requirements of Rule 10A-3 and Section 10A(m) of the Exchange Act. The following discussion explains the general requirements of Rule 10A-3 and identifies certain variations in the NYSE and Nasdaq rules. In addition, differences exist in the application and content of Rule 10A-3 and the NYSE and Nasdaq requirements as they apply to investment companies and foreign private issuers. Such companies should consult legal counsel for additional information.

1. Audit committee independence

Rule 10A-3 requires all audit committee members to be independent. Under the rule, audit committee members may not accept any consulting, advisory or other compensatory fee from the company or any of its subsidiaries. Thus, the rule prohibits payments to an audit committee member for services as an officer, employee or consultant of the company, but does not forbid an audit committee member from accepting payments for service as a director or member of any board committee or under a retirement plan. The rule also prohibits indirect compensation by prohibiting payments to current spouses, minor children or stepchildren or children or stepchildren currently sharing a home with the audit committee member. The NYSE and Nasdaq rules broaden this prohibition by also forbidding payments to additional family members, including parents, adult children, mothers-and fathers-in-law, sons-and daughters-in-law, sisters-and brothers-in-law and anyone (other than domestic employees) residing in the audit committee member's home. Rule 10A-3 further restricts indirect compensation by prohibiting payments to certain associated entities of which the audit committee member is currently a partner (unless merely a limited partner) or member, serves as a managing director or executive officer or occupies a similar position. Such associated entities include entities that provide accounting, consulting, legal, investment banking or financial advisory services to the company or any of its subsidiaries.

Rule 10A-3 also forbids any person affiliated with the company or any of its subsidiaries from serving on the audit committee. With respect to this requirement, the SEC adopted a safe harbor that excludes

any person or entity from affiliate status if that person or entity is not an executive officer or shareholder owning ten percent or more of any class of voting equity securities of the company. Additionally, Rule 10A-3 excludes outside directors and passive owners of an affiliate of the company from automatic designation as affiliates themselves. Automatic designation as an affiliate does apply to executive officers, directors who are also employees of an affiliate, and general partners and managing members of an affiliate.

The NYSE and Nasdaq rules apply the following additional independence criteria:

- the rules require the board of directors of each listed company to affirmatively determine that each audit committee member has no material relationship with the company that would jeopardize the director's ability to exercise independent judgment;
- the rules prohibit any person who is employed or whose family member is employed as an executive officer of another corporation from serving on the company's audit committee if at any time within the past three years any of the company's executive officers served on the compensation committee of the other company;
- under the rules, any person who is or whose family member is employed by or affiliated with any of the company's current or former auditors, and under Nasdaq's rules, any person who has helped to prepare the company's or any of its subsidiaries' financial statements, may not serve on the audit committee until three years after that affiliation or employment relationship ends, and under NYSE's rules, any person with an immediate family member who is a partner in the company's auditing firm, regardless of that person's position in a "professional capacity" at the firm, will not be considered independent;
- the rules prevent audit committee service by persons having certain employment or ownership relationships with organizations that pay significant sums to or receive significant sums from the company (the precise level of those sums varies under the rules of each of the NYSE and Nasdaq, but both rules state such sums in terms of absolute amounts and percentages of consolidated gross revenue); and
- although Rule 10A-3 contains no look-back period for its independence requirements, both the NYSE and Nasdaq rules include a three-year look-back period applicable to all of the independence criteria, even those that parallel the Rule 10A-3 requirements.

Rule 10A-3 and the NYSE and Nasdaq rules contain various exemptions from the independence requirements. The rules exempt new public companies from the independence requirements for a limited transition period. Under the exemption, a new public company must have one independent audit committee member at the time of its initial listing, a majority of independent members within 90 days and a fully independent committee within one year. Moreover, under the Nasdaq rules, an audit committee member who fails to meet the Nasdaq independence requirements may still serve (for no more than two years) on the audit committee if (1) the director otherwise meets the requirements of Section 10A(m)(3) of the Exchange Act and the associated rules, including Rule 10A-3, (2) neither the director nor any of his or her family members is a current officer or employee of the company, (3) the board of directors determines that the company's best interests are furthered by the director's service on the audit committee and (4) the board discloses the reasons for its determination and the nature of the relationship between the company and the audit committee member in the next annual proxy statement (or Annual Report on Form 10-K if the company does not file a proxy statement). The Nasdaq rules also allow audit committee members who cease to be independent for reasons outside their control to continue to serve on the audit committee until the next annual shareholders meeting or one year, whichever period is shorter, provided that the company notifies Nasdaq immediately.

(a) Responsibility for the appointment, compensation, retention and oversight of the work of independent accountants

Rule 10A-3 requires public company audit committees to assume responsibility for hiring, overseeing and terminating the independent accountants engaged to prepare or issue an audit report or perform other audit, review or attest services for the company. Such services include all of the services encom-

passed by the "Audit Fees" category in the corporation's disclosure of fees paid to its independent accountants, such as services necessary to perform an audit, comfort letters, statutory audits and assistance with documents filed with the SEC. *See* "Federal Proxy Rules and the Proxy Statement—The Proxy Statement—Disclosure Related to Independent Auditors."

This provision of Rule 10A-3 does not preempt any law of the company's governing jurisdiction that might require or permit shareholders, the board of directors as a whole, a tribunal or any other governmental entity to select or oversee the company's outside auditors. In the case of such an apparent conflict, the audit committee must, to the extent permitted by the company's governing law, recommend outside auditors to the shareholders or board of directors.

The NYSE and Nasdaq corporate governance rules require an audit committee to perform certain additional duties that must be set forth in the audit committee charter. These duties relate largely to holding regular discussions with management and independent auditors about matters pertaining to risk management or audit problems and issues. Companies requiring additional information about such matters should consult legal counsel.

(b) Funding for the operation of the audit committee

Under Rule 10A-3, the audit committee determines the extent of funding that the company must provide to it. The funds provided to the audit committee should be sufficient to compensate the company's independent auditors engaged and overseen by the audit committee, to compensate any advisors engaged by the audit committee and for ordinary administrative expenses necessary or appropriate for the audit committee to carry out its duties.

(c) Exemptions from compliance; disclosure requirements

Rule 10A-3 contains a number of exemptions from compliance with requirements of the rule, including exemptions for boards of auditors of foreign private issuers, foreign government issuers, overlapping boards, security futures products, standardized options, asset-backed issuers, unit investment trusts and multiple listings. Companies must disclose their reliance on these exemptions in annual reports and proxy statements for shareholder meetings at which directors will be elected. Such companies must also disclose whether and how reliance on the exemption will materially adversely affect the audit committee's ability to act independently and otherwise comply with Rule 10A-3. These disclosure requirements apply to all exemptions under Rule 10A-3 other than:

- the exemption for unit investment trusts;
- subsidiaries relying on the multiple listing exemption;
- the exemption for overlapping boards;
- the exemptions for securities futures products and standardized options;
- the exemption for securities issued by foreign governments; and
- the exemptions for securities issued by asset-backed issuers and similar passive issuers.

Rule 10A-3 also modifies certain disclosure requirements. For instance, the disclosure about audit committee members that companies must include in proxy statements must also appear or be incorporated by reference in the listed company's Annual Report on Form 10-K. Related to this requirement, Rule 10A-3 deems a company's entire board of directors to be the audit committee in the absence of a separately designated audit committee and requires such a company to state in its disclosure that the entire board of directors serves as the audit committee. However, the rule does not require such a company to comply with this requirement if the company is not required to disclose its reliance on an exemption under Rule 10A-3, as discussed above.

Additionally, Rule 10A-3 requires companies with securities listed on a national securities exchange or an automated inter-dealer quotation system of a national securities association (such as the NYSE and Nasdaq) to disclose in proxy statements for shareholder meetings at which directors will be elected whether their audit committee members are independent according to the definition in the applicable listing standards, and companies with non-listed securities must disclose whether their audit committee

members are independent according to any SEC-approved definition of independence developed by a national securities exchange or association (the rules further require the company to state which definition it chose and to apply that definition consistently in making independence determinations).

2. Audit committee report

Each proxy statement relating to an annual meeting at which directors are to be elected must also contain an audit committee report, which must state that:

- the audit committee has reviewed and discussed the audited financial statements with management;
- the audit committee has discussed with the independent accountant the matters required to be discussed by Statement on Auditing Standards 61, which includes a review of the findings of the independent accountant during its examination of the company's financial statements;
- the audit committee has received the written disclosures and the letter from the independent accountant required by applicable requirements of the Public Company Accounting Oversight Board regarding communications concerning independence, and has discussed with the independent accountant the independent accountant's independence; and
- based on the above review and discussions, the audit committee recommended to the board of directors that the audited financial statements of the company be included in the Annual Report on Form 10-K for the last fiscal year for filing with the SEC.

Like the compensation committee report found elsewhere in the proxy statement, the audit committee report must appear over the names of each audit committee member. *See* Item 7 of Schedule 14A and Item 407(d) of Regulation S-K.

L. NOMINATING COMMITTEE DISCLOSURE

The SEC's disclosure rules regarding nominating committees are contained in paragraph (d) of Item 7 of Schedule 14A. As with other Item 7 disclosures, the nominating committee disclosures are required in proxy materials relating to any meeting at which directors will be elected. The rules require proxy materials prepared by public companies to indicate whether the company has a standing nominating committee (or a committee performing similar functions) and, if not, why the board of directors believes that operating without a nominating committee is appropriate and who among the board members considers director nominees. In addition, the rules require proxy statements to provide the following information regarding the company's director nomination process:

- if the nominating committee has a charter, the company is required to disclose whether a current copy of the charter is available to shareholders on the company's website, and if so, to provide the website address. If a current copy of the charter is not available on the company's website, the company must include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years. If a current copy of the charter is not available on the company's website, and is not included as an appendix to its current proxy statement, the company must identify in which of the prior proxy statements the charter was included;
- if the nominating committee does not have a charter, the company is required to make a statement to that effect;
- a company with securities listed on a national securities exchange or an automated inter-dealer quotation system of a national securities association with independence requirements for nominating committee members is required to disclose whether the members of its nominating committee are independent under the listing standards of the applicable national securities exchange or association;
- a company with non-listed securities is required to disclose whether the members of its nominating committee are independent according to any SEC-approved definition of independence in the listing standards of a national securities exchange or association (the rules further require the company to state which definition it chose and to apply that definition consistently in determining the independence of nominating committee members and audit committee members);

- the company is required to describe the material terms of any nominating committee policy that governs the consideration of shareholder-recommended director candidates, including a statement as to whether the nominating committee will consider director candidates recommended by shareholders;
- if the nominating committee does not have a policy with regard to consideration of director candidates recommended by shareholders, the company must so state that fact;
- if the nominating committee will consider candidates recommended by shareholders, the company must describe the procedures by which shareholders can recommend director candidates;
- the company must also describe any specific, minimum qualifications that a nominating committee-recommended candidate must meet for a position on the company's board of directors as well as any qualities or skills that the nominating committee believes are prerequisites to board membership;
- the company must describe the process by which the nominating committee identifies and evaluates nominees and any particularities in the process arising in the case of shareholder-recommended nominees;
- for each non-incumbent nominee (other than current executive officers) who received nominating committee approval for inclusion in the company's proxy card, the company must state which one or more of the following categories of persons or entities recommended that nominee: security holder, non-management director, chief executive officer, other executive officer, third-party search firm or other specified source;
- the company must disclose the functions performed by any third party that the company pays to help identify or evaluate director nominees; and
- if the nominating committee received a nominee recommendation within the timeframe required by the rules from a shareholder beneficially owning more than five percent of the company's voting common stock for at least one year as of the date of the recommendation (or from a group of shareholders beneficially owning, in the aggregate, more than five percent of the voting common stock, with the securities used to calculate that ownership held for at least one year as of the date of the recommendation), the company is required to identify the candidate and the shareholder (or shareholder group) that recommended the candidate and disclose whether the nominating committee chose to nominate the candidate; provided, however, that no such identification or disclosure is required without the written consent of both the shareholder or shareholder group and the candidate to be so identified.

M. COMPENSATION COMMITTEE DISCLOSURE

The proxy rules also require the following compensation committee disclosures, which follow those already applicable to the audit committee and nominating committee. The company is required to disclose:

- whether the compensation committee has a charter, and whether the charter is available through the company's website, and if so, to provide the website address. If a current copy of the charter is not available on the company's website, the company must include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years. If a current copy of the charter is not available on the company's website and is not included as an appendix to its current proxy statement, the company must identify in which of the prior proxy statements the charter was included; and
- the committee's processes and procedures for the consideration and determination of executive and director compensation, including the committee's scope of authority, the role of executive officers in determining or recommending executive officer and director compensation, and the identity and role of compensation consultants.

SEC commentary regarding the amended rules emphasizes that this disclosure is intended to focus on aspects of corporate governance affecting the determination of executive compensation and supplements the separate CD&A section required by the amended rules. *See* Item 407(e) of Regulation S-K.

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N. SHAREHOLDER COMMUNICATIONS WITH THE BOARD OF DIRECTORS

As with the shareholder nomination disclosures and other Item 7 disclosures, the disclosures regarding shareholder communications with directors of public companies are required in proxy materials relating to any meeting at which directors will be elected. The rules require the company's proxy materials relating to director elections to:

- disclose whether the company provides a process by which shareholders may send communications to the board of directors and, if not, why the board believes it is appropriate not to have such a process; and
- if the company does have such a process, the company must:
  - state the manner in which shareholders should send communications to the board of directors and, if applicable, to specified individual directors; and
  - if all shareholder communications are not sent directly to the board of directors, describe the company's procedure for determining which shareholder communications will be delivered to the board of directors.

In addition, the proxy statement must describe the company's policy, if any, with regard to board members' attendance at annual shareholder meetings and state the number of board members who attended the prior year's annual meeting.

O. DISCLOSURE RELATED TO INDEPENDENT AUDITORS

Under Item 9 of Schedule 14A, proxy statements related to annual meetings at which directors are to be elected (or special meetings or written consents in lieu of an annual meeting) or any meeting at which selection of the independent auditors is approved must include:

- the name of the principal accountant selected or being recommended to shareholders for election, approval or ratification, or, if no accountant has been selected or recommended, the reasons why one has not been selected or recommended;
- the identity of the company's principal accountant for the previous fiscal year if it is different from the accountant selected or recommended for the current year;
- if the company's principal accountant at any time during the past two fiscal years is no longer acting in that capacity, or a new principal accountant has been hired, specified additional information relating to the facts and circumstances of the change in accountant; and
- whether a representative of the principal accountant will attend the annual meeting and, if so, whether the representative will have an opportunity to make a statement and be available to respond to appropriate questions.

The company is also required to disclose:

- the aggregate fees billed by the principal accountant under the captions noted below:

Caption	Description
Audit Fees	Aggregate fees billed in each of the last two fiscal years for professional services rendered in connection with the audit of the company's annual financial statements and for reviews of the financial statements included in its Quarterly Reports on Form 10-Q.
Audit-Related Fees	Aggregate fees billed in each of the last two fiscal years for assurance and related services by the principal accountant that are reasonably related to the performance of the audit or review of the company's financial statements that are not reported under the caption "Audit Fees" above, including a description of the nature of the services comprising the fees disclosed under this category.

Caption	Description
Tax Fees	Aggregate fees billed in each of the last two fiscal years for professional services rendered by the principal accountant for tax compliance, tax advice and tax planning, including a description of the nature of the services comprising the fees disclosed under this category.
All Other Fees	Aggregate fees billed in each of the last two fiscal years for all other products and services provided by the principal accountant that are not otherwise disclosed above, including a description of the nature of the services comprising the fees disclosed under this category.

- the audit committee's pre-approval policies and procedures related to products and services provided by the principal accountant and the percentage of the products and services provided under the captions "Audit-Related Fees," "Tax Fees" and "All Other Fees" that were pre-approved by the audit committee; and
- if the percentage is greater than 50 percent, the percentage of hours expended on the principal accountant's audit of the company's financial statements for the most recent fiscal year that was attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

Although there is no legal requirement that shareholders approve or ratify the selection of a company's independent accountant, it has become customary to submit the selection of the independent accountant to a shareholder vote at the company's annual meeting.

P. CERTAIN RELATIONSHIPS AND RELATED TRANSACTIONS

If action is to be taken at an annual meeting with respect to the election of directors, the proxy rules require disclosure of a variety of information about transactions between the company and specified related parties. Item 7 of Schedule 14A cross references Item 404 of Regulation S-K, which was revised in 2006 by the amended rules and now adopts a principles based approach to disclosure as opposed to prior bright line standards. The amended rules expand the scope of the transactions covered by the disclosure requirements to include any individual or series of related financial transactions, arrangements or relationships in which:

- the company benefits from the transaction, even if not a contractual party to the arrangement;
- the amount exceeds $120,000; and
- the related person had or will have a direct or indirect material interest, determined on the basis of the significance of the information to investors, in light of all of the circumstances, including consideration of the relationship of the related persons to the transaction, their relationship to each other and the importance of the interest to the person having the interest.

The rules provide a number of exceptions to the disclosure requirements, including, but not limited to, executive compensation arrangements otherwise reported under Item 402 of Regulation S-K (other than in the case of an immediate family member), indebtedness incurred in connection with the purchase of goods and services on usual trade terms, ordinary course business and travel advances and reimbursements, and pro rata benefits applicable to a class of equity security holders.

In addition, the rules require disclosure of the policies and procedures adopted by the company and its board of directors for the review, approval and ratification of related party transactions. The disclosure requires a description of the material features of the policies and procedures, such as:

- the types of transactions that are covered and the standards to be applied;
- the members of the company's board of directors responsible for applying the policies and procedures; and
- whether the policies and procedures are in writing, and if not, how such policies and procedures are documented.

The rules expressly require the identification of any transactions where the company's policies and procedures do not otherwise require review, approval or ratification, or circumstances in which the policies and practices were not followed.

Each of these disclosure requirements contains a number of instructions to assist and direct the company in providing the necessary disclosure. Readers are encouraged to review the relevant provisions of Item 404 of Regulation S-K to determine the appropriate disclosures for their company.

Q. EQUITY COMPENSATION PLAN SHAREHOLDER APPROVAL RULES

The NYSE and Nasdaq listing standards require shareholder approval of listed company's equity compensation plans. With a few limited exceptions, shareholder approval of all equity compensation plans, including stock option and restricted share plans as well as all material amendments to such plans are required. The NYSE and Nasdaq prior exemptions for "broad-based" equity compensation plans and plans excluding officers and directors from a shareholder approval requirement have been eliminated by amendments to the NYSE and Nasdaq listing standards. The specific requirements of the NYSE and Nasdaq equity compensation plan shareholder approval rules are summarized below.

1. The New York Stock Exchange Rules

Plans Covered. Under the NYSE listing standards, an "equity-compensation plan" that requires shareholder approval is "a plan or other arrangement that provides for the delivery of equity securities (either newly issued or treasury shares) of the listed company to any employee, director or other service provider as compensation for services." Any compensatory grant of options or other equity securities that is not made under such a plan is an equity compensation plan for these purposes.

The following are specifically exempted from the equity compensation plan definition even if the brokerage and other costs of the plan are paid for by the listed company:

- plans that pay all benefits in cash;
- plans adopted prior to June 30, 2003 (but not material revisions to such plans described below);
- plans that are made available to shareholders generally, such as a typical dividend reinvestment plan;
- plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:
  - the shares are delivered immediately or on a deferred basis; or
  - the payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions);
- tax-qualified plans, such as 401(k) plans and employee stock ownership plans;
- employee stock purchase plans intended to meet the requirements of Section 423 of the Internal Revenue Code of 1986, as amended (the Code); and
- parallel excess plans, which generally are plans that are designed to work in parallel with tax-qualified retirement plans such as 401(k) plans, to provide benefits in excess of various Code limits applicable to the tax-qualified retirement plans.

The NYSE listing standards require that, in circumstances in which equity compensation plans and amendments do not require shareholder approval, the plans and amendments still must be considered and approved by the company's compensation committee or a majority of the company's independent directors.

Material Revisions and Amendments. Under the NYSE listing standards, any material revision of an equity compensation plan also requires shareholder approval. A "material revision" includes, but is not limited to:

- a material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spinoff or similar transaction), provided that:
  - if a plan contains a formula for automatic increases in the shares available or for automatic grants pursuant to a formula, each such increase or grant will be considered a revision requiring shareholder approval unless the plan has a term of not more than ten years (a Formula Plan); and

- if a plan contains no limit on the number of shares available and is not a Formula Plan, then each grant under the plan will require separate shareholder approval regardless of whether the plan has a term of not more than ten years (a Discretionary Plan);
- an expansion of the types of awards available under the plan;
- a material expansion of the class of employees, directors or other service providers eligible to participate in the plan;
- a material extension of the term of the plan;
- a material change to the method of determining the strike price of options under the plan (a change in the method of determining "fair market value" from the closing price on the date of grant to the average of the high and low prices on the date of grant is an example of a change that the NYSE would not view as material); and
- the deletion or limitation of any provision prohibiting repricing of options. *See* the next section for details.

It is important to note that an amendment to an equity compensation plan will not be considered a "material revision" requiring shareholder approval if it curtails rather than expands the scope of the plan in question.

Option Repricings. Under the NYSE rules, a plan that does not specifically permit option repricing will be considered to prohibit repricing. Accordingly, any actual repricing of options will be considered a material revision of a plan even if the plan itself is not revised. The NYSE rules define "repricing" broadly to include any of the following or any other action that has the same effect:

- lowering the strike price of an option after it is granted;
- any other action that is treated as a repricing under GAAP; and
- canceling an option at a time when its strike price exceeds the fair market value of the underlying stock in exchange for another option, restricted stock or other equity, unless the cancellation and exchange occurs in connection with a merger, acquisition, spin-off or other similar corporate transaction.

Inducement Awards and Awards Assumed in Mergers and Acquisitions. The NYSE rules exempt "employment inducement grants" and certain grants with respect to options and plans that are assumed in mergers and acquisitions, but require companies relying on one or more of these exemptions to make a press release and/or written notification to the SEC, depending on the exemption. Such inducement awards are also available for rehires following a bona fide period of non-employment.

Broker Voting. The NYSE rules prohibit member organizations of the NYSE (brokers) from giving a proxy to vote on equity compensation plans unless the beneficial owner of the shares covered by the proxy has given voting instructions. This prohibition will have as significant an impact on the approval of equity compensation plans as any of the other changes to the shareholder approval requirements. In the past, companies could expect to receive the vote of member organizations if the proposed plan or amendment did not cover more than five percent of the company's outstanding shares. Without the expected broker votes, companies will be required to solicit shareholder approval of equity compensation plans much more aggressively. In addition, significant shareholders will be able to exert more influence in the equity compensation plan shareholder approval process.

Notification Requirement. NYSE-listed companies must notify the NYSE in writing when they rely on one or more of the shareholder approval exemptions described above, including the inducement grant exemption, the merger and acquisition exemption and the exemptions for certain types of plans.

2. The Nasdaq Stock Market Rules

Plans Covered. Like the NYSE rules, the Nasdaq rules govern a wide range of equity compensation arrangements. Specifically, the rules require shareholder approval of all "stock option plans and other equity compensation arrangements." As with the NYSE, Nasdaq also excludes certain plans from the shareholder approval requirements, including:

- plans adopted before June 30, 2003 (but not material revisions to such plans described below);
- plans that are made available to shareholders generally, such as a typical dividend reinvestment plan;

- arrangements that merely provide a convenient way for employees, directors or other service providers to purchase stock at fair market value;
- tax-qualified plans, such as 401(k) plans and employee stock option plans;
- parallel non-qualified plans, which generally are plans designed to work in parallel with tax-qualified retirement plans to provide benefits in excess of various Code limits applicable to the tax-qualified retirement plans; and
- plans or arrangements relating to an acquisition or merger.

The Nasdaq rules limit the term of any Formula Plan to ten years unless shareholder approval of the plan is obtained every ten years. Plans that do not limit the number of shares available for grant require shareholder approval of each grant under the plan.

Material Revisions and Amendments. Like the NYSE rules, the Nasdaq rules also require shareholder approval of material amendments to stock option plans or other equity compensation arrangements and provide a non-exclusive list of potential amendments requiring shareholder approval, including:

- a material increase in the number of shares available under the plan (other than an increase as a result of a stock split, merger, spinoff or similar transaction);
- a material increase in benefits to participants, including any material change to:
  - permit a repricing;
  - reduce the price at which shares or options may be offered; or
  - extend the duration of the plan;
- a material expansion of the class of participants eligible to participate in the plan; and
- an expansion in the types of options or awards provided under the plan.

Option Repricings. Under the Nasdaq rules, amending a plan to permit option repricings constitutes a material revision and requires shareholder approval. Additionally, the Nasdaq interpretive materials make it clear that shareholder approval is required to reprice options, unless the plan as approved by shareholders specifically allows for repricing.

Inducement Awards and Awards Assumed in Mergers and Acquisitions. The Nasdaq rules exempt "employment inducement grants" and certain grants with respect to options and plans that are assumed in mergers and acquisitions. Unlike the NYSE rules, the Nasdaq rules require inducement grants to be approved by the company's compensation committee or by a majority of the company's independent directors. In addition, in order to rely upon the inducement grant exception, the company must issue a press release promptly following the grant disclosing the material terms of the award. Under the Nasdaq rules, inducement awards are available for rehires following a bona fide period of non-employment. Awards assumed in connection with a merger or acquisition do not require shareholder approval only if:

- shareholder approval is not required to convert, replace or adjust outstanding options or other awards to reflect the transaction; and
- shares available under certain plans acquired in mergers and acquisitions may be used for certain post-transaction grants without further shareholder approval.

R. SHAREHOLDER ACCESS TO COMPANY PROXY MATERIALS FOR DIRECTOR NOMINATIONS

What Is Shareholder Access. Under the current SEC rules, only the company's director nominees are included in the company's proxy statement and proxy card. If shareholders wish to nominate their own candidates, they must prepare their own proxy statement and proxy card. Shareholder access refers to an alternative regime in which shareholders could include director nominees in the company's proxy materials in opposition to the company's nominees.

Historical Background. Rule 14a-8 of the Exchange Act requires a public company to include a shareholder proposal in its proxy statement if the proponent meets modest share ownership, timeliness and length of proposed submission requirements. If a company seeks to exclude a shareholder proposal from its proxy statement, the company must, following receipt of a qualifying shareholder

submission, establish that the proposal satisfies an SEC established justification for exclusion. With respect to the election of directors, in November 2007 the SEC amended Rule 14a-8(i)(8) to codify the SEC's interpretation that companies may exclude from their proxy materials any shareholder proposal that would result in an immediate election contest or set up a process for shareholders to conduct a future election contest.

Proposed Rules. There are currently two primary changes proposed by the SEC. The first change would add a new Rule 14a-11. This change would require a company to include in its proxy materials director nominees proposed by shareholders who satisfy certain ownership and other requirements, including that the nominating shareholder or group hold at least one percent of the stock of the company for at least one year. Second, the SEC proposed an amendment to Rule 14a-8(i)(8) that would narrow the circumstances under which a company may exclude proposals related to elections and nominations for directors.

If adopted, the SEC's rules would subject nearly all U.S. public companies to the cost of including shareholder nominees in proxy materials to stand for election against the director nominees recommended by the company's board of directors. In this respect, the proposed rules are likely to have a significant impact on the director nomination process. They will also increase the number of contested elections in which shareholder nominees stand for election against those recommended by a company's board of directors.

Current Rules. In October 2009, the SEC announced that it will not vote on its proxy access proposals until early 2010. The SEC's delay in taking action means that final rules will not be in place for 2010 shareholder meetings of calendar year-end companies.

The SEC's delay in approving final proxy access rules suggests that the SEC may want to finalize changes to Rules 14a-8 and 14a-11 at the same time. However, both companies and investors should benefit from the additional time. Investors will have additional time to consider the types of proxy access proposals that they would like to submit to companies and the types of director candidates that they would like to nominate under a proxy access regime. Companies will have more time to educate their management teams and boards about proxy access and to continue to engage their investors constructively so as to consider whether to implement their own proxy access regime and minimize the chances of having to face a proxy access election.

S. PRESENTATION OF INFORMATION

The proxy rules also contain specific rules regarding the manner in which information is to be presented in the proxy statement. Among other things, Rule 14a-5 of Regulation 14A requires that:

- information in the proxy statement be clearly presented and organized according to subject matter with appropriate headings for the various categories of information;
- information in the proxy statement be presented in Roman type at least as large and as legible as ten-point modern type, except that financial statements and tables (but not the notes thereto) may be in eight-point modern type if necessary for convenient presentation;
- the proxy statement must include the deadline for any proposals shareholders intend to present at the company's next annual meeting; and
- the proxy statement must include the date after which notice of a shareholder proposal that is not submitted in accordance with the provisions of Rule 14a-8 of Regulation 14A will be considered untimely.

T. OTHER REQUIREMENTS RELATED TO PROXY SOLICITATION MATERIALS

In addition to the requirements described in this handbook, the proxy rules contain numerous additional items and instructions relating to information required to be presented in materials used to solicit proxies, depending on the type of meeting and the matters to be considered at the meeting. These additional items relate to, among other things, the prohibition against false or misleading statements in proxy materials and the inclusion of information specific to the types of matters to be considered at the annual meeting, such as equity plans and combination transactions.

U. PLAIN ENGLISH

Although the proxy statement is prepared to meet legal requirements, it also is a valuable shareholder communications tool. One way to make the proxy statement useful as a shareholder communications tool is to prepare a document that is well-organized, more visually appealing and more readable. The SEC's plain English rules do not currently govern proxy statements; however, as discussed above, the SEC has expressed its support for the use of plain English principles with respect to executive compensation disclosure in the proxy statement. Although not required to do so, more and more companies are using the plain English rules as a guide to prepare proxy statements that are more easily understood by their shareholders. Preparing the proxy statement in accordance with the plain English rules benefits the shareholders and the company—shareholders are able to better understand the matters discussed and to make an informed decision and the company is presented in a more positive light with disclosure that is more easily read and understood. There are many resources available for assistance in preparing the proxy statement and other documents in accordance with the plain English rules. Companies should consult with legal counsel or their RR Donnelley representative for more guidance on these matters.

III. FORM OF PROXY

The proxy card on which shareholders actually mark their votes is largely dictated by the computer forms that most public companies now use to enable the proxies to be tallied electronically. The proxy card should be prepared in close cooperation with the company that will be tabulating the results for the meeting to ensure that it will work correctly with its technology. The company should also discuss the form of proxy with its inspector of election.

The form of proxy must comply with a number of requirements contained in Rule 14a-4 of Regulation 14A, which require the form of proxy to:

- identify in boldface type the person or entity on whose behalf the proxy is being solicited;
- contain a blank space for shareholders to date the proxy;
- identify clearly and impartially each matter to be acted upon regardless of whether it is conditioned upon approval of another matter or whether it was proposed by the company or a shareholder; and
- provide means by which the shareholder may approve, disapprove or abstain with respect to each separate matter (other than the election of directors) by marking the appropriate box.

Where the proxy relates to the election of directors, the proxy card must set forth the name of each person nominated for election as a director. The proxy card may allow shareholders the opportunity to grant authority to vote for all nominees as a group only if similar means are provided to allow shareholders to withhold authority to vote for all nominees as a group. Conversely, the proxy card must include one of the following means for shareholders to withhold authority to vote for each nominee:

- a box opposite the name of each director nominee that may be marked to indicate a vote to withhold authority for that nominee;
- an instruction in bold face type indicating that a shareholder may withhold authority to vote for a specific nominee by lining through or otherwise striking out the name of the nominee;
- designated blank spaces in which the shareholder may write the names of the nominees with respect to whom authority to vote is withheld; or
- any other similar means if appropriate instructions are provided indicating how a shareholder may withhold authority for any director nominee.

The form of proxy may grant discretionary authority with respect to matters as to which a choice is not specified by the shareholder if certain conditions are met, as more fully described in the proxy rules. In addition, the proxy rules allow persons soliciting support of a minority slate of nominees to also seek authority to vote for one or more of the nominees named in the company's proxy statement if additional specified conditions are satisfied. The specific rules relating to granting or seeking authority to vote by proxy depend upon the type of matter upon which authority is being granted or sought.

Readers should review the proxy rules regarding granting discretionary authority found in Rule 14a-4 of Regulation 14A before including any statement in a form of proxy purporting to grant such authority.

As discussed previously, no form of proxy or consent may be delivered to or requested from any person before such person has received a definitive proxy statement filed with the SEC. In filing the form of proxy with the definitive proxy statement in accordance with the requirements of the proxy rules, the form of proxy should be filed as an appendix at the end of the proxy statement.

IV. DUE DILIGENCE REGARDING PROXY MATERIALS

The proxy rules contain anti-fraud regulations similar to those contained elsewhere in the federal securities laws. Specifically, the proxy rules prohibit the use of proxy solicitations that:

- contain any statement that, at the time and in light of the circumstances in which it is made, is false or misleading with respect to any material fact;
- omit to state any material fact necessary to make the statements in the proxy materials not false or misleading; or
- omit to state any material fact necessary to correct any statement in any earlier communication related to the solicitation of a proxy for the same meeting or subject matter that has become false or misleading.

To ensure compliance, persons responsible for preparation of the company's proxy materials must ensure that directors and officers of the company are provided ample time prior to their filing or mailing to review and verify the information contained in the solicitation materials and annual report to shareholders.

Most companies also circulate a formal questionnaire for all directors and officers in order to obtain or confirm the personal information that must be included in the proxy statement. Preparation of the "D&O Questionnaire," as they are called, involves a review of disclosure requirements, government regulations and officer and director biographies. As these forms can be difficult to prepare, persons responsible for preparing the D&O Questionnaire should consult with legal counsel to ensure compliance with the legal and technical disclosure requirements. Once the questionnaires have been completed and returned by the directors and officers, the information included must be reviewed and summarized for inclusion in the proxy statement and other year-end documents. Adequate time should also be provided for the review of the CD&A by members of the compensation committee and members of management who participate in the compensation process.

V. DISTRIBUTION OF PROXY MATERIALS TO SHAREHOLDERS

The proxy rules prohibit the solicitation of proxies prior to the delivery to each solicited shareholder of a proxy statement that complies with the disclosure requirements of the proxy rules. The proxy rules also require that an annual report to shareholders accompany or precede the proxy statement if directors are to be elected at the meeting. *See* Rule 14a-3 of Regulation 14A. Historically, companies have mailed paper copies of proxy statements, annual reports and additional solicitation materials to shareholders.

Under the e-proxy rules, companies may deliver proxy materials, including notices of shareholder meetings, proxy statements, forms of proxy, annual reports and any amendments to such materials that are required to be furnished to shareholders, either by the new "notice only option" or the traditional method of delivering a full set of printed materials, also referred to as the "full set delivery option." Companies choosing to use the traditional full set delivery option, however, must still undertake limited elements of the notice only option, thus creating a mandatory e-proxy requirement.

Companies are not limited to one option as the exclusive means for providing proxy materials to shareholders. Rather, they may use the notice only option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders.

The e-proxy rules became effective for large accelerated filers, i.e. companies subject to the Exchange Act requirements for at least twelve months with $700 million or more of public float that

have filed at least one annual report (other than registered investment companies), for solicitations occurring on or after January 1, 2008, and are mandatory for all other companies and soliciting persons beginning January 1, 2009.

A. NOTICE ONLY OPTION

The notice only option may be used in connection with the delivery of proxy materials for all shareholder meetings other than business combination transactions. To adopt the notice only option, companies must (1) send a notice of internet availability of proxy materials to shareholders at least 40 days before the meeting date or the date that consents may be used to effect a corporate action if no meeting is scheduled, (2) post the proxy materials on a publicly-accessible internet website which meets certain criteria by the time the notice is first sent to shareholders and (3) provide shareholders with a voting method at the time the notice is first sent to shareholders. Companies can satisfy the final requirement by providing electronic voting platforms, a toll-free phone telephone number for voting or a downloadable, printable proxy card on a website. To avoid an instance where shareholders execute a proxy without having reviewed the proxy statement, the telephone number for voting of the proxy may not be included in the notice, though the phone number may be posted to the website.

Other than the notice of a shareholders meeting required by state law, no other information may accompany the notice of internet availability of proxy materials. Further, the notice must conform to plain English requirements. The notice constitutes "other soliciting material" that must be filed with the SEC no later than the date on which the notice is first sent to shareholders.

Contents of the Notice of Internet Availability of Proxy Materials. The new rules provide that the notice is required to contain certain prominent legends and other information. *See* "Appendix D—Selected Contents of the Notice of Internet Availability of Proxy Materials" for a list of the information required in the notice.

Delivery of Proxy Card. A proxy card may only be sent to shareholders ten or more days after sending the notice, though the proxy card may be sent before the end of the ten-day period if it is accompanied by the proxy statement and annual report. If a company chooses not to send the proxy statement and annual report with the proxy card, another copy of the notice of internet availability of proxy materials must accompany the proxy card.

Delivery of Written Proxy Materials. Companies adopting the notice only option must send paper copies of the proxy materials to shareholders upon request, free of charge. Shareholders have the right to make a permanent election to receive either paper or e-mail copies of proxy materials in connection with future proxy solicitations, and companies are required to record such elections. Shareholder requests to receive paper proxy materials must be fulfilled by first class mail or other reasonably prompt method of delivery within three business days, provided such request is received prior to the company's meeting. Thereafter, companies are obligated to provide copies of the proxy materials for a period of one year after the date of the shareholders meeting or corporate action to which the materials relate, though the materials need not be sent within three business days nor by first class mail.

Design of the Publicly Accessible Web Site. All proxy materials identified in the notice must be made publicly accessible, free of charge, at the website address specified in the notice, which cannot be the SEC's Electronic Data Gathering, Analysis and Retrieval (EDGAR) website, on or before the date that the notice is sent to shareholders. The materials must be presented on the website in a format or formats convenient for both reading online and printing on paper, and must remain available on that website through the conclusion of the shareholders meeting. As noted above, the website must provide shareholders with at least one method to execute proxies as of the time the notice is first sent to shareholders, such as an electronic voting platform, a toll-free telephone number for voting, or a printable or downloadable proxy card on the website.

Web Site and E-mail Confidentiality. Companies must ensure that their website is designed such that users remain anonymous, including the elimination of any cookies or tracking features. Companies also may not use an e-mail address provided solely to request a copy of proxy materials for any purpose other than to send copies of those materials to shareholders.

Potential State Law Conflicts with E-Proxy Rules. Notwithstanding the mandatory e-proxy requirement, many companies may continue to elect the full set delivery option to avoid potential conflicts with state law that might occur if written proxy materials are not provided. One such state law conflict was addressed in 2008 when California eliminated its requirement that shareholders must first provide an unrevoked consent before companies could lawfully send annual reports and any accompanying materials electronically to them. As a result, companies incorporated in California or having a principal executive office in California may now take advantage of the notice only model. Other state laws, however, may continue to conflict with the e-proxy rules. Readers are urged to discuss their specific situations with legal counsel to address any particular issues they may face as a result of the e-proxy rules.

Suggested Actions for Companies Planning to Employ the Notice only Option. It is recommended that companies planning to adopt the notice only option consider the following:

- Determine whether it is appropriate to continue to use the full set delivery option initially to allow time to evaluate the notice only option and to assess other companies' experience with the new regime.
- Begin planning and complete the company's proxy materials earlier than in the past because, among other things, the notice only option will require that the materials be posted not later than 40 days prior to the shareholders meeting. In addition, careful coordination will be required between the company and its proxy solicitor (if any) and intermediaries because companies will be required to supply intermediaries with the information required for intermediaries to prepare their own notices and post the proxy materials to their own website, which will add several days to the process (intermediaries are likely to require at least five days for the process involved in compiling and distributing their own notice of internet availability of proxy materials).
- Review state laws that may conflict with the e-proxy rules with legal counsel before utilizing the new regime.
- Many companies' bylaws require that proxy materials be sent by mail. This is an appropriate time to update bylaws to provide for electronic notice. Companies are advised to consult with legal counsel regarding this matter.
- Companies should make sure they have plans in place to comply with website anonymity requirements, to answer questions from shareholders regarding the distribution of proxy materials electronically and to process requests from intermediaries for proxy materials.

B. FULL SET DELIVERY OPTION

Companies may operate under the traditional proxy rules and deliver paper copies of the proxy materials to shareholders by mail as in the past. Under the e-proxy rules, companies choosing the full set delivery option also must (1) send a notice of internet availability of proxy materials accompanied by a full set of proxy materials, or incorporate all of the information required to appear in the notice of internet availability of proxy materials into the proxy statement and proxy card, and (2) post the company's proxy materials on a publicly-accessible internet website which meets certain criteria by the time the notice is first sent to shareholders. Companies that elect to use the full set delivery option need not comply with the 40-day deadline above and are not required to respond to requests for copies of proxy materials.

The full set delivery option varies from the notice only option in a number of ways. The SEC recently published guidance containing the following table comparing some of the key differences between the notice only and full set delivery options:

	Notice Only	Full Set Delivery
Preparation of notice	Must prepare a Notice of Internet Availability of Proxy Materials.	Need not prepare a separate Notice of Internet Availability of Proxy Materials if same information is included in the proxy materials.

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	Notice Only	Full Set Delivery
Delivery of notice	The notice must be sent to shareholders separately from any other communications or documents.	The notice must accompany, or the information in the notice must be incorporated into, the full set of proxy materials.
Timing of notice	The notice must be sent to shareholders at least 40 days prior to the shareholders meeting.	The notice information is provided at the same time as the full set of proxy materials are delivered.
Means to vote	Must provide a means to vote on a website, which could be an internet voting platform, telephone number, or printable/ downloadable proxy card.	A paper proxy card included in full set would provide a means to vote; no need to provide a separate electronic means to vote.
Request for copies	The soliciting party must provide copies upon request of shareholder.	Need not provide copies of proxy materials upon request because a paper copy has already been provided.

In addition to the above, if the full set delivery option is chosen:

- The company need not send the notice of internet availability of proxy materials and full set of proxy materials at least 40 days before the meeting date because shareholders will not need extra time to request printed copies of the proxy materials.
- The notice may be accompanied by a copy of the proxy statement, annual report to shareholders (if required by Rule 14a-3(b)) and proxy card.
- The text of the prescribed legend and the required contents of the notice differ; specifically, the company need not include the portion of the prescribed legend relating to shareholder requests for copies of the proxy materials and instructions on how to request a copy of the proxy materials. *See* "Appendix D—Selected Contents of the Notice of Internet Availability of Proxy Materials" for a list of the information required in the notice.

C. INTERMEDIARIES

As discussed above, Rule 14a-13 of Regulation 14A establishes the rules by which the company works with broker-dealers, banks, voting trustees and other record holders to ensure that the proxy materials are provided to the beneficial holders of the company's voting securities. Companies are required to survey, by first class mail, these organizations at least 20 business days prior to the record date for the annual meeting to determine the number of copies these organizations will require for distribution to beneficial holders. Following receipt of this information, the company is required to supply each organization with copies of the proxy statement and other proxy solicitation materials and annual reports in the number and assembled in the manner as requested by the record holder to ensure delivery to the beneficial holders of the company's voting securities. The company is also required, upon the request of the record holder, to pay its reasonable expenses for completing the mailing of the proxy materials to the beneficial holders.

Under the new e-proxy rules, broker-dealers, banks, voting trustees and other record holders are required to adopt the notice only option if the company requests them to do so. In that case, intermediaries are required to send their own notice of internet availability of proxy materials to shareholders. Companies choosing the notice only option must provide each intermediary with the information necessary to prepare the intermediary's notice of internet availability of proxy materials with sufficient time for the intermediary to prepare and send its notice and post the proxy materials on a publicly available website at least 40 days before the shareholders meeting date. Intermediaries may not adopt the notice only option if the company has chosen not to do so.

Contents of the Intermediary's Notice. Although a specific list of the required contents of the intermediary's notice is beyond the scope of this publication, the intermediary's notice is generally the same as that sent by the company, though tailored specifically for beneficial owners. Among other things, the intermediary's notice must provide instructions on when and how to request paper copies and the website where the beneficial owner can access his or her request for voting instructions. The intermediary may direct beneficial owners to the company's website or its own website to access the proxy materials. If it directs beneficial owners to the company's website, the intermediary must inform beneficial owners that they can submit voting instructions to the intermediary, but that the beneficial owner cannot execute a proxy directly unless the intermediary has executed a proxy in favor of the beneficial owner.

Responsibilities of the Intermediary. In addition to sending its own notice, intermediaries must permit beneficial owners to make a permanent election to receive paper or e-mail copies of the proxy materials, keep records of beneficial owner preferences, provide proxy materials in accordance with those preferences and provide a means to access a request for voting instructions no later than the date on which the intermediary's notice is first sent.

D. HOUSEHOLDING

The SEC permits "householding" – the delivery of a single proxy statement or annual report to all shareholders of record having the same address – if:

- the proxy statement or annual report is addressed to all shareholders at the same address as a group;
- the company receives either affirmative consent or implied consent in accordance with the requirements of the proxy rules to household delivery;
- each shareholder at the shared address receives a separate proxy card; and
- the company includes an undertaking in the proxy statement to deliver upon request a separate copy of the annual report or proxy statement, as applicable.

Companies using the notice only model may household materials; however, each householded account must be allowed to execute separate proxies. Therefore, the company must ensure that separate account numbers or identification numbers are used for each householded account or it may send separate notices of internet availability of proxy materials for each householded account in a single envelope.

As discussed previously, the requirements relating to delivery of the notice of annual meeting are governed by state corporate law. Any company considering the delivery of proxy statements under the householding rules should confirm that household delivery will comply with the corporate law of its jurisdiction of incorporation. Section 233 of the DGCL allows companies to make use of the "householding" rules promulgated under the Exchange Act. Under Section 233, a notice given by a Delaware corporation under the DGCL or the company's charter or bylaws is effective if given by a single written notice to shareholders sharing the same address so long as the shareholders consent. Section 233 further provides that any shareholder who fails to object in writing to the company within 60 days after receiving written notice from the company of its intention to send a single notice to shareholders sharing the same address is deemed to have consented to receiving such single written notice.

VI. FILING PROXY MATERIALS

A. SECURITIES AND EXCHANGE COMMISSION

All proxy materials filed with the SEC, whether preliminary or definitive, must include a cover page in the form set forth in Schedule 14A identifying the filing party, the nature of the filing (e.g., preliminary proxy statement, definitive proxy materials), and providing instructions relating to the payment of the filing fee in cases where a fee is required. *See* Rule 14a-6 of Regulation 14A.

The SEC's EDGAR system is a helpful resource in obtaining examples of disclosure used by other companies for similar matters. If the matter requires SEC review, using these examples may facilitate prompt SEC clearance.

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1. Preliminary proxy materials

Rule 14a-6(a) of Regulation 14A requires preliminary proxy soliciting materials to be filed with the SEC at least ten days prior to the date they are first sent or given to shareholders. The rule states that a shorter period may be authorized upon a showing of good cause.

There is no filing requirement for preliminary proxy materials that relate to an annual meeting at which only the following "routine" matters will be considered:

- the election of directors;
- the approval or ratification of independent auditors;
- shareholder proposals submitted in accordance with Rule 14a-8 of Regulation 14A (the proxy rule governing the submission of proposals by shareholders); and
- the approval or ratification of benefit plans, or any amendment thereto, that falls within restrictions imposed by the federal securities laws.

Each preliminary proxy filing must include the preliminary proxy statement, the preliminary form of proxy and any other soliciting material. In addition, the preliminary proxy materials must be filed electronically and clearly marked "Preliminary Copies" and accompanied by a statement of the date on which definitive copies of such preliminary materials are intended to be provided to security holders. There are no filing fees for proxy statements unless the proxy materials relate to an acquisition, merger or similar transaction.

Under the proxy rules, the SEC has ten days following the filing to advise the company if it intends to commence a complete review of the proxy materials. If the company is not notified by the SEC within ten days of filing that a review is being undertaken, the company is free to distribute the proxy materials to its shareholders without further consultation with the SEC. Nevertheless, because the SEC does not provide notice if no review is to be undertaken, it is advisable to contact the SEC to confirm that the SEC will not review the filing or that the review is complete before materials are sent to shareholders.

2. SEC review

If the SEC elects to undertake a complete review of the preliminary proxy materials, the review period may take up to 30 days or more. The SEC's review of preliminary proxy materials focuses on the company's compliance with the proxy rules and the regulations contemplated thereby. The SEC's authority does not extend to any consideration of the fairness or the merits of a proposal. If a company anticipates that a preliminary proxy filing will be required, the timetable for holding the annual meeting should allow for the 30 or more day review period as well as additional time to respond to the SEC's comments. In addition, the preliminary materials should be filed as early as possible to allow sufficient time to revise the proxy statement in response to comments from the SEC and still be able to mail the materials to shareholders within the timetable established to hold the annual meeting.

3. Revised proxy materials

Upon review, the SEC may require substantive changes to be made to the preliminary proxy materials. In such event, revised materials must be submitted to the SEC prior to distributing definitive copies of the proxy materials to shareholders. The filing of revised proxy materials does not recommence the ten-day time period unless the revised materials contain material revisions or material new proposals that constitute a fundamental change in the proxy materials. If the revisions to the proxy materials are material or material new proposals are included, the final proxy materials must be reviewed and cleared by the SEC before they are delivered to shareholders. Rule 14a-6(h) of Regulation 14A requires that any revised or amended proxy material filed with the SEC be marked, by underscoring or some other appropriate manner, to indicate clearly and precisely the changes effected therein.

4. Definitive proxy materials

Definitive proxy materials relating to an annual meeting at which only routine matters are to be considered must be filed with the SEC no later than the date the materials are first sent or given to shareholders. *See* Rule 14a-6(b) of Regulation 14A. Like the preliminary filing requirements, the company must electronically file the proxy statement, proxy card and all other soliciting material, in the form in which such material is furnished to shareholders, on the date they are first mailed to shareholders. The proxy rules require that companies file three copies of the definitive proxy materials with each national securities exchange on which the company has a class of securities listed or registered. Definitive proxy materials must also be accompanied by a statement of the date on which copies of such materials were provided to security holders, or, if not yet provided, the date on which copies thereof are intended to be released. The AMEX and Nasdaq allow proxy materials filed with the SEC electronically to satisfy the company's filing requirements with these organizations. The NYSE's electronic filing provisions do not include proxy materials and require listed companies to file hard copies of all proxy materials directly with the NYSE.

5. EDGAR

Since 1993, the SEC has required public companies to submit at least some of the documents they file with the SEC electronically via the EDGAR system, and by 1999, all domestic companies were subject to electronic filing requirements. With a few limited exceptions, generally relating to confidential proxy materials for business combinations and the company's annual report to shareholders, all proxy materials must be submitted to the SEC electronically through EDGAR.

Regulation S-T, the rule specifically requiring electronic filing, contains numerous rules and regulations governing electronic filings through EDGAR, including the requirement that first-time filers obtain EDGAR access codes and corporate account numbers, requirements related to signatures filed electronically and the format of documents filed electronically, among others. Filers should contact their RR Donnelley representative for further information relating to these rules and preparing documents for electronic filing.

B. STOCK EXCHANGES

Each of the NYSE, Nasdaq and AMEX also requires the filing of proxy solicitation materials. The NYSE requires listed companies to file six definitive copies of all proxy materials with the NYSE not later than the date on which such materials are sent to shareholders. In addition, the NYSE suggests listed companies file preliminary materials with the NYSE if any action is to be taken at an annual meeting relating to matters that may affect substantially the rights or privileges of listed securities of the company or result in the creation of new issues or classes of securities that the company may desire to list on the NYSE. In such an event, the NYSE staff will review preliminary materials and submit such comments as it may have before such materials become final. Nasdaq requires listed companies to file with Nasdaq copies of all proxy solicitation materials and three copies of all reports and other documents that the company files with the SEC. AMEX requires listed companies to file with AMEX five copies of the proxy statement, form of proxy and other soliciting materials that are mailed to shareholders. As discussed above, AMEX and Nasdaq allow proxy materials filed via EDGAR to satisfy these organizations' filing requirements, but the NYSE requires listed companies to file hard copies of proxy materials.

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THE ANNUAL REPORT TO SHAREHOLDERS

I. PREPARATION

If the company's proxy statement relates to an annual meeting at which directors are to be elected, the proxy rules require that it be accompanied or preceded by an annual report to shareholders that complies with the requirements of Rule 14a-3 of Regulation 14A. The annual report is a different document than the proxy statement and the Annual Report on Form 10-K that public companies must file with the SEC, and is subject to much less regulation and supervision by the SEC.

Although the SEC does not dictate the contents of the annual report to shareholders to the extent of the proxy statement, the annual report to shareholders must include the following items required by Rule 14a-3 of Regulation 14A:

- consolidated, audited balance sheets as of the end of each of the two most recent fiscal years and audited statements of income and cash flows for the three most recent fiscal years for the company and its subsidiaries, that are:
  - prepared in accordance with the rules and regulations promulgated by the SEC in Regulation S-X; and
  - presented in Roman type at least as large and as legible as ten-point modern type, except that financial statements (but not the notes thereto) may be in eight-point modern type if necessary for convenient presentation;
- additional information required by Items 301–305 of Regulation S-K, including selected financial data for the preceding five-year period (Item 301), supplementary quarterly and other financial information (Item 302), management's discussion and analysis of the financial condition and results of operations of the company (Item 303), information concerning changes in or disagreements with the company's independent auditors on accounting and financial disclosures (Item 304) and quantitative and qualitative disclosures about market risk (Item 305);
- a brief description of the business conducted by the company and its subsidiaries during the preceding fiscal year;
- information relating to the company's industry segments, products and services, operations and export sales required by Item 101 of Regulation S-K;
- information identifying each of the company's executive officers and directors and indicating each person's principal occupation or employment;
- information required by Item 201 of Regulation S-K relating to the market price, trading market and security holders of the company's equity securities and dividends paid by the company; and
- unless included in the company's proxy statement, an undertaking in boldface type that a copy of the company's Annual Report on Form 10-K will be provided free of charge to any person solicited who requests the report in writing, except that the company is not required to provide copies of all exhibits to the Annual Report on Form 10-K free of charge.

In addition, the company's "performance graph" should now be presented under the disclosure item entitled "Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters" in the company's annual report to shareholders that accompanies or precedes a proxy or information statement relating to an annual meeting at which directors are to be elected, rather than in the company's proxy statement. A company's performance graph is the graph comparing the company's "cumulative shareholder return" for a minimum five-year period (or such period of time as the company's securities have been registered under the Exchange Act) with the cumulative total return of a broad market index (such as the Standard & Poor's 500 Stock Index) and the cumulative return of an index of companies similar to the company. *See* Item 201(e) of Regulation S-K.

II. INTEGRATION OF ANNUAL REPORT TO SHAREHOLDERS AND OTHER SECURITIES LAW FORMS

Some companies have chosen to include their Annual Report on Form 10-K as part of their annual report to shareholders or to deliver to shareholders their Annual Report on Form 10-K in satisfaction of the proxy rules' annual report delivery requirements. All information required to be included in the annual report to shareholders is also required to be included in the Annual Report on Form 10-K. Other companies elect to incorporate by reference into their Annual Report on Form 10-K some of the information presented in the annual report to shareholders. Companies that elect to bind their Annual Report on Form 10-K into the annual report to shareholders will sometimes also include a "wrap-around" forepart containing the president's or chairperson's letter and glossy photographs of the company's management or operations. Companies considering integrating their annual report and Annual Report on Form 10-K should be aware of the implications of Rule 14a-3(d), which states that information in such an integrated document in response to items required by Form 10-K is subject to liability under Section 18 of the Exchange Act, including information from the annual report that otherwise would not be subject to such liability.

III. FILING REQUIREMENTS

A. SECURITIES AND EXCHANGE COMMISSION

Seven copies of the annual report to shareholders must be provided to the SEC, solely for informational purposes, not later than the date the proxy statement is first mailed to shareholders or the date the preliminary proxy materials (or definitive proxy materials in the absence of a preliminary filing) are first filed with the SEC, whichever is later. Unless the annual report to shareholders is incorporated by reference into other documents filed with the SEC by the company, it may, but is not required to be, filed using EDGAR. *See* Rule 14a-3 of Regulation 14A.

B. STOCK EXCHANGES

In certain circumstances, companies are also required to file the annual report to shareholders with their stock exchange. As a result of rule changes enacted in August 2006, companies are no longer required to file hard copies of the annual report with the NYSE if the company has elected to provide shareholders with the Annual Report on Form 10-K in satisfaction of the annual report requirement. *See* NYSE Listed Company Manual Rule 204.00. Presumably if a company chooses not to provide the Annual Report on 10-K to shareholders, the company would be required to file its annual report with the NYSE notwithstanding the fact that annual reports are not listed among the items required to be filed in hard copy with the NYSE under its amended rules. Nasdaq requires the annual report to be filed with Nasdaq at the time it is distributed to shareholders; however, if the company has elected to send the Annual Report on Form 10-K to shareholders in satisfaction of the annual report requirement, then Nasdaq will consider the filing of the Annual Report on Form 10-K with the SEC as filing the annual report with Nasdaq. *See* Nasdaq Marketplace Rule 5250(c)(1). AMEX requires three copies of the annual report to be filed with AMEX at the time it is distributed to shareholders, unless the annual report was otherwise filed electronically with the SEC. *See* AMEX Company Guide § 701.

IV. DELIVERY TO SHAREHOLDERS

As stated above, an annual report to shareholders must be delivered to each shareholder either before or with any proxy statement related to an annual meeting at which directors will be elected. Many companies send the proxy statement, proxy card, notice of internet availability of proxy materials (if such information is not included in the proxy materials) and annual report to shareholders together in one package. If the documents are sent in separate mailings, they must be sent in a manner reasonably designed to ensure that the annual report reaches the shareholder first. To save on mailing

costs, some companies mail the proxy statement by third class or bulk mail and the annual report by first class mail to ensure that it arrives first. The company will be under the same obligations to survey the broker-dealers, banks, voting trustees or other clearing agencies prior to the mailing as they are with the proxy statement. *See* "Federal Proxy Rules and the Proxy Statement—Distribution of Proxy Materials to Shareholders."

Like proxy statements, the company may deliver a single copy of the annual report to all shareholders of record having the same address if specified conditions are met. See the discussion relating to householding delivery of proxy materials above for a description of the conditions that must be satisfied to take advantage of these provisions for delivery of the company's annual report to shareholders. The proxy rules also allow for electronic delivery of the annual report to shareholders. In addition, the listing requirements of each of the NYSE, Nasdaq and AMEX contain a requirement that companies with listed securities prepare and deliver to shareholders an annual report containing audited financial statements of the company and its subsidiaries.

SHAREHOLDER PROPOSALS

Rule 14a-8 of Regulation 14A, the shareholder proposal rule, permits shareholders to submit matters for inclusion in the company's proxy statement and consideration at the company's annual meeting. Rule 14a-8 is presented in a plain-English style and question-and-answer format to make the requirements relating to shareholder proposals more easily understood by shareholders. Even with a more readable shareholder proposal rule, however, only a small proportion of public companies actually receive shareholder proposals for consideration at their annual meeting. The SEC has reviewed the proxy rules and regulations relating to shareholder proposals, particularly the rules discussed below providing the company with substantive grounds to exclude shareholder proposals from its proxy materials. The SEC's proposals and rulemaking on this matter have largely focused on shareholder access as discussed more fully above in the section entitled "The Proxy Statement—Shareholder Access to Company Proxy Materials for Director Nominations." Readers should consult with legal counsel before responding to a proposal submitted by a shareholder under Rule 14a-8.

I. PROCEDURAL REQUIREMENTS

To properly submit a shareholder proposal, the proxy rules require the shareholder submitting the proposal to satisfy specified conditions, including:

- holding a minimum of $2,000 in market value, or one percent, of the company's securities entitled to vote on the proposal for at least one year prior to the date the proposal is submitted and through the date of the annual meeting (if the shareholder fails to hold the required number of securities through the annual meeting date, the company may exclude any proposal submitted by the shareholder for meetings held in the following two years) (Rule 14a-8(b));
- providing information regarding the shareholder submitting the proposal for inclusion in the proxy statement (Rule 14a-8(l));
- submitting no more than one proposal to the company for a particular annual meeting of shareholders (Rule 14a-8(c));
- submitting a proposal and accompanying supporting statement not exceeding 500 words (Rule 14a-8(d));
- attending the annual meeting, or arranging for a qualified representative to attend the annual meeting on the shareholder's behalf, to present the proposal (if the shareholder, or its qualified representative, fails to attend the annual meeting and present the proposal without good cause, the company may exclude any proposal submitted by the shareholder for meetings held in the following two years) (Rule 14a-8(h)); and
- submitting the proposal prior to the deadline required by the proxy rules, which is 120 days before the one-year anniversary of the date the company's proxy statement for the previous year's annual meeting was first mailed to shareholders (Rule 14a-8(e)).

A proposal that is not submitted in compliance with the eligibility or procedural requirements discussed above may be excluded by the company. If a company wishes to exclude a proposal on eligibility or procedural grounds, the company must first notify the shareholder of the deficiency within 14 days of receipt of the proposal and allow the shareholder to correct the problem. The shareholder then has 14 days following receipt of the company's notice to correct the deficiency. The company can only exclude the proposal if the shareholder fails to adequately remedy the deficiency. If a deficiency cannot be remedied, such as failure to submit the proposal prior to the deadline, the company is not required to provide the shareholder notice or an opportunity to cure. *See* Rule 14a-8(f).

II. SUBSTANTIVE GROUNDS FOR EXCLUSION OF A SHAREHOLDER PROPOSAL

In addition to the eligibility and procedural rules, Rule 14a-8(i) provides several substantive means by which a company may exclude shareholder proposals from the proxy statement and proxy card, including any proposal that:

- is not a proper subject for action by shareholders under the laws of the company's jurisdiction of incorporation;
- would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject, or that is contrary to any of the proxy rules;
- relates to a personal claim or grievance against the company or any other person, or that is designed to result in a benefit to the shareholder submitting the proposal that is not shared by the company's shareholders at large;
- relates to operations that account for less than a specified percentage of the company's total assets, net earnings and gross sales for its most recent fiscal year, or is not otherwise significantly related to the company's business;
- deals with a matter relating to the company's ordinary business operations;
- the company does not have the power or authority to implement;
- relates to an election for membership on the company's board of directors;
- directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;
- the company has already substantially implemented;
- substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the proxy materials for the same meeting;
- deals with substantially the same subject matter as another proposal that was previously included in the company's proxy materials within the preceding five calendar years and received fewer than a specified number of votes at the meeting or meetings; or
- relates to the payment of cash or stock dividends, or to the company's ordinary business operations.

If a company desires to exclude a shareholder proposal based on one or more of the substantive requirements described above, the proxy rules include detailed procedures that must be followed. *See* Rule 14a-8(i).

III. EXCLUDING SHAREHOLDER PROPOSALS RELATED TO RISK AND MANAGEMENT SUCCESSION

SLB No. 14E marks a reverse in course for the SEC, which now takes the position that proposals relating to risk assessment (including environmental and health risks) and management succession are generally not excludable on this basis. *See* SEC Staff Bulletin No. 14E (October 27, 2009).

The SEC previously witnessed a marked increase in the number of no-action requests in which companies sought to exclude these proposals. Companies argued that while the shareholder proposals did not explicitly request an evaluation of risk, they were nonetheless excludable under Rule 14a-8(i)(7) because they would require the company to engage in risk assessment.

The Staff will no longer focus on whether a proposal relates to the company engaging in an evaluation of risk. Instead, the Staff will focus on the subject matter to which the risk pertains or that gives rise to the risk. "In those cases in which a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company." For those proposals relating to the ordinary business matters of the company, the proposal generally will be excludable.

The Staff also announced in SLB No. 14E that it generally will no longer allow companies to exclude proposals relating to CEO succession planning in reliance on Rule 14a-8(i)(7). Previously, the Staff considered proposals concerning CEO succession planning to be excludable because they relate to the termination, hiring or promotion of employees, which are each ordinary business matters. The Staff now believes that CEO succession planning raises a significant policy issue regarding the governance of the company which transcends the day-to-day business matter of managing the workforce.

IV. RESPONSES TO SHAREHOLDER PROPOSALS

Upon receiving a proposal for inclusion in a company's proxy materials, the company has numerous alternatives for responding to the proposal. The company may elect not to dispute inclusion of the proposal, in which case the proposal must be included in the company's proxy statement and the proxy card to be used at the annual meeting. In such an event, the company may make a recommendation to the shareholders to vote for or against the proposal or may take no position on the proposal. If the company determines to recommend a vote against the proposal and desires to include in the proxy statement a statement in opposition to the proposal, the company must follow specified filing requirements contained in the proxy rules.

The company may also seek to exclude the proposal from the proxy materials based on the procedural or substantive rules discussed above. If the company desires to exclude the proposal, the company must follow the requirements contained in the proxy rules. As the procedures for opposing a shareholder proposal can be complicated, readers are urged to consult with legal counsel to ensure compliance.

In addition, the company may meet with the submitting shareholder and negotiate a mutually agreed resolution of the issue. According to the *2008 Annual Corporate Governance Review* released by Georgeson, in 2008 nearly half the proposals submitted by shareholders were later withdrawn and never included in the proxy statement or considered at the annual meeting as a result of these negotiations.

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PREPARING FOR THE ANNUAL MEETING

I. TIME AND RESPONSIBILITY SCHEDULE AND CHECKLIST

One of the most important components in conducting a successful annual meeting of shareholders is early and consistent preparation. For some, this preparation begins more than a year prior to the date of the annual meeting. To prepare properly for and coordinate the many activities involved in conducting a successful annual meeting, most companies prepare a detailed time and responsibility schedule. As its name indicates, the time and responsibility schedule outlines the tasks that must be completed prior to the annual meeting, establishes the expected deadline for completion of the tasks and allocates responsibility among the persons preparing for the annual meeting to complete the required tasks. A good place to start in preparing the time and responsibility schedule for the upcoming annual meeting is with the schedule that was prepared for the most recent annual meeting. Each party that may be responsible to perform any of the required tasks should be consulted and have an opportunity to comment on the form of the time and responsibility schedule.

While the prior year's time and responsibility schedule is an appropriate starting place for the preparation of the schedule for the upcoming meeting, care should be taken to ensure that lessons learned from last year's meeting are incorporated into the current time and responsibility schedule and that any revisions required by changes to the laws, rules and regulations governing the annual meeting are also incorporated. It is important to review the time and responsibility schedule frequently to make corrections required as events change during preparation for the annual meeting. Although the time and responsibility schedule will differ among companies, it should contain expected deadlines and allocate responsibility for the following tasks at a minimum:

- determination of appropriate notice and record dates for the annual meeting in accordance with applicable rules and regulations;
- determination of an appropriate location in accordance with the company's charter documents and reservation of appropriate meeting facilities;
- determination of the company's director nominees;
- preparation and adoption of board of directors resolutions to:
  - establish the annual meeting date and record date;
  - approve the company's director nominees and other matters to be considered at the annual meeting;
  - approve the proxy statement, annual report to shareholders and other proxy materials for distribution to shareholders; and
  - appoint the inspector of elections for the meeting;
- determination of final date for receipt of shareholder proposals and responsibility for submission of such proposals;
- preparation and distribution of D&O Questionnaires (*See* "Federal Proxy Rules and the Proxy Statement—Due Diligence Regarding Proxy Materials");
- preparation of the notice of internet availability of proxy materials, proxy statement and form of proxy, and determination of the appropriate date for filing such materials with the SEC and appropriate stock exchange organizations;
- preparation of the annual report to shareholders and filing the annual report with the SEC and appropriate stock exchange organizations;
- distribution of letters to broker-dealers, banks, voting trustees and other clearing organizations regarding beneficial owners;
- arrangements with financial printers to print and distribute the proxy materials and annual report;
- arrangements with internal information technology personnel or with external vendors, as applicable, to post the company's proxy materials on a publicly-accessible website which complies with the proxy rules and regulations;
- coordination with intermediaries for a proxy distribution;

- coordination of physical arrangements for the annual meeting, including meeting facilities, security, promotional items for shareholders and transportation and accommodation arrangements for directors, officers and other support people; and
- preparation of appropriate annual meeting documents such as an agenda, script and management presentations.

This is not an exhaustive list of the items that may be included in a time and responsibility schedule for many companies. The schedule will need to be continually revised and updated throughout the preparation for the annual meeting. Additionally, preparing for and conducting an annual meeting requires extensive coordination among many of the company's internal departments, including representatives of the executive, legal, finance and communications departments, as well as among the company's outside advisors, such as legal counsel, auditors, transfer agent and proxy solicitor, if one is used.

II. SETTING THE ANNUAL MEETING DATE

Some states require annual meetings to be held within a specified time period following the company's prior annual meeting. If a meeting is not held within the specified time period, these states generally give shareholders the right to demand that a meeting be held. Most states leave the setting of the specific annual meeting date to the company, whether pursuant to a date set in the company's bylaws or by a resolution of the board of directors. In addition, companies with shares listed for trading on the NYSE are required to hold their annual meeting within a reasonable time after the end of the company's fiscal year so that the information in the annual report is relatively timely. The annual meeting is usually held shortly after the financial statements for the most recent fiscal year have been audited and the annual report of the company has been distributed to shareholders. As a result, for a company whose fiscal year is the calendar year, the annual meeting of shareholders is generally held in late spring.

III. SETTING THE RECORD DATE

All state corporate statutes allow for the use of a record date to establish the persons eligible for notice of and voting at an annual meeting, whether as an alternative to or replacement of the closing of shareholder records for some time prior to the annual meeting. State corporate law generally allows the record date to be fixed in the bylaws of the company or established by a resolution of the board of directors. In addition, the record date must generally be no more than, nor fewer than, a fixed number of days before the date of the annual meeting. For example, under Delaware corporate law, the record date must be no more than 60, nor fewer than ten, days before the meeting date. *See* DGCL Section 213. Companies typically establish a record date far enough in advance to allow sufficient time for the solicitation of proxies prior to the meeting. Federal proxy rules require that companies contact institutional record holders at least 20 business days prior to the record date of the annual meeting to inquire whether other persons are the beneficial owners of the company's securities and the number of proxies and other soliciting material to supply to the record holder for such beneficial owners. *See* Rule 14a-13 of Regulation 14A.

IV. DETERMINING THE ORDER OF BUSINESS; PREPARING THE AGENDA AND RULES OF CONDUCT

There is no required order of business that must be followed in conducting an annual meeting of shareholders. Nonetheless, a well-organized order of business and agenda are essential elements to conducting a successful annual meeting. Another important element to maintaining control at the annual meeting is preparing clear and understandable rules of conduct for the meeting and making them available for shareholders as they enter the meeting. Such rules will increase the control that the chairperson has over the conduct of the meeting. In preparing the rules of conduct for the annual meeting, readers should note that Robert's Rules of Order are not required and most practitioners

recommend against their use. The rules of conduct prepared for the annual meeting should be designed to provide guidelines for an orderly meeting, while providing flexibility to the chairperson to make appropriate modifications and adjustments as the meeting progresses and as the situation may require. In addition, the rules of conduct should include limits on the number of questions that shareholders may ask and the time periods for which shareholders may speak during the meeting. Sample agenda and rules of conduct for an annual meeting are included in this handbook as Appendix B. *See* page B-1.

In addition, most companies prepare a detailed script for speakers to follow during the meeting, including alternate scenarios to manage various events that may arise during the meeting (e.g., dealing with an unruly shareholder, a request to speak to matters not on the agenda or a request for cumulative voting, where allowed by state law). For more information on the type of information to include in an annual meeting script, *see* "Preparing for the Annual Meeting—Preparing for Unexpected Events; Informational Packages and Detailed Meeting Script."

V. PRE-MEETING LOGISTICS

A. LOCATION

The proper location of the annual meeting of shareholders is generally governed by state corporate statutes. Under most of these statutes, annual meetings are permitted to be held inside or outside the state of incorporation in accordance with the bylaws of the company. Some states require the meetings to be held at the company's principal office unless expressly permitted to be held elsewhere by its charter or bylaws. Bylaws typically defer the actual location decision to the board of directors of the company. Some companies hold their meetings at the same location (generally at or near their corporate headquarters) each year, while some larger companies with a national shareholder base have found it beneficial to rotate their annual meeting location among a number of metropolitan areas where they have large shareholder density and where a large facility is located. Recent technological advancements offer companies even more flexibility, including satellite transmissions to various locations or use of the internet or other electronic sources to hold a meeting with no physical location. *See* "The Meeting—Electronic Annual Meetings and Supplemental Broadcasts" for more information regarding regional and electronic meetings.

Factors to consider in selecting a location for the annual meeting include, among other things:

- the ability of a sufficient number of shareholders to attend the meeting at that location;
- access to the company's headquarters or other facilities;
- access to suitable meeting facilities;
- access to appropriate transportation alternatives; and
- the absence of mitigating factors, such as local anti-business climate, previous demonstrations at similar meetings or election-year campaign issues.

Once the geographic location has been selected, the specific meeting facilities should be chosen and reserved as soon as possible. Some meeting facilities are booked a year or more in advance. Factors to consider in selecting a meeting facility include, among other things, exhibit areas, appropriate meeting rooms, access for handicapped shareholders, adequate sound equipment, lighting, seating and ventilation, access to technology connections and expense.

B. PHYSICAL ARRANGEMENTS

Following reservation of the meeting facilities, preparation of the physical arrangements begins. Persons responsible for preparing the physical accommodations for the annual meeting should consider the following items:

- seating arrangements for the directors, officers, legal and accounting advisors, shareholders and other necessary participants;
- shareholder access to microphone stations to address the meeting;
- adequate audio-visual equipment for participants;

- adequate telephone, data and other telecommunications connections;
- arrangements for beverages or other refreshments for meeting participants; and
- hotel accommodations, transportation and parking arrangements for meeting participants.

Those responsible for the physical arrangements should make themselves familiar with the layout of the building and its audio-visual equipment and coordinate the availability of the various services or special arrangements that will be necessary to conduct the meeting. Social events and hotel accommodations for the directors and officers of the company, if desired, should also be arranged prior to the meeting.

C. ATTENDANCE RULES

Although shareholders (or their proxy holders) are the only parties with an enforceable right to enter the meeting, many companies also allow admission to other persons, such as employees of the company, representatives of the press, legal counsel, accounting advisors, the inspector of elections, representatives of the company's transfer agent and other invited guests. Once it is determined who will be allowed to enter the meeting, those responsible for conducting the meeting must ensure that ample space is provided to allow attendance by all such parties. Companies should also establish clear policies in advance concerning the attendance of these parties at the annual meeting. Policies that may restrict access by shareholders based on room size, late arrival, etc., should be publicized in the company's proxy materials.

To enforce these attendance restrictions, some companies require attendees to present admission tickets, usually obtained by returning a card provided with the company's proxy materials. In addition, many companies require shareholders to present picture identification prior to entering the meeting. A registration desk is also an important part of enforcing attendance rules. A registration desk will allow verification of the shareholder status of any person who decides to attend the meeting at the last minute. In addition, registration procedures can alert the company as to the number of shareholders wishing to address the meeting. Some companies also arrange for an attorney to be present at the registration desk to arbitrate any non-standard request for admission.

D. SECURITY

Even though fewer disruptive demonstrations have been seen in recent years, with the current state of the economy and recent corporate scandals, many commentators believe that shareholder attendance at annual meetings will increase, and that shareholders will be more active in voicing questions and concerns. With this in mind, security will likely be more important to conducting a successful meeting in coming years. Persons responsible for coordinating security arrangements should consider the following (depending on the likelihood of disruptions):

- becoming aware of the security offered by the facility hosting the annual meeting;
- assigning individuals in the company's security or legal department to assist with escorting disruptive shareholders from the meeting;
- contacting the local police department to alert them of the annual meeting, to provide any information that may be known regarding possible disturbances and to coordinate between the police and company or hired security personnel; and
- preparing a detailed meeting script containing scenarios to provide guidance in the event of various disruptions.

VI. PREPARING FOR UNEXPECTED EVENTS; INFORMATIONAL PACKAGES AND DETAILED MEETING SCRIPT

At even the most well-planned annual meetings, unexpected events will occur. The best way to minimize the impact of unexpected events is to provide the chairperson and other participants in the meeting with the information needed to handle the various situations that may arise at the annual meeting. Individuals who deal with shareholder questions and comments at the annual meeting must

have access to the information needed to respond to a wide array of questions and concerns about the company and its business. This information is often prepared by persons in the company's communications department and provided to directors and officers for their review prior to the meeting. The chairperson and other corporate personnel should also receive information outlining the legal matters that must occur to properly transact business at the annual meeting, including:

- determination that a quorum is present at the annual meeting;
- the vote required to approve the matters to be considered at the meeting;
- the availability of corporate records and the shareholder list; and
- the procedures for processing and tabulating the votes received by proxy prior to the meeting and/or in person at the meeting.

Preparing a detailed script for the annual meeting will also assist the directors and officers in conducting the meeting. The script generally follows the meeting agenda and adds the specific text that the chairperson can follow to ensure that the meeting proceeds in an orderly manner. In addition to including appropriate text for conducting the meeting, the person preparing the meeting script should also consider the following:

- The script should provide that all legally required items be accomplished early in the meeting so that the meeting may be adjourned if a disruption occurs during the question and answer session or during management's presentation regarding the company's business.
- Instructions and alternative text should be included to respond to various scenarios that may arise, including:
  - requests for cumulative voting;
  - shareholders who exceed the time limits for making comments;
  - generally disruptive shareholders;
  - requests to be heard on matters outside the approved agenda; or
  - shareholders wishing to bring a motion before the meeting.
- The script should include procedures in the event that an emergency or major disturbance occurs that requires evacuation of the meeting facilities. These procedures may include:
  - announcing that a quorum is present for transacting business at the meeting;
  - announcing preliminary results of matters presented at the meeting;
  - adjourning the meeting if necessary; and
  - exiting the meeting room in an orderly fashion, including a description of the appropriate exits for different participants.

A sample annual meeting script is included in this handbook as Appendix C. *See* page C-1.

VII. CORPORATE GADFLIES

Another event that companies, particularly larger companies with numerous shareholders, should prepare for is the attendance at the annual meeting of shareholders of so-called corporate "gadflies," who attend annual meetings solely to make complaints, ask disruptive questions or submit proposals that do little more than disrupt the meeting and further their specific social or political agenda. These parties sometimes take extreme positions at meetings to dramatize what they view as a lack of corporate democracy. Some try to dominate the meeting by shouting management down or refusing to abide by the rules of conduct. The tactics used by these shareholders can add additional time to the meeting, and can be very disruptive to the proceedings of the meeting. A well-prepared meeting script, easily understood rules of conduct and an understanding of the company's charter documents and the state law governing the annual meeting will assist the chairperson of the meeting in dealing with these parties. Although corporate gadflies can disrupt the meeting, they have little power to effect change if sufficient proxies have been received to transact business at the meeting and to approve the matters submitted to shareholders. If these shareholders do attempt to cause a disruption, practitioners generally advise companies to wait out the disruption or, as often occurs, allow other shareholders to request the disruptive shareholders to be silent and permit the meeting to proceed. Rules of conduct

that limit the time shareholders are allowed to address the meeting and that are made clear at the beginning of the meeting also assist in discouraging overly disruptive behavior.

VIII. SHAREHOLDER LISTS

Most states provide shareholders the right to inspect a list of the shareholders of the company under specified conditions. Shareholders may wish to review the company's shareholder list for purposes of soliciting proxies for the upcoming annual meeting. The proxy rules also contain provisions that require companies to assist parties wishing to solicit proxies or provide information to shareholders. Under Rule 14a-7 of Regulation 14A, companies are generally required, upon the request of a shareholder and at the company's option, to either provide a shareholder list or mail the requesting shareholder's materials on his or her behalf.

In addition, state corporate statutes in most states require that companies make available to shareholders prior to the annual meeting a list of shareholders entitled to vote at the meeting. Nearly all states require the shareholder list to be available at the meeting; however, some states require shareholders to comply with specified conditions to gain access to the list.

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THE MEETING

I. TRANSACTION OF BUSINESS AT THE ANNUAL MEETING

A. VOTING PROCEDURES—QUORUM

State corporate law governs the requirements to properly transact business at an annual meeting, including the requirement that a quorum of votes be present in person or by proxy at the meeting. State law also establishes the procedures by which the presence of a quorum is determined, some of which are found in the state corporate statutes and others of which are found in the company's charter documents. Although not determined until the beginning of the meeting, most public companies seek to determine through the receipt of proxies that a quorum will be present at the meeting well before the meeting date.

In determining whether a quorum is present at an annual meeting, the following should be considered:

- votes represented by shareholders who attend the meeting will generally be included even if the shareholder does not vote at the meeting (unless the shareholder is attending solely to contest the legality of the meeting, in which case the shareholder's shares will not be included in the quorum determination);
- shares represented by proxies with instructions to vote on less than all of the matters are considered present at the annual meeting for quorum purposes; and
- treasury shares and shares held by subsidiaries of the company conducting the annual meeting are generally not included in the number of shares present at the annual meeting.

After a quorum has been established, a shareholder leaving the meeting will generally not nullify the presence of a quorum for the meeting or invalidate any action taken at the meeting.

B. VOTING PROCEDURES—VOTE REQUIRED

Requirements differ among state corporate statutes regarding the vote required to approve matters submitted at an annual meeting. Most states require the affirmative vote of a majority of the shares voting at the annual meeting to approve most matters submitted at the meeting. Some states require a higher threshold, the affirmative vote of a majority of the company's outstanding voting stock, to approve fundamental corporate matters, while other states have even higher super-majority voting requirements to approve fundamental corporate transactions. In some states, companies are allowed to specify in their charter documents, within limits, the vote required to approve matters submitted to shareholders at the annual meeting that may be different from a baseline established in the state corporate law. State corporate statutes should also be reviewed to determine the proper treatment of abstentions, broker non-votes and votes to withhold authority, the determination of which can be complicated.

In addition, the stock exchanges may have requirements regarding shareholder votes on certain matters mandated to be submitted to a vote of the shareholders. For example, Nasdaq Marketplace Rule IM-5635 requires a vote of a company's shareholders for certain issuances of additional stock, and the minimum vote that will constitute shareholder approval in such case is a majority of the total votes cast on the proposal.

C. VOTING PROCEDURES—ELECTRONIC VOTING

A technological advancement that has impacted the annual meeting is the use of electronic voting. Although commentators generally believe that electronic voting does not increase the number of votes cast at the meeting, they do believe that electronic votes are often cast earlier, which provides the company with information regarding the shareholder vote earlier in the process and allows the company to change its solicitation efforts if the early results are not as expected. Before allowing shareholders to vote electronically, a company must ensure that electronic voting is allowed under (1) the corporate laws of its state of incorporation (*See* Section 212 of the DGCL and Section 178 of the CCC, which allow shareholders to authorize a proxy through an electronic transmission), (2) the company's

charter documents and (3) the rules of the stock exchange or market on which the company's stock is listed for trading.

If the company is authorized to use electronic voting, a technology must be selected that will satisfy state and federal proxy rules. Companies that elect to use electronic voting should consider providing disclosure in their proxy materials regarding the procedures for using electronic voting and the validity of the procedures under state corporate law. Other issues to consider in creating electronic voting procedures include:

- *Security and Authenticity*. Any complaint that a company's voting system can be manipulated electronically could result in negative publicity or even invalidate the results of the meeting.
- *Costs and Expenses*. Although there will be a fee associated with initiating electronic voting, electronic votes are generally less expensive per vote compared to votes received by mail.

II. UNEXPECTED PROPOSALS

The chairperson of the meeting should be prepared to respond to unexpected proposals that may be presented during the meeting. Although these proposals can disrupt the meeting, they can usually be excluded based on provisions contained in the company's charter documents and the state corporate law governing the meeting. Corporate charter documents generally require shareholders to submit matters for consideration at the annual meeting a specified number of days prior to the annual meeting. If proposals are submitted to the company after the deadline, they may be excluded on that basis alone. Proposals may also be excluded if they are inconsistent with state corporate law, including if the proposed matter would be illegal or relates to activities that have been delegated by state corporate law to the board of directors of the company. If the proposal is not in order for the meeting, the chairperson has a variety of alternatives to exclude the matter rather than taking a vote at the meeting. The chairperson can explain why the matter is out of order and request the shareholder to withdraw the matter and submit it for consideration at next year's meeting.

Proposals that are valid for consideration at the annual meeting should be presented at the meeting. Proposals relating to the conduct of the meeting may be submitted to a vote of the shareholders present. Because most proxy statements grant discretionary authority to the proxy holders to act on matters that properly come before the annual meeting, it is not likely that any undesired proposal that is properly presented will be approved.

III. SHAREHOLDER QUESTIONS

At most annual meetings, the company's management makes a presentation to the shareholders on the company's progress during the prior fiscal year. The presentation is often followed by a question and answer period during which shareholders are allowed to ask questions of management. Although some shareholders ask questions about actions being considered at the meeting or about the company's business, many shareholders, such as the corporate gadflies discussed above, attend the annual meeting simply to make complaints about the direction of the company, its stock price or operations or to further a personal agenda. The chairperson of the meeting and the other officers responsible for responding to these questions should be provided sufficient information about the operations of the company and should be prepared for the types of questions or comments that may be expected from shareholders.

IV. INFORMATION PROVIDED TO SHAREHOLDERS AT THE ANNUAL MEETING

In addition to state corporate statutes that require companies to make available a list of the shareholders authorized to vote at the annual meeting, good corporate practice suggests that companies should make available to shareholders who attend the annual meeting copies of their annual report to shareholders, proxy statement and other proxy materials and Exchange Act reports, such as the company's Annual Report on Form 10-K. Some companies also use the annual meeting to prepare displays or provide promotional materials to shareholders regarding the company's business.

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V. ADJOURNMENT

State law governs the procedures for adjourning a meeting of shareholders and will typically determine the need for (1) notice of the adjourned meeting, (2) a new record date and (3) a quorum count, and whether new business may be validly taken at the adjourned meeting.

VI. ELECTRONIC ANNUAL MEETINGS AND SUPPLEMENTAL BROADCASTS

Recent technological advances allow companies to hold electronic meetings with no physical location or to broadcast their annual meetings over the internet or by satellite or other telecommunications medium to numerous locations and to shareholders, employees or other participants who may be unable to attend the meeting.

A. SIMULCASTING THE ANNUAL MEETING TO NUMEROUS LOCATIONS

A number of companies now supplement their official meeting with simultaneous broadcasts. Providing expanded access to the annual meeting can be a useful investor and employee relations tool by allowing shareholders and employees who otherwise would be unable to attend the annual meeting to access and participate in the meeting. Some companies also allow online participants to e-mail questions to management.

B. ELECTRONIC MEETINGS

Delaware companies are able to not only broadcast their meetings to remote locations, but to hold their annual meetings entirely electronically without a physical location. Section 211(a)(1) of the DGCL allows boards of directors of Delaware companies that are authorized to select the location for the annual meeting to determine that the meeting not be held at a physical location, but instead be held solely by means of remote communication.

Holding an annual meeting electronically offers the company advantages such as:

- reducing the expense of conducting the annual meeting, which can be a costly process for some companies;
- reducing the amount of senior management and board member time that is occupied by the annual meeting through the elimination of travel that is sometimes required to attend remote annual meetings; and
- providing access to the annual meeting to a broader group of shareholders and employees, who may be unable or unwilling to travel to a physical meeting held at a remote location.

Holding a meeting electronically, however, is still a novel concept with its share of critics. Companies considering an electronic meeting should consider the following factors:

- Delaware was the first state to authorize entirely electronic annual meetings and few other states have adopted similar changes to their corporate statutes. Companies should consult with legal counsel to determine if an electronic meeting is authorized by corporate statutes in their state of incorporation.
- The technology used to conduct the meeting must meet state corporate law requirements for shareholder participation. For a shareholder to be "present" for purposes of a quorum and voting under Delaware corporate law, the company must have the reasonable ability to:
  - verify that each person deemed present and permitted to vote at an electronic meeting is a shareholder or proxyholder;
  - provide shareholders and proxyholders a reasonable opportunity to participate in and vote at the meeting, including the ability to concurrently read or hear proceedings of the meeting; and
  - maintain a record of each vote or other action taken by a shareholder or proxyholder at the meeting by means of remote communication.

- Because electronic meetings are relatively new, companies should review their charter documents (and make any appropriate amendments) to ensure that an electronic meeting is authorized.
- Because electronic meetings will likely increase the number of shareholders participating in the meeting, results may be less predictable as shareholders wait to vote at the meeting or change their vote at the meeting. This is particularly the case with meetings at which controversial proposals will be submitted.
- If more shareholders participate in the electronic meeting, companies should also be prepared for increased shareholder activism. Electronic meetings have been criticized by institutional investors and corporate gadflies because they eliminate the shareholders' face to face contact with the company's management.

Although electronic meetings will likely result in less certainty by corporate management about the outcome of the annual meeting, some commentators believe that the electronic meeting may ultimately provide companies and shareholders some of the advantages the annual meeting was intended to provide. It is uncertain how many other states will follow Delaware's lead in allowing electronic meetings or how many companies will take advantage of the technological and statutory changes to hold electronic meetings, but some believe electronic meetings are here to stay and will be an integral part of corporate democracy in the future.

VII. REGIONAL MEETINGS

In addition to supplementing their annual meeting through remote broadcast of the principal meeting, some companies with geographically diverse shareholder bases have chosen to hold regional open houses or forums around the country to provide shareholders an opportunity to meet and hear firsthand from corporate executives. Even though no action is taken at these meetings, they are shareholder communication tools that allow shareholders to evaluate and interact with management of the company.

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POST-MEETING ACTIVITIES

I. MINUTES OF THE MEETING AND CORPORATE DOCUMENTS

Preparing minutes of the annual meeting is generally the responsibility of the corporate secretary pursuant to state corporate law or the company's charter documents. While minutes of the annual meeting do not affect the validity of the actions taken at the meeting, they are kept to ensure that the records of the company are complete. Accurate minutes also avoid confusion relating to the actions taken at the annual meeting. After the minutes have been prepared, the corporate secretary should file the minutes and the other critical meeting documents (such as the Inspector of Election Report, the Oath of the Inspector of Election, the voting results and meeting transcripts) with the corporate records.

Companies often use recording devices or court reporters to accurately document the proceedings at the annual meeting. Although these tapes or transcripts may be useful to the corporate secretary in preparing the minutes, they should not be a substitute for the preparation of written minutes of the meeting. If a meeting is taped or recorded, companies often make copies of the tapes available to shareholders upon request. Some companies also include an archived version of the annual meeting on their website. Companies that provide access to archived copies of their annual meeting should also consider the information that is discussed at the annual meeting and how that information will be received by shareholders. Commentators suggest that the archive should be placed in a section of the company's website where other information is archived and clearly marked. In addition, at some time following the meeting the archived annual meeting should be removed entirely from the company's website to avoid access to information that is no longer accurate or current.

II. ORGANIZATIONAL BOARD MEETING FOLLOWING SHAREHOLDERS MEETING

Many companies hold a board of directors meeting following their annual shareholders meeting. If the company's directors are present for the annual meeting, this is an excellent time to convene a meeting of the board of directors. The types of matters discussed and action taken at such meetings, in addition to any action that needs to be taken related to the business of the company, generally include:

- electing the officers of the company for the ensuing year;
- designating the executive officers of the company who are subject to the requirements of Section 16 under the Exchange Act;
- conducting annual shareholders meeting proceedings for the company's wholly-owned subsidiaries, if any, to elect directors and officers of such subsidiaries; and
- reviewing the functioning of the just-completed annual meeting of shareholders, and taking any action that may be required for the company's next annual meeting of shareholders.

III. REPORT ON THE RESULTS OF VOTING

Because the large majority of shareholders of publicly traded companies do not attend annual meetings, many companies issue press releases announcing the results of voting at the meeting. Some companies also circulate to their shareholders a newsletter or bulletin describing the highlights of the meeting. Companies can also provide a more detailed discussion of the results of the meeting to shareholders who request a more detailed review. As discussed above, some companies provide access to an archived version of the annual meeting on their website. These archived recordings can be accompanied by a written description of the results of voting at the meeting. The final determination as to what information to provide and the means by which it is provided is generally based on the investor relations, marketing and expense impact of the various alternatives.

The federal securities laws require that public companies report the voting results of shareholder meetings in the company's Quarterly Report on Form 10-Q covering the quarter in which the meeting took place. Specifically, the Quarterly Report on Form 10-Q must contain:

- the date of the meeting and whether it was an annual or special meeting;
- if applicable, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting; and
- a brief description of each matter voted upon at the meeting, stating the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes, as to each such matter, including a separate tabulation with respect to each nominee for office.

IV. POST-MEETING REVIEW

Following the annual meeting, many companies find it useful for all of the staff participants to meet and review the execution of the annual meeting. At such a meeting, the participants review the time and responsibility schedule and meeting agenda to note any items that can be improved for the following year's annual meeting. All aspects of the meeting should be examined for possible improvement, including the proxy solicitation materials, annual report, meeting facilities, agenda, script, security, logistics, proxy solicitor and shareholder participation.

Following the annual meeting, sometimes shortly after the post-meeting review is complete, many companies begin planning for the following year's meeting, including preparing a new time and responsibility schedule and selecting and arranging the facilities for the next meeting.

CONCLUSION

Preparing for the annual meeting is a complex process requiring the company to comply with state and federal laws, stock exchange rules and the company's charter documents. Persons preparing for the annual meeting should consult with legal counsel to ensure the numerous requirements are satisfied. In addition, the actions of a host of participants must be coordinated, including representatives of the company's executive, legal, finance and communications departments, and representatives of the company's outside legal counsel, independent auditors, transfer agent and possibly a proxy solicitor. The key to a successful meeting is starting the preparation process early, enlisting the help of the necessary participants and working diligently to see the process through to completion.

RESOURCES

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APPENDIX A

General Notice and Filing Requirements for Annual Meetings and Related Matters[1]

	Meeting and Record Date	Annual Report to Shareholders	Preliminary Proxy Materials	Definitive Proxy Materials	Report of Actions Taken
State Law	Notice must be provided and a record date established that is within a specified number of days prior to the annual meeting.[2]	No Specific Requirement	No Specific Requirement	No Specific Requirement	No Specific Requirement
Federal Securities Law	The proxy rules require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials and annual reports to those beneficial holders. These inquiries must be made no later than 20 business days prior to the record date for the annual meeting. (Rule 14a-13)	An annual report complying with Rule 14a-3 of Regulation 14A under the Exchange Act must be delivered to each shareholder and seven copies must be mailed to the SEC no later than the later of the date on which the annual report is first sent or delivered to shareholders or the date that the company files preliminary proxy materials (or definitive materials if preliminary materials are not required) with the SEC. (Rule 14a-3) The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of	Preliminary proxy statement and proxy card relating to any meeting at which non-routine matters will be considered must be filed with the SEC at least 10 days (or such shorter period as the SEC may authorize) before definitive proxy materials are mailed to shareholders. (Rule 14a-6(a))	Concurrently with or before the mailing of the definitive proxy statement, proxy card and other soliciting materials to shareholders, the company must file copies of such materials with the SEC and provide copies to each national securities exchange on which the company's securities are listed. (Rule 14a-6(b)) The proxy rules also require certain inquiries to institutional record holders regarding beneficial owners and delivery of proxy materials to those beneficial holders. (Rule 14a-13) If the company is adopting the "notice only" option of providing proxy materials to	For each matter submitted to a vote of shareholders, the company must provide the following information in its Annual Report on Form 10-K or its Quarterly Report on Form 10-Q for the period in which the meeting was held: (a) the date and type (annual or special) of meeting; (b) if directors were elected, the name of each director elected or whose term continues after the meeting; (c) a brief description of each matter voted upon, including the number of votes cast for, against or withheld (as well as the number of abstentions and broker non-votes) for

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	Meeting and Record Date	Annual Report to Shareholders	Preliminary Proxy Materials	Definitive Proxy Materials	Report of Actions Taken
Federal Securities Law		annual reports to those beneficial holders. (Rule 14a-13)		its shareholders, the company must post its proxy materials on a publicly accessible internet website and send a Notice of Internet Availability of Proxy Materials at least 40 days before the shareholders meeting to which the proxy materials relate. In addition, the contents of the notice must be provided to institutional record holders and intermediaries to provide such parties sufficient time to prepare, print and send such parties' own Notice of Internet Availability of Proxy Materials to beneficial owners. (Rule 14a-16)	each matter and a separate tabulation for each director nominee and (d) a description of the terms of any settlement with any participant terminating a solicitation in opposition, including the cost to the company.
NYSE	Notice must be provided to the NYSE immediately (in no event later than 10 days before the record date) of the meeting and record date, and the company must publicize any meeting to consider non-routine matters. (Listed Company Manual §§ 204 & 401)	An annual report containing audited financial statements (in the format and by the means allowed or permitted by applicable law) must be made available to shareholders on or through the company's website when such report is filed with the SEC. Companies must	Preliminary proxy materials relating to specified matters should be filed with the NYSE for review and comment before they become final. (Listed Company Manual §§ 204 & 402)	Definitive proxy statement and proxy card must be filed with the NYSE before or at the same time they are provided to shareholders. (Listed Company Manual § 402)	Companies must notify the NYSE of the occurrence of numerous specified events. (Listed Company Manual § 204)

	Meeting and Record Date	Annual Report to Shareholders	Preliminary Proxy Materials	Definitive Proxy Materials	Report of Actions Taken
NYSE		also post to their website a prominent undertaking to provide all holders the ability to receive a hard copy of the company's complete audited financial statements free of charge. So long as the company files its annual report through EDGAR, it is not required to file a hard copy with the NYSE (Listed Company Manual §§ 203 & 204)			
AMEX	Shareholders and AMEX must receive notice of the annual meeting at least 10 days before the meeting. AMEX must receive notice of the record date immediately upon its establishment. (AMEX Company Guide §§ 701 & 703)	An annual report containing audited financial statements (in the format and by the means allowed or permitted by applicable law) must be delivered to shareholders and filed with AMEX, unless the material was otherwise filed electronically with the SEC. (AMEX Company Guide §§ 610 & 701)	Preliminary proxy materials relating to specified matters should be filed with AMEX for review. (AMEX Company Guide § 122, Commentary)[3]	Definitive proxy statement, proxy card and other materials must be filed with AMEX. (AMEX Company Guide § 701)[3]	Companies must notify AMEX of the occurrence of numerous specified events. (AMEX Company Guide Part 9)

	Meeting and Record Date	Annual Report to Shareholders	Preliminary Proxy Materials	Definitive Proxy Materials	Report of Actions Taken
NASDAQ	Companies are required to hold an annual meeting. (Marketplace Rule 5620)	An annual report containing audited financial statements (in the format and by the means allowed or permitted by applicable law) must file with Nasdaq all reports and other documents filed or required to be filed with the SEC or Other Regulatory Authority. This requirement is satisfied by publicly filing documents through the EDGAR System. (Marketplace Rule 5205(e)).	Preliminary proxy materials relating to matters subject to Nasdaq's Voting Rights Policy should be provided to Nasdaq for review. It is suggested that copies of the preliminary proxy statement be furnished to Nasdaq for review prior to formal filing. (IM-5640)[3]	Proxies must be solicited and proxy statements provided to shareholders for all meetings and copies concurrently delivered to Nasdaq. (IM-5640)[3]	Companies must notify Nasdaq of the occurrence of numerous specified events. (Marketplace Rules)

1 The information provided in this Appendix A is not intended to be an exhaustive list of the notice and filing requirements that may be applicable to all companies. Readers are urged to consult with legal counsel for the requirements applicable to their particular company.

2 The following is a list of notice and record date requirements for annual meetings at which routine matters will be considered in states that are popular jurisdictions of incorporation:

	Not More Than	Not Less Than		Not More Than	Not Less Than		Not More Than	Not Less Than
Delaware	60 days	10 days	Massachusetts	70 days (record date only)	7 days (notice only)	New Jersey	60 days	10 days
California	60 days	10 days	Pennsylvania	90 days (record date only)	5 days (notice only)	Maryland	90 days	10 days (notice only)
New York	60 days	10 days	Nevada	60 days	10 days	Illinois	60 days	10 days

3 AMEX and Nasdaq rules allow companies' EDGAR filings to satisfy these proxy material filing requirements. *See* AMEX Company Guide § 1101 and Nasdaq Marketplace Rule 5005 (15); 5250(c)(1).

2010 ANNUAL MEETING HANDBOOK

APPENDIX B

The sample agenda and rules of conduct provided below are intended to be a general guide in preparing for the meeting. The sample agenda and rules are not intended to include all of the matters that may be required for any particular company. Readers are urged to review the law applicable to their company to ensure that matters required to be completed during the meeting are included in the agenda, and to ensure that any rules of conduct applicable to their company are provided to shareholders upon entering the meeting.

SAMPLE ANNUAL MEETING OF SHAREHOLDERS
OF
[NAME OF COMPANY]
AGENDA
[DATE]

A. Call the Meeting to Order

1. Introductions
2. Instructions on Rules of Conduct and Procedures
3. Proof of Notice of Meeting
4. Proxies; Existence of Quorum

B. Proposals and Discussion

1. Proposal No. 1 – Election of Directors – **[List Director Nominee Names]**
2. Proposal No. 2 – **[Describe additional proposals and include full text of resolutions being considered rather than reading them in their entirety during the meeting.]**

C. Voting

1. Opening of Polls
2. Voting on Proposals
3. Closing of Polls

D. Results of Voting

E. Adjournment

F. Management Presentation

G. Questions and Answers

If you have sent in your proxy card your shares will be voted accordingly.

PLEASE DO NOT SIGN A BALLOT AT THIS MEETING UNLESS YOU WANT TO CHANGE THE WAY YOU VOTED ON YOUR PROXY.

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SAMPLE RULES AND PROCEDURES FOR THE CONDUCT OF ANNUAL MEETING

We would like to welcome you to the **[year]** Annual Meeting of Shareholders of **[Name of Company]**. In fairness to all shareholders in attendance and in the interest of an orderly meeting, we require that you honor the following rules of conduct:

1. All shareholders and proxy holders must register at the reception desk before entering the room for the meeting.
2. The taking of photographs and use of audio or video recording equipment is prohibited.
3. The meeting will follow the Agenda provided to all shareholders upon entering the meeting.
4. Only shareholders of record or their proxy holders may address the meeting.
5. All questions and comments should be directed to the chairperson of the meeting. You may address the meeting only after you have been recognized.
6. If you wish to address the meeting, please **[go to the nearest microphone station] [raise your hand]**. Upon being recognized, please state your name clearly, your status as a stockholder or a proxy holder and present your question or comment.
7. Each speaker is limited to a total of no more than three questions or comments, no more than one of which may be on any single topic and each of which must be no more than one minute in length.
8. Please permit each speaker the courtesy of concluding his or her remarks without interruption.
9. The views and comments of all stockholders are welcome. However, the purpose of the meeting will be observed and the chairperson or secretary will stop discussions that are:
   - irrelevant to the business of the company or the conduct of its operations;
   - related to pending or threatened litigation;
   - derogatory references that are not in good taste;
   - unduly prolonged (longer than one minute);
   - substantially repetitious of statements made by other stockholders; or
   - discussions related to personal grievances.

APPENDIX C

Provided below is a sample annual meeting script intended as a general guide in preparing for the meeting. This sample script is not intended to include all of the matters that may be required for any particular company. Readers are urged to review the law applicable to their company to ensure that matters required to be completed during the meeting are included in the script.

SAMPLE SCRIPT FOR ANNUAL MEETING
[COMPANY NAME]
ANNUAL MEETING OF SHAREHOLDERS
[DATE AND TIME]

I. CALL THE MEETING TO ORDER

A. Introductions

Chairperson: Hello, ladies and gentlemen. Will the meeting please come to order. I want to welcome all of you to the annual meeting of shareholders of **[Company Name]**. I am **[Name]**, Chairperson of the Board of **[Company Name]**, and I will be presiding at this meeting.

Also present at the meeting today are: **[Introduction of directors, officers and invited guests present at the meeting.] [Name]** will act as secretary of the meeting. **[Name of Inspector of Election]**, our transfer agent, has been appointed to act as Inspector of Election.

[Name of representative from independent auditor], a representative from **[name of independent auditor]**, is also present at the meeting. During the question and answer period at the end of the meeting, **[he/she]** will be available to answer questions concerning the company's financial statements.

B. Instructions on Rules of Conduct and Procedures

Chairperson: Each of you should have registered at the desk as you entered the meeting. If there are any of you who have not registered, would you at this time please step over to the desk and sign the register.

Upon entering the meeting, each of you was presented with an agenda for the meeting. On the reverse side of the agenda is a list of the rules of conduct for the annual meeting. To conduct an orderly meeting, we ask that participants abide by these rules.

As stated in the rules of conduct, shareholders should not address the meeting until recognized. Should you desire to ask a question or speak during the meeting, please raise your hand. After being recognized, first identify yourself and your status as a shareholder or representative of a shareholder, then state your point or ask your question. As stated in the rules of conduct, we ask that you restrict your remarks to the item of the agenda that is before us.

Thank you for your cooperation with these rules.

[USE ANNEXES A–E, AS NECESSARY.]

C. Proof of Notice of Meeting

Chairperson: The Secretary has delivered an Affidavit of Mailing establishing that notice of this meeting was duly given. A copy of the notice of meeting and the Affidavit of Mailing will be incorporated into the minutes of this meeting. All shareholders of record at the close of business on **[record date]** are entitled to vote at the annual meeting.

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D. Proxies; Existence of Quorum

Chairperson: Our first order of business at this meeting is to determine whether the shares represented at the meeting, either in person or by proxy, are sufficient to constitute a quorum for the purpose of transacting business. **[Secretary's Name]** do you have a report?

Secretary: Yes, the shareholders list shows that holders of **[ ]** shares of common stock of the company are entitled to vote at this meeting. We are informed by **[Inspector of Election]** that there are represented in person or by proxy **[ ]** shares of common stock or approximately **[ ]**% of all of the shares entitled to vote at this meeting.

Chairperson: Thank you. Because holders of a majority of the shares entitled to vote at this meeting are present in person or by proxy, I declare this meeting to be duly convened for purposes of transacting such business as may properly come before it.

II. PROPOSALS AND DISCUSSION

A. Proposal No. 1—Election of Directors

Chairperson: The next order of business is a description of the matters to be voted on at today's meeting. The first proposal before the shareholders of the company is the election of **[ ]** directors to serve until the annual meeting of shareholders in **[ ]** and until their successors are duly elected and qualified. The management of the company recommends the election of the following persons as directors of the company:

[Names of Director Nominees]

B. Proposal No. 2—Additional Proposals

[PREPARE APPROPRIATE SCRIPT DESCRIBING ADDITIONAL PROPOSALS.]

III. VOTING

A. Opening Polls

Chairperson: The polls are now open. If you desire a ballot, please raise your hand to so indicate and it will be provided. The Inspector of Election will provide ballots to those who desire them. If you previously voted by proxy, you do not need to vote today unless you wish to change your vote.

B. Voting on Proposals

Chairperson: The Inspector of Election will now collect any outstanding ballots. If you have brought your proxy or wish to vote by ballot, please provide your proxy or ballot to the Inspector of Election. Again, if you have already voted by proxy, you need not vote today unless you would like to change your vote. Please hold up your hand so that your ballot can be collected.

C. Closing Polls

Chairperson: We now seem to have all the ballots, and since all those desiring to vote by ballot have done so, I hereby declare the polls closed. The ballots and proxies will be held in the possession of the Inspector of Election. The Inspector of Election will count the votes.

[ALLOW BALLOTS AND PROXIES TO BE COUNTED.]

IV. RESULTS OF VOTING

[CONFIRM WITH THE INSPECTOR OF ELECTION THAT BALLOTS HAVE BEEN COUNTED.]

Chairperson: Will the Secretary please report the results of the voting.

Secretary: We have been informed by the Inspector of Election that the ballots have been counted and that the nominees for election to the Board of Directors have been duly elected and **[report any additional results of voting]**.

V. ADJOURNMENT

Chairperson: Thank you for attending today's meeting. The meeting is adjourned. We will now have a presentation by the company's management, after which we will have a brief question and answer period.

VI. MANAGEMENT PRESENTATION

[REMARKS BY MANAGEMENT.]

VII. QUESTIONS AND ANSWERS

[OPEN THE MEETING TO QUESTIONS BY SHAREHOLDERS.]

Annex A

SHAREHOLDER'S COMMENTS EXCEED TIME LIMIT

Chairperson: I'm sorry, but you have exceeded the time limit set forth in the rules. Please promptly conclude your remarks.

[IF SHAREHOLDER PERSISTS.]

Chairperson: I repeat, you have exceeded the time limit set forth in the rules. Time limits have been imposed so that everyone may have a chance to speak and so that we may conduct the meeting in an orderly manner. Now please take your seat **[so that we may respond to your comments]**.

[IF SHAREHOLDER STILL PERSISTS—*SEE* ANNEX B REGARDING DISRUPTIVE SHAREHOLDERS.]

Annex B

RESPONSE TO DISRUPTIVE SHAREHOLDER CONDUCT

Request for Quiet

Chairperson: I must request that if you are not recognized, please refrain from speaking out so that we may continue with the orderly conduct of this meeting. **[If not in the question and answer period also state—You will have the opportunity to ask questions about the business and financial condition of the company after we have conducted the formal items of business of the meeting.]**

[IF SHAREHOLDER PERSISTS.]

Second Warning

Chairperson: I repeat that if you are not recognized, your conduct is out of order. Please keep quiet so that we may continue with the meeting in an orderly manner. Otherwise you will be asked to leave the meeting, and, if necessary, removed from this room.

[IF SHAREHOLDER STILL PERSISTS.]

Removal of Shareholder

Chairperson: Sir (or madam), I have repeatedly asked you to stop your disruptive conduct and have advised you that your action is out of order. However, you have chosen not to comply with my request and as Chairperson of this meeting, I must now ask you to leave the meeting. Security, would you please escort this individual from the meeting.

Annex C

SHAREHOLDER DEMANDING TO BE HEARD ON MATTERS OUTSIDE THE AGENDA

Chairperson: We have established an order of business which is set out in the agenda for this meeting so that we can conduct the meeting in an orderly manner. All discussion at this meeting should be limited to the proposals that are the subject of this meeting.

[IF SHAREHOLDER PERSISTS.]

Chairperson: Your comments go beyond the business of the meeting as set forth in the agenda and are out of order. If you would like to speak with someone from the company about this issue, please wait until after the meeting when one of the officers will discuss the matter with you or arrange a mutually convenient time to discuss the matter.

[IF SHAREHOLDER CONTINUES TO PERSIST.]

Chairperson: Rather than debate this point, I will ask the shareholders present to decide whether they agree with me that we follow the order of business as set forth in the agenda or depart from the printed agenda and listen to your remarks at this time.

The question is: Do the shareholders present desire to follow the order of business set forth in the agenda? All shareholders in favor, say "aye." All opposed, "no." The "ayes" have it. We will therefore proceed with the order of business as set forth in the agenda.

[IF SHAREHOLDER CONTINUES TO PERSIST.]

Chairperson: Your comments and conduct at this time are out of order, and if you persist, I will be forced to ask you to leave the meeting.

Annex D

SHAREHOLDER WISHING TO BRING A MOTION BEFORE THE MEETING

Chairperson: Our Bylaws provide that only business brought before this meeting by or at the direction of our Board of Directors may be considered. The only business noticed and brought before this meeting by the Board is to elect directors and **[other proposals]**. As a result, we are prohibited from addressing your motion at this meeting.

Additionally, the vast majority of our shareholders are voting today by proxy. These shareholders have not been given notice of your proposal and it would be unfair to act on your motion without first giving them notice and the opportunity to consider the substance of your motion.

[IF SHAREHOLDER PERSISTS AND COMPANY HAS SUFFICIENT PROXIES TO CARRY THE VOTE.]

Chairperson: May I have a motion to table the shareholder's motion.

[Name]: I so move.

[Name]: I second the motion.

Chairperson**:** All shareholders in favor, say "aye." All opposed, "no." The "ayes" have it. The motion is tabled.

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Annex E

EMERGENCY PROCEDURES

While unlikely, a situation may arise before or during the shareholders meeting that requires deviation from the agenda. In the event of a major disturbance, it may be necessary or desirable to adjourn the meeting as promptly as possible while making sure that all the legal prerequisites to effect corporate action at the meeting have been satisfied.

Chairperson: As Chairperson of this meeting I now rule:

1) notice of this meeting has been properly served;

2) a quorum is present—over **[ ]**% of the voting power of the company is represented by proxy;

3) all items of business are properly before the meeting;

4) the polls are open and will stay open for 48 hours to receive any votes you may wish to cast by proxy or ballot. Mail them to **[address of company]**; and

5) I declare the meeting adjourned.

Ballots are available from ushers. A post-meeting report will include the final vote tabulation.

APPENDIX D

SELECTED CONTENTS OF THE NOTICE OF INTERNET AVAILABILITY OF PROXY MATERIALS

Companies are advised to consult legal counsel for additional information regarding the contents of the notice of internet availability of proxy materials in each particular instance. The notice must contain certain information, including the items listed below:[1]

- A prominent legend in bold-face type that states:

"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].

- **This communication presents only an overview of the more complete proxy materials that are available to you on the internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.**
- **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert website address].**
- **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."**

- The date, time and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on, and the company's recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified website;
- (1) A toll-free telephone number, (2) an e-mail address or (3) an internet website address where the shareholder can request a copy of the proxy materials for all meetings and for the particular meeting to which the notice relates;
- Any control/identification numbers that the shareholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement; and
- Information about attending the shareholders meeting and voting in person.

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[1] The notice used by companies adopting the full set delivery option need not include the portion of the prescribed legend relating to shareholder requests for copies of the proxy materials nor the instructions on how to request a copy of the proxy materials.

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NOTES

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ACC 2010 Annual Meeting - Subsidiary Corporate Governance

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SPAIN

1. Introduction

1.1 This note outlines the key differences between a company conducting a business in Spain through a branch or a "permanent establishment" in Spain or through a separate subsidiary company in Spain.

2. Spain

2.1 Legal Status

	Spanish Subsidiary	Spanish Branch
2.1.1	A company incorporated in Spain has a distinct legal personality, i.e. it can own and deal with property, sue and be sued in its own name and contract on its own behalf. Accordingly, a subsidiary company is (but its parent company is not, except in very exceptional cases) liable for its own debts and other contractual obligations.	A Spanish branch has no legal personality distinct from that of its parent company. It follows, therefore, that all of the assets of the Spanish branch will be owned by the parent company including, without limitation, any real estate, notwithstanding the fact that such assets may be utilised/occupied by the Spanish branch. A parent company with a branch in Spain is liable for debts and other obligations contracted through the branch and court judgments may be enforced against the parent company's assets outside Spain subject to the application of private international law rules or a reciprocal enforcement of judgment treaty.

2.2 Statutory Obligations

	Spanish Subsidiary	Spanish Branch
2.2.1	**Registration** The Spanish subsidiary will have to be registered at the Mercantile Registry. Upon registration, the Spanish subsidiary will be allocated a company registration number independent of its parent company.	**Registration** The establishment of a Spanish branch must be registered at Companies Registry together with the name and address of one or more persons acting as branch representatives. Registration is carried out after the setting up of the branch, and the branch may commence its activity before registration has been completed. Upon registration at Companies

	Spanish Subsidiary	Spanish Branch
		Registry, the Spanish branch will be allocated a branch registration number independent of its parent company.
2.2.2	**Constitution**	**Setting up a branch**
	Company's Deed of Incorporation and Articles of Association must be registered with the Registrar of Companies.	A notarial deed of setting up of the branch will have to be executed, which must include copy of the parent company's Articles of Association with a certified translation (if not in Spanish), the names and details of the directors of the parent company, the funds attributed to the branch, if any, and the names and details of the branch representatives, together with the authorities they may exercise on behalf of the branch. All the information must be in Spanish, or must be accompanied by a certified translation into Spanish.
2.2.3	**Name**	**Name**
	If proposed name is too similar to that of an existing Spanish company or trademark, the Registrar will refuse the use of the name. He may also refuse on ground of public policy (e.g. if name is misleading or offensive). The Spanish company is then required to suggest alternative names if it wishes to be registered as a company. If a Company wishes to use a name other than its corporate name for business purposes this will need to be registered at the Trademarks Register if the Company wishes to protect the name. Certain words are prohibited or need special approval, for instance if they are reserved for government or official use, or may imply official endorsement. The same process applies in	Similar requirements; and the Registrar may refuse use of a particular name on similar grounds, even though the name may be identical to the name of the parent company.

	Spanish Subsidiary	Spanish Branch
	case the company changes its name.	
2.2.4	**Accounts**	**Accounts**
	All Spanish incorporated companies must file annual accounts, and they need to be audited accounts if the assets, turnover or employees of the company exceed certain thresholds; but it is not necessary for the Spanish subsidiary of an overseas parent to file the accounts of its parent. Annual accounts must be formulated by the Board within three months from the end of the financial year, approved by the shareholders within six months from the end of the financial year, and filed with the Companies Registry one month after approval by the shareholders. Failure to file or late filing of the annual accounts has the following consequences: i) the Companies Registry will be locked for the company after a delay of six months in the filing; this means that the company will be unable to file any document for registration, with a few exceptions; (ii) a financial penalty may be imposed in the amount of between €1,200 and €60,000 (between €1,200 and €300,000 if the turnover of the company exceeds 6 million euros). The company will be entitled to a 50% rebate in the fine if the accounts have already been filed when the procedure to impose the fine starts.	A Spanish branch must file annual accounts in respect of the branch in the same ways as required for a Spanish incorporated company; the accounts will need to be audited if the same thresholds established for Spanish companies are exceeded. The above requirement can be replaced with the filing in the Spanish Mercantile Registry if official proof of filing of annual accounts in its country of incorporation by the parent company of the branch; however, this is only possible if the parent company is required to prepare audited accounts and to disclose those accounts publicly under the laws of its country of incorporation, and said accounts are equivalent to those that need to be filed by Spanish companies; as mentioned above, if the parent country law does not require the above, then the branch must submit accounts as if it were registered as a company. Failure to file or late filing of the annual accounts as above has the following consequences: i) the Companies Registry will be locked for the branch after a delay of six months in the filing; this means that the Branch will be unable to file any document for registration, with a few exceptions; (ii) a financial penalty may be imposed in the amount of between €1,200 and €60,000 (between €1,200 and €300,000 if the turnover of the branch exceeds 6 million euros). The branch will be entitled to a 50% rebate in the fine if the accounts have already been filed when the procedure to impose the fine starts.

	Spanish Subsidiary	Spanish Branch
2.2.5	**Registered Office**	**Registered Office**
	Company must have a registered office. Although this may be changed, the company must at all times retain a registered office in Spain.	The Spanish branch must have a registered office for as long as it registered as a branch.
2.2.6	**Directors and Secretary**	**Directors and Secretary**
2.2.6.1	Details of names and personal details and of changes must be recorded with the Mercantile Registry.	A representative of the branch must be appointed and registered at the Mercantile Registry. Not possible to appoint separate Spanish directors. No requirement for decisions in relation to the Spanish branch to be made in Spain or by Spanish directors.
2.2.6.2	The Articles can provide for a sole director, two or more joint directors (who may act under a double signature principle, or under a full joint signature principle), two or more joint and several directors, or a board of directors (which must include a President and Secretary). Directors owe certain duties to the company under law, e.g. the duty to act in good faith and administer the company as a good and loyal administrator, as well as the duty to promote the success of the company for the benefit of its members, and some other duties.	
2.2.7	**Annual General Meeting**	**Annual General Meeting**
	All companies are obliged to hold an annual general meeting each year. (In companies with only one shareholder, the role of the meeting is performed directly by the sole shareholder). The annual general meeting must approve the annual accounts and the management by the directors.	No equivalent requirements.

	Spanish Subsidiary	Spanish Branch
2.2.8	**Mortgages and charges** Company is obliged to include in the annual accounts particulars of certain mortgages or charges created by it relating to property or assets.	**Mortgages and charges** Same requirement if accounts for the Spanish branch are filed pursuant to 2.3.4 above.
2.2.10	**Statutory books** These must be maintained by the company. Consist of the register of shareholders or members, the books or minutes of shareholders' and directors' resolutions, and the books of accounts (companies with only one shareholder also must maintain a book of contracts with the sole shareholder). Statutory books and registers must be kept up to date at all times.	**Statutory books** No equivalent Spanish requirement.
2.2.11	**Letters, trade catalogues, etc** Business stationery, brochures and documents, whether in hard copy or electronic form (e.g. e - mail/fax versions) and the Spanish subsidiary's website must show place of registration, tax registration number and Mercantile registration number, registered office address and full name of the Spanish subsidiary.	**Letters, trade catalogues, etc.** Same requirements, all of them in respect of the branch, not the parent company. Sample wording is provided in Appendix 1.
2.2.12	**Miscellaneous matters regulated by Companies Act**	**Miscellaneous matters regulated by Companies Act**
2.2.12.1	Minimum contents of Articles of Association.	No equivalent Spanish requirements.
2.2.12.2	Minimum contents of	

	Spanish Subsidiary	Spanish Branch
	certain shareholders' or board resolutions (increase or decrease of capital stock).	
2.2.12.3	Notice and requirements for calling and holding shareholders' and directors' meetings.	
2.2.12.4	Time limits for filing details of matters outlined above.	
2.2.12.5	Accounting reference date.	
2.2.12.6	Rules on liquidation of the company	

APPENDIX 1

Sample wording for branch stationary

[Name - Spanish branch]

[Registered Address of Spanish branch]

C.I.F: [ ]

Inscrita en el Registro Mercantil de [Madrid], al Tomo [ ], Folio [ ], Hoja nº [ ], Inscripción 1ª

SWEDEN

1. Introduction

1.1 This note outlines the key differences between a company conducting a business through a branch in Sweden or through a separate subsidiary company in Sweden.

2. Sweden

2.1 Legal Status

	Swedish Subsidiary	Swedish Branch
2.1.1	A company incorporated in Sweden (*Sw. Aktiebolag)*, has a distinct legal personality from that of its parent company i.e. it can own and deal with property, sue and be sued in its own name and contract on its own behalf. Accordingly, a subsidiary company is (but its parent company generally is not) liable for its own debts and other contractual obligations.	A Swedish branch has no legal personality distinct from that of its parent company. The parent company will be liable for debts and other obligations contracted through the branch and court judgments may be enforced against the parent company's assets outside Sweden subject to the application of private international law rules or a reciprocal enforcement of judgment treaty.

2.2 Statutory Obligations

	Swedish Subsidiary	Swedish Branch
2.2.1	**Registration**	**Registration**
	Company will be registered at Companies Registry.	The establishment of the Swedish branch must be registered at Companies Registry together with the name and address of one or more persons resident in Sweden authorised to accept service of papers or documents on behalf of the company.
2.2.2	**Constitution**	**Constitution**
	Company's Articles of Association must be filed with the Companies Registry.	Verified copy of the parent company's Constitution, Memorandum, or Articles of Association (or similar) has to be submitted.

	Swedish Subsidiary	Swedish Branch
2.2.3	**Name**	**Name**
	If proposed name is too similar to that of an existing Swedish company, the Registry may refuse registration. It may also refuse on ground of public policy (e.g. if name is misleading or offensive). Company is then required to suggest an alternative name if it wishes to be registered as a company. Company may wish to use a name other than its corporate name for business purposes. This, too, will require the Registry's approval.	The name shall include the parent company's name, nationality and the word branch (*Sw Filial).* The Registry may refuse use of a particular name on similar grounds, even though the name should include words identical to the name of the parent company.
2.2.4	**Accounts**	**Accounts**
	A Swedish Aktiebolag must file audited annual accounts, but it is not necessary for the Swedish subsidiary of an overseas parent to file the annual accounts of its parent.	The requirements of a branch registration depends on the law of the parent company - if it is required to prepare audited annual accounts and to disclose those accounts publicly, then the branch must file a verified copy of those annual accounts including any consolidated accounts for the group. No further accounts must be submitted if the parent company's legal form is comparable with an Aktiebolag.
2.2.5	**Registered Office**	**Registered Office**
	Company must have a registered office. Although this may be changed, the company must at all times retain a registered office in Sweden.	The address of the Swedish branch will be registered but the parent company may cease to have a Swedish presence at any time with minimal procedural formalities (subject to consideration of tax issues).
2.2.6	**Directors**	**Directors**
2.2.6.1	Details of names, personal code numbers/dates of birth and addresses of directors and of changes must be provided to Companies Registry.	Details of name, personal code number/date of birth and address of one managing director (and, if the company appoints a deputy, similar information for him) and of changes must be provided to Companies

	Swedish Subsidiary	Swedish Branch
		Registry.
2.3.6.2	The Articles can provide for 1-2 directors together with at least 1 deputy, or for at least 3 directors together with none or any number of deputies. Directors are obligated to act in good faith and to promote the success of the company for the benefit of its shareholders.	
2.2.7	**Annual General Meeting**	**Annual General Meeting**
	A Swedish Aktiebolag is obliged to hold an annual general meeting each year.	No equivalent Swedish requirements.
2.2.8	**Annual Return**	**Annual Return**
	N/A	N/A.
2.2.9	**Mortgages and charges**	**Mortgages and charges**
	Mortgages over real estate and floating charges in Sweden are created through registration. However, registration is not mandatory (but recommendable) to pledge the real estate mortgage deeds or floating charges.	Mortgages over real estate and floating charges in Sweden are created through registration. However, registration is not mandatory (but recommendable) to pledge the real estate mortgage deeds or floating charges.
2.2.10	**Statutory books**	**Statutory books**
	Shareholders ledger minutes of shareholders meetings and board of directors meetings and annual accounts must be maintained by the company. Documents must be kept up to date at all times.	No equivalent Swedish requirement.
2.2.11	**Accounting requirements**	**Accounting requirements**
	Comprehensive accounting records must be kept and annual accounts are usually required to be audited prepared by an auditor who	Branch Registration: Comprehensive accounting records must be kept. Audited accounts of the parent company prepared in accordance with home country requirements

	Swedish Subsidiary	Swedish Branch
	is a member of a recognised Swedish accountancy body and filed annually. Accounts of parent company group do not have to be filed.	plus group accounts may be required.
2.2.12	**Letters, trade catalogues, etc**	**Letters, trade catalogues, etc**
	Business stationery, brochures and documents, whether in hard copy or electronic form (e.g. e - mail/fax versions) and the company's website must show registration number, registered address and full name of the company. Directors need not be listed.	All instruments, invoices, notices, publications, letters, order forms and other documents issued by the branch must state the parent company's legal form and registered office, its registration number, the branch's Swedish registration number and the name of the Swedish register.
2.2.13	**Miscellaneous matters regulated by Companies Act**	**Miscellaneous matters regulated by Companies Act**
2.2.13.1	Directors' contracts of employment.	Time limits for filing details of matters outlined above.
2.2.13.2	Substantial purchases from or sales to directors.	
2.2.13.3	Loans to and other transactions affecting directors.	
2.2.13.4	Notice requirements for calling shareholders' and directors' meetings.	
2.3.15.5	Time limits for filing details of matters outlined above.	
2.3.15.6	Accounting reference date.	The accounting reference date must be included in the articles of association of the parent company.

APPENDIX 1

Sample wording for all written branch documentation

[Name - Swedish branch]

[Name - Swedish branch], is registered with the Swedish Companies Registration Office as a branch under number [Insert registered number]).

[Name - parent company] is a company incorporated in [country of incorporation], registered with the [applicable registry] under number [Insert registered number]) and with its registered office at [Insert registered office address].

UNITED KINGDOM

1. Introduction

1.1 This note outlines the key differences between a company conducting a business through a branch (referred to in the tax legislation as a "permanent establishment") or through a separate subsidiary company in the UK.

2. United Kingdom

2.1 Legal Status

	UK Subsidiary	UK Branch
2.1.1	A company incorporated in Great Britain has a distinct legal personality from that of its parent i.e. it can own and deal with property, sue and be sued in its own name and contract on its own behalf. Accordingly, a subsidiary company is (but its parent company is not) liable for its own debts and other contractual obligations.	A UK branch has no legal personality distinct from that of its parent company. It follows, therefore, that all of the assets of the UK branch will be owned by its parent company including, without limitation, any real estate, notwithstanding the fact that such assets may be utilised / occupied by the UK branch. The parent company will be liable for debts and other obligations contracted through the UK branch and court judgments may be enforced against the overseas company's assets outside Great Britain subject to the application of private international law rules or a reciprocal enforcement of judgment treaty. This is subject to a general principle of international law that the courts of one country will not collect the taxes of foreign states and HM Revenue & Customs ("HMRC") will not ordinarily be able to enforce a UK tax liability against an overseas company's non-UK assets.

2.2 Statutory Obligations

	UK Subsidiary	UK Branch
2.2.1	**Registration** The UK subsidiary will be registered at Companies Registry.	**Registration** The establishment of a UK branch of an overseas company must be registered at Companies Registry using form OS IN01 within one

	UK Subsidiary	UK Branch
		month of the UK branch opening. When registering the particulars of the UK branch with Companies House it will be necessary to set out the business activities to be carried on. Upon registration, Companies House will allocate the UK branch a unique branch number and issue a certificate of registration. Business activities should not commence until Companies House have allocated the UK branch with a branch number and certificate of registration but please note that there is no requirement to physically carry on an activity at the UK branch before registration. Nb. If the parent company is a newco when the UK branch is to be formed / registered this should not present any additional issues.
2.2.2	**Company Number** Upon registration at Companies Registry the UK subsidiary will be allocated a company number independent of its parent company.	**Company Number** Upon registration at Companies Registry the UK Branch will be allocated a company number independent of its parent company.
2.2.3	**Constitution** Company's Memorandum and Articles of Association must be filed with the Registrar of Companies.	**Constitution** A copy of the parent company's Constitution must be filed with the Registrar of Companies. The copy of the Constitution can be filed in a language other than English but must be accompanied by a certified translation in English.
2.2.4	**Name** If proposed name is too similar to that of an existing UK company, the Registrar may refuse registration. He may also refuse on ground of public policy (e.g. if name is misleading or offensive). The UK subsidiary is then required	**Name** Similar requirements; and the Registrar may refuse use of a particular name on similar grounds, even though the name may be identical to that of the parent company.

	UK Subsidiary	UK Branch
	to suggest an alternative name if it wishes to be registered as a company. The UK subsidiary may wish to use a name other than its corporate name for business purposes. This, too, may require the Registrar's approval. Certain words need special approval. Included in the list are International, European, UK, Great Britain, Group and Holding.	
2.2.5	**Accounts**	**Accounts**
	Most UK incorporated companies must file audited accounts, but it is not necessary for the UK subsidiary of an overseas parent to file the accounts of its parent.	An overseas incorporated company with a UK branch (please note that this is the legislative term but for the avoidance of doubt includes a branch) must file accounts of the whole company in the same way as required for a UK incorporated company. It would therefore be the parent company that files the accounts in this instance. Note that the requirement to file accounts of the **whole** company may result in significant disclosure.
	Delivery of Accounts	**Delivery of Accounts**
	The directors of the UK subsidiary must deliver to the UK registrar for each financial year of the company: • the UK company's annual accounts • the directors' report • the auditors' report The balance sheet accompanying the reports must state the name of the person who signed it on behalf of the UK subsidiary and the auditors report must state the name of the auditor.	The directors of the parent company, must deliver to the UK registrar copies of all accounting documents prepared in relation to a financial period which it is required to disclose by its parent law. If the parent law, requires audited accounts the following will need to be delivered: • the overseas company's annual accounts • the directors' report • the auditors' report If the parent law only requires modified accounting documents to be disclosed, it will be sufficient to deliver copies of these. The accounts can be filed in a

	UK Subsidiary	UK Branch
		language other than English but must be accompanied by a certified translation in English.
	Filing Period	**Filing Period**
	The period for a private company is nine months after the end of the relevant accounting reference period. Note that under new provisions of the Companies Act 2006 the period for filing accounts was reduced from ten months to nine months.	The period for a UK branch of an overseas company is three months from the date on which the accounts are first required to be disclosed in accordance with the company's parent law.
	Failure to file accounts and reports	**Failure to file accounts and reports**
	If the directors of the UK company fail to deliver the requisite accounting documents and reports any person who was a director of the UK subsidiary immediately before the end of the period allowed for filing would be liable to a fine.	If the requirements to deliver the requisite accounting documents and reports are not complied with an offence is committed by any person who was a director of the parent company (**and not the representatives of the UK branch**) immediately before the end of the period allowed for filing.
	In addition, the company would be liable to a civil penalty.	
	It is a defence for a UK director charged with such an offence to prove that he took all reasonable steps for securing that the filing requirements would be complied with within the requisite period.	It is a defence for a director of the overseas parent company charged with such an offence to prove that he took all reasonable steps for securing that the filing requirements would be complied with within the requisite period.
2.2.6	**Registered Office**	**Registered Office**
	Company must have a registered office. Although this may be changed, the	The UK address will be registered but the parent company may cease to have a UK presence at any time

	UK Subsidiary	UK Branch
	company must at all times retain a registered office in England and / or Wales.	with minimal procedural formalities (subject to consideration of tax issues).
2.2.7	**Directors and Secretary**	**Directors and Secretary**
2.2.7.1	Details of names and addresses and of changes must be provided to Companies Registry.	No requirement to appoint separate UK directors or for decisions in relation to the UK branch to be made in the UK or by UK directors.
	A private company must appoint at least one director who is a natural person but please note that the Companies Act 2006 removed the requirement for a private UK company to appoint a secretary.	The UK branch will need to appoint at least one authorised person to represent the parent company as a "permanent representative" of the parent company in respect of the UK branch.
	A director of a UK company will be personally liable for acts of negligence, default, breach of duty or breach of trust. A "shadow director" i.e. a person on whose directions or instructions the directors of the company are accustomed to act will also be liable in the same way as statutory directors.	Upon registration of the UK branch, the extent of the permanent representative's authority will need to be set out as either limited or unlimited and if limited, a brief description of the permanent representative's authority will need to be defined. Particulars of whether or not a permanent representative will be authorised to act alone or jointly will also need to particularised. The parent company may also nominate an individual to accept service of documents on its behalf in respect of the UK branch but unlike the requirement to appoint a permanent representative this is **not** mandatory. If no individual is nominated to accept service of documents the permanent representative of the UK branch or any director or the secretary of the parent company will be authorised to do so. Please note that under The Overseas Companies Regulations 2009 (the "Regulations") which govern the incorporation of overseas companies and branches liability for non compliance under the Regulations will fall upon the parent company and its officers.

	UK Subsidiary	UK Branch
2.2.7.2	The Articles can provide for a sole director, but he cannot also act as secretary. Directors currently owe certain common law duties to the company e.g. the duty to act in good faith. The Companies Act 2006 introduces statutory duties which, while based on the common law duties, go further and impose new requirements on directors e.g. a duty to promote the success of the company for the benefit of its members.	
2.2.8	**Annual General Meeting**	**Annual General Meeting**
	Only public companies will be obliged to hold an annual general meeting each year. The Companies Act 2006 imposes no requirements on private companies.	No equivalent UK requirements.
2.2.9	**Annual Return**	**Annual Return**
	Must be submitted by the UK subsidiary giving details of share capital and officers of the company. Changes in names and addresses of officers must also be notified, as must all allotments of shares.	No requirements for annual return in respect of UK branch. However, the parent company may need to file annual financial statements (after annual general meeting approval) with the Companies Register in its country of incorporation. Such annual financial statements comprise balance sheet, profit and loss account plus management and audit report (if applicable).
2.2.10	**Mortgages and charges**	**Mortgages and charges**
	The UK subsidiary is obliged to file particulars of certain mortgages or charges created by it relating to UK property.	Similar requirements may apply depending of the jurisdiction the parent company.
2.2.11	**Statutory books**	**Statutory books**
	These must be maintained	No equivalent UK requirement.

	UK Subsidiary	UK Branch
	by the UK subsidiary. Consist of the register of members, the register of directors, a register of directors' residential addresses and a register of secretaries if the company is a public company or is a private company which chooses to retain a company secretary. Registers must be kept up to date at all times. Copies of directors' service contracts must also be kept at the registered office of the UK subsidiary.	
2.2.12	**VAT records**	
	A person who is either registered for VAT or obliged to be registered must keep such records as HM Revenue and Customs (HMRC) require. In addition to a VAT Account HMRC require such persons to keep a variety of records, generally of a type most businesses would in any case keep. The records do not have to be kept in any set way but they must be readily available to HMRC officers on request. There is no statutory requirement for them to be maintained in the UK but HMRC could issue a direction to that effect.	Similar requirements.
2.2.13	**PAYE Records**	**PAYE Records**
	An employer is required to keep PAYE records (Pay As You Earn - deductions made by employer from salary in respect of income tax).	Similar requirements.
2.2.14	**Letters, trade catalogues, etc**	**Letters, trade catalogues, etc**

		UK Subsidiary	UK Branch
		Business stationery, brochures and documents, whether in hard copy or electronic form (e.g. e - mail/fax versions) and the UK subsidiary's website must show place of incorporation, registration number, registered office address and full name of the UK subsidiary. Directors need not be listed but if one name is shown then the names of all of the directors must be shown.	UK legislation requires overseas companies with a branch in the UK to include the company's name in all forms of business correspondence and documentation for carrying on business activities in the UK, whether in hard copy or electronic form, including, letters, emails, cheques, order forms, invoices and websites. The parent company must also state the following particulars on all business letters, order forms and websites that are used in carrying on business in the UK: the company's country of incorporation; the identity of the registry, if any, in which the company is registered in its country of incorporation; if applicable, the number with which the company is registered in that registry; the location of its head office; the legal form of the company; whether the liability of the members of the company is limited, whether the company is limited; if applicable, whether the company is being wound up or is subject to other insolvency proceedings; and if there is a reference to the amount of share capital on business letters, order forms or websites, the references must be shown as paid up share capital.
2.2.15	**Miscellaneous matters regulated by Companies Act**		**Miscellaneous matters regulated by Companies Act**
2.2.15.1	Directors' contracts of employment.		No equivalent UK requirements.
2.2.15.2	Substantial purchases from or sales to directors.		
2.2.15.3	Loans to and other transactions affecting directors.		
2.2.15.4	Notice requirements for calling shareholders' and		

	UK Subsidiary	UK Branch
	directors' meetings.	
2.2.15.5	Time limits for filing details of matters outlined above.	
2.2.15.6	Accounting reference date.	The accounting reference date must be included in the articles of association of the parent company.

APPENDIX 1

Sample wording for branch stationery

[Name - UK branch]

[Address]
Telephone: [Telephone Number]
Fax: [Fax Number]

[Name - parent company] has a UK establishment registered in England: [Address (Registered number: [Number])

[Name - parent company] is a company incorporated in [country], registered with the [applicable registry] under number (Registration number [Number]) and with its registered head office at [Head office address]

Proposal letterhead UK Branch / Order documentation:

[Top centre page]

[Name]

Registered UK Branch Office: [Address] (registered branch number: [Number])

[Bottom centre page]

[Name - parent company] is a company incorporated in [country], registered with [registry] under number [registration number] and with its registered head office at [Head office address].

Proposal business card UK Branch:

[**Name of employee**]
[Job title]
[Company name] (UK Branch)
[Address]
UK establishment registered in England (registration number: [Number]

Email signature UK Branch:

[**Name of employee**]
[Job title]
[Address] (UK Branch)
Telephone: [Telephone Number]
Fax: [Fax Number]

EVERSHEDS

ACC 2010 Annual Meeting

Subsidiary Corporate Governance

Briefing Note

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CONTENTS

CHINA

Doing Business in mainland China

1. Types of business vehicles and key issues to consider

China is playing an increasingly important role in the global economy. China is the largest holder of foreign reserves and one of the largest participants in international financial markets. China is now the third-largest economy in the world and is growing at a much more rapid pace than the other major economies. It is also one of the largest players in commodity markets. Yet, whether cooperating with Chinese investors in overseas markets or navigating the Chinese market as a foreign investor, significant challenges are invariably encountered.

Our team of experts in our China practice can advise you effectively and efficiently on how to handle such challenges. It is important, for example, to understand key points relating to:-

1.1 **Legal System** - socialist legal system with Chinese characteristics, similar to civil law

1.2 **Restrictions on Foreign Ownership** - Foreign investments require governmental approvals and registrations at different levels depending on the amount and industry of investment. The Industrial Catalogue for the Guidance of Foreign Investment ("Guidance Catalogue") has classified industries as encouraged, restricted, prohibited and permitted for foreign investment. The latest version of the Guidance Catalogue has a strong focus on encouraging investment in green and high-tech industries. Being "encouraged" can bring a number of advantages, including expedited approvals and registrations, and potential fiscal assistance from applicable governments

1.3 **Business Vehicles** - Common business vehicles are:

1.3.1 representative offices;

1.3.2 locally incorporated wholly-owned subsidiaries of parent companies (known as "wholly foreign-owned enterprises" or "WFOEs"), which are limited liability companies; and

1.3.3 joint ventures (either Sino-foreign equity joint ventures ("EJVs"), Sino-foreign cooperative joint ventures ("CJVs") or foreign-invested joint venture companies limited by shares ("FICLs"). EJVs and CJVs are almost always limited liability companies, whereas FICLs are companies limited by shares.

For foreign private equity players, the latest developments have centred around partnering with domestic Renminbi funds.

For foreign venture capital players, most enterprises have entered China through specific types of joint venture arrangements permitted under Chinese law (though such opportunities are limited to the high-tech sector).

The most common form of business vehicle used by foreign investors is the WFOE, particularly if no foreign-ownership restrictions apply to the relevant industry.

1.4 **Approval & Registration -** The incorporation of an FIE is registered on the issuance of a business licence by the relevant Administration of Industry and Commerce. Prior to this, the applicant will need to obtain approval from the Ministry of Commerce or its local counterpart (depending on, among other things, the amount of investment). Further registrations are then made with the relevant authorities of tax, foreign exchange, customs, etc. In certain industries (e.g. banking, securities, asset management, insurance, etc) pre-approval from the competent industry administration is required.

1.5 **Capital Requirements -** Theoretically, the minimum capitalisation for a standard limited liability company is CNY30,000 (about US$4,390). However, in practice, the minimum requirements for FIEs are much greater and vary greatly across districts and regions in respect of the types of companies permitted and from industry to industry. For example, in regulated industries such as banking, securities and asset management, minimum capital requirements are considerably high.

1.6 **Shareholder & Director Nationality** - No restrictions apply on the nationality of shareholders and directors. As mentioned above, WFOEs are not permitted in certain industries (e.g. in the finance sector).

1.7 **Management Structure** - Management and control of a Chinese company is 3-tiered – (i) the shareholders' general meeting (not required if there's only one shareholder); (ii) the board of directors; and (iii) the general management. These are subject to the scrutiny and supervision of the supervisory board. For FIEs in the form of limited liability companies, there are only two tiers with the board of directors being the ultimate authority, instead of the shareholders' general meeting. In addition to the formal structures of management, the company is also required to consult with representatives of its labour union (if it exists) and employees for matters such as restructuring of the company, major issues concerning operation and other significant rules and regulations of the company.

1.8 **Board Requirements** - Most FIEs will have a minimum of 3 directors. Director appointments become effective upon the issuance of a resolution of the shareholder appointing the director. Such appointment is then filed with the local registration authority. Board meetings should take place at the location of the entity (or otherwise in accordance with the entity's articles of association) and they should be held at least once every year (for EJVs and CJVs).

1.9 **Directors' Liability** - Directors, senior management and supervisors are subject to duties of loyalty and diligence to the company. Among other restrictions, directors, senior managers and supervisors are also prohibited from embezzling funds of the company, depositing company funds in a bank account in his/her name or another person's name, lending company funds to others, taking advantage of his/her position to obtain commercial opportunities belonging to the company.

1.10 **Parent Company Liability** - Limited liability companies are similar conceptually to proprietary or private companies found in most jurisdictions. They are intended to be 'closed' companies which are not open to public investment. Their investors assume liabilities towards the company to the extent of their respective subscribed capital contributions and the company is liable, to the extent of all its assets, for its debts. Companies limited by shares are similar conceptually to public companies found in most jurisdictions. Public investment is permitted but, compared with a limited liability company, a larger capital investment is required and the requirements for formation and governance are generally more

1.11 **Tax incentives** - The 2008 Enterprise Income Tax Law unified the income tax treatment of domestic and foreign invested enterprises (FIEs). Tax incentives are available for investment in the high-technology industry, which applies to both domestic enterprises and FIEs. Incentives are awarded locally on a case-by-case basis.

1.12 **Foreign Exchange Controls** - China applies strict foreign exchange controls in accordance with The Regulation on Foreign Exchange Administration and numerous supplementary rules and regulations. Current items for foreign exchange can be directly handled with banks approved for foreign exchange business. Capital items are subject to the approval by or registration with the relevant Administration of Foreign Exchange.

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FRANCE

Comparison of the main characteristics of French companies (limited to *société anonyme* ("SA"), *société par actions simplifiée* ("SAS") and *société à responsabilité limitée* ("SARL")

	SA		**SAS**	**SARL**
	Unitary structure (Board of Directors)	**Two-tiered structure (supervisory board and Management Board)**	**Contractual structure very flexible suitable for larger companies. This structure cannot be used for listed companies.**	**Traditional private company structure**
Shareholders	At least 7 shareholders.		1 or more shareholders.	1 or more shareholders.
Liability of the shareholders	Limited to their contribution to the share capital		Limited to their contribution to the share capital	Limited to their contribution to the share capital
Share capital minimum	€ 37,000 (€ 225,000 if it is a listed company)		no minimum	no minimum
Management structure and main conditions / restrictions	(i) the **General manager** *(directeur général)* must be an individual (French or foreigner). (ii) the **President of the Board of Directors** must be a director and an individual. (the duties of the president can be combined with those of the general manager who will then be named "Président Directeur Général") (iii) **Board of directors :** a minimum of 3 directors and a maximum of up to 18 directors (individuals and corporate entities - French or foreigners). subject to the Articles of Association.	(i) the **President of the Management Board** must be an individual (French or foreigner). (ii) the **Management Board** must have between 1 (sole general manager) and 5 members (individuals), 7 in listed companies. They must be individuals. (iii) **Supervisory Board:** a minimum of 3 members and a maximum of up to 18 members (individuals and corporate entities - French or foreigners) subject to the Articles of Association. The members of the Management Board cannot be members of the Supervisory Board.	(i) one **President,** either an individual or a corporate entity (French or foreigners). (ii) The Articles of Association can provide for additional management positions / structure such as a *Directeur Général*, *Directeur Général Délégué* (an individual or corporate entity - French or foreigners), a board of directors, a Management Board, supervisory boards.	1 or more **managers** (*gérant*) (there is no board in this type of company). The manager must be an individual (French or foreigner), a shareholder or not part of the company.

	(iv) In addition, an **assistant general manager** (*directeur général délégué*), who must be an individual, can be appointed (optional).			
Role of the management structure	The Board of Directors is in charge of supervising the management of the company. The Board of Directors must be called once a year, at least, to prepare the annual accounts to be submitted to the shareholders meeting.	The Management Board is in charge of the management of the company and must be called 4/5 times a year. The Supervisory Board is in charge of supervising the management of the Management Board. and must be called 4 times a year.	The day to day management of the company is carried out by the "Président" (in principle) The role of any type of management structure (other than the "Président" and, if any, *Directeur Général*, *Directeur Général Délégué*) is determined by the Articles of Association.	The day to day management of the company is carried out by the "gérant".
Who has the power to bind the company?	The "Président Directeur Général" or the "Directeur Général" and if any, the "Directeur Général Délégué". The directors (other than the "Président Directeur Général"/"Directeur Général" cannot bind the company as a matter of law).	The president of the Managing Board and, if any, the "Directeur Général" (if the Articles of Association provide for a "Directeur Général").	The "Président" and, if any, the "Directeur Général" (if the Articles of Association provide for a "Directeur Général" and if the latter is recorded on the k-bis extract of the company).	The *gérant*.
Limitation of powers of the management	This is authorised and can be inserted either in the Articles of Association or any other documents. Any limitation of powers is however not enforceable against any third party acting in good faith. Hence, the company is bound by any action taken by the management even if this action exceeds the limitation of powers.			
Removal of the management	The directors and chairman can be removed from office with or without cause at any time without compensation, as can the Supervisory Board members. The "Directeur Général" and, if any, the "Directeur Général Délégué" and the members of the Management Board can only be removed with good cause. If they are removed without good cause, their removal is still valid but they may be entitled to obtain damages from the court. In any event, an abusive removal of any the abovementioned people or one which does not follow due procedure will give rise to a claim for damages.		The Articles of Association deal with this issue (regarding the competent body to do so and the compensation to be paid). In any event, an abusive removal or one which does not follow due procedure will give rise to a claim for damages.	The gérant can only be removed with good cause. If they are removed without good cause, the removal is still valid but the gérant may be entitled to obtain damages from the court. In any event, an abusive removal or one which does not follow due procedure will give rise to a claim for damages.

	SA		SAS	SARL
	Unitary structure (Board of Directors)	**Two-tiered structure (supervisory board and Management Board)**	**Contractual structure very flexible suitable for larger companies. This structure cannot be used for listed companies.**	**Traditional private company structure**
Management : conditions of nationality / residence	*Gérant, President, Directeur Général, Directeur général délégué, Président du conseil d'administration, Président du directoire*: A foreign citizen who is not member of an EU, EEA or OECD's state must file a declaration with the office of the *Prefecture* in the *Department* where he will be exercising his professional activity to be validly appointed as manager, unless he has a resident's card.			
Role of the shareholders	The shareholders are competent to amend the Articles of Association, to approve the annual accounts and to appoint and remove the directors (inter alia). A shareholders meeting must be convened once a year to approve the annual accounts and appropriate the results.		The shareholders are competent to resolve to take any of the following decisions: ➢ increase, amortisation or reduction of capital, merger, split-off, dissolution, conversion into another form of company, appointment of auditors, approving of the annual accounts and appropriation of the results. Apart from that, the Articles of Association freely determine the powers of the shareholders. A shareholders meeting must be convened once a year to approve the annual accounts and appropriate the results.	The shareholders are competent to amend the Articles of Association, to approve the annual accounts and to appoint and remove the directors (inter alia). A shareholders meeting must be convened once a year to approve the annual accounts and appropriate the results.
Auditors Required	At least one statutory auditor and one replacement statutory auditor.		At least one statutory auditor and one replacement statutory auditor except if certain conditions are met.	No statutory auditors required until certain financial thresholds are met.
Ownership	The ownership of the shares in an SA or an SAS results from the registration of the name of the shareholder and the number of shares the latter owns, in the company's books.			The ownership of the shares results from (i) the registration of the name of the shareholder and the number of shares owned in the Articles of Association of the company and (ii) the completion of certain formalities such the filing of the share transfer agreement and the up-to-date Articles of Association with the clerk of the Court.

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GERMANY

1. Introduction

For international investors, the German law offers a broad variety of legal forms for participating effectively on this market, which are available for Germans and non-Germans.

Foreign investors may start a business in Germany by simply becoming active within Germany via a German branch (*Zweigniederlassung*), which can be registered with the commercial register at the respective local court. The commercial register is the source of fundamental information on each company, where in addition to information on company name, seat, representatives and equity capital you can also ask for the articles of association and the annual balance sheet (if the company in question is obligated to publish it).

If a foreign investor wants to set up an independent German entity, legally separated from its domestic business abroad, he has the choice between several types of partnerships (*Personengesellschaften*), including general (*OHG*) and limited (*KG*) partnership, as well as corporations (*Kapitalgesellschaften*), including the Limited Liability Company (*GmbH*) and the stock corporation (*AG*). The choice between an entity being a partnership or a corporation often is dependant on tax factors.

The GmbH vehicle is the most popular German investment vehicle chosen by foreign investors. Therefore, the following focuses on the GmbH and a hybrid legal form, in which a GmbH serves as the general partner of the partnership, the GmbH & Co. KG.

2. The GmbH

2.1 Reasons for choosing a GmbH

The structure of the German GmbH is similar to a limited liability company in the UK. In particular for the use within a group, it offers the advantage of a relatively flexible structure, where the shareholders may choose articles of incorporation to suit their needs. Furthermore, the shareholders may directly control the managing directors, even with regard to the operative part of the company. In particular compared to an AG (stock corporation), the GmbH is less formalistic, allowing for quick shareholders` resolutions. As with any corporation, the GmbH provides a restriction of liability to its shareholders up to the respective share capital.

2.2 Formation / Acquisition of a GmbH

The foreign investor may choose whether he wants to formate his own GmbH or acquire a shelf-company. In any event, the investor will need to use the services of a notary public, since either the new shareholder has to execute a deed of formation and its articles of association at the notary public or the sale and transfer agreement for the acquisition of a GmbH has to be notarized. If the new shareholder cannot be present himself, a representative may take his position, but only based on a written and, indispensable in case of a formation, notarized power of attorney.

Costs involved with the formation of a small GmbH with a share capital of EUR 25,000 (the minimum share capital) amount to app. EUR 2,000, in case of the acquisition of a shelf company app. EUR 4.000 (purchase price plus lawyers fees) together with the costs of the notary public.

The GmbH may start its business operations immediately after the notarization of its articles of association even if the registration with the commercial register has not taken place yet. However, during the period between the notarization and the registration with the commercial register, the company does not possess a corporate veil. The shareholders' liability is not limited during this period. Therefore, if a quick start is needed and a few days matter, the shelf company is the saver option.

2.3 Share capital

Different to the UK Ltd (which is the main reason why nobody thinks about using a German GmbH in the UK, while a number of UK Ltd are used in Germany by German citizens), the GmbH requires a minimum share capital of EUR 25,000 of which EUR 12,500 must be paid in. Capital contributions may be made in cash or in kind. In case of a contribution in kind, the founding shareholders are obligated to prepare a special report (*Sachgründungsbericht*) demonstrating the adequacy of the valuation of contribution in kind. The GmbH will not be registered until at least 50% of the minimum capital (i.e. Euro 12,500 under minimum capital) has been paid-in.

2.4 Corporate Bodies of a GmbH: Shareholders` Meeting and the managing directors

The GmbH has two corporate bodies: the shareholders´ meeting (*Gesellschafterversammlung*) and the managing directors (*Geschäftsführer*). For smaller companies, an advisory board is not required by law but can be appointed voluntarily – this is in particular used in Joint-Ventures or by private equity or venture capitalists.

2.4.1 Shareholders' Meeting

The shareholders of a GmbH have many additional powers exceeding those defined in the articles of association. Under statutory law, the shareholders decided in particular on the appointment and removal of managing directors, the approval of the annual financial statements and amendments of the articles of association. While usually the shareholders may waive any form requirements, certain decisions (like any amendment of the articles of association or a transformation of the company) again require a notary public.

The managing directors are responsible for calling a shareholders` meeting. A shareholders´ meeting must at least be called once a year since the shareholders must annually resolve on the determination of the financial statements and on the appropriation of the results.

2.4.2 Managing Directors (*Geschäftsführer*)

The managing director conducts the business for the GmbH and represents the company externally. He is subject to instructions issued by the shareholders' meeting. The managing director must be an natural person. Even a non-German permanently living outside of Germany can be appointed managing director if can - in principle -

travel to Germany at any time. Which basically means that the foreign managing director should not be imprisoned.

Managing directors of a GmbH conduct the business on behalf of the company. They are therefore in principle not liable towards third parties for the debts of the company nor does the company have a right to demand internal compensation for losses arising during their management.

2.5 Legal status of the shareholders, limited liability

The main aim of a corporation is to restrict the liability of its shareholders doing business. The liability of the shareholders vis a vis creditors is restricted to the nominal capital of the company, as far as it has been paid in full. If the original capital contribution has not yet been paid, the shareholders will be liable up to the amount of the original capital contribution.

2.6 Transfer of shares

The transfer of shares in a GmbH requires notarisation and must be brought to the attention of the company and noted in the Commercial Register. The duty of notarisation is very broad. Not only the transfer agreement itself, but also the agreements linked with the transfer of the shares have to be notarised. For example, if the obligation to transfer shares is laid down in an agreement without being notarised, none of the parties is bound and may at any time choose to rescind from the agreement. At least, until the transfer is validly affected, leading to validation of the linked agreements as well.

2.7 The enterprise company -"Unternehmergesellschaft (haftungs-beschränkt)"-

Again, since October 1, 2008, a new form of a limited liability company, a "minor" GmbH, the so-called "enterprise company (with limited liability)" – in German "*Unternehmergesellschaft* (*haftungsbeschränkt*)" has been established. This company does not require any minimum capital. The registered share capital has to be paid up completely and capital contributions have to be made in cash only. The company has to observe certain restrictions with respect to distribution of profits.

The intention of the German legislator for introducing the enterprise company was twofold: On the one hand he wanted to counter the utilization of the English "Private Company Limited by Shares" in Germany, on the other hand he wanted to provide a type of company to small businesses, that is easily set up, does not require huge initial capital, but does limit the personal liability of the shareholders. The UG does not appear to have been a great success. This may be because customers and business partners in Germany may be wary of a company where the owner is not able to find start up capital of EUR 25,000 for his business.

3. Combination of Limited Partnership (KG) and Limited Liability Company (GmbH), the GmbH & Co. KG

The limited partnership is an entity in which the general partner is a limited liability company (*GmbH & Co. KG*). Today it ranks in numbers, second only to the GmbH. More than 120.000 commercial entities are structured as a GmbH & Co. KG in Germany.

3.1 Reasons for choosing a GmbH & Co. KG

There are a number of possible motives for choosing a GmbH & Co. KG instead of a GmbH. Basically, the GmbH & Co. KG is attractive to those who want to combine the advantages of a partnership with the advantages of a corporation, i.e., the greater- in comparison with the GmbH- flexibility of a KG and certain possible tax advantages with the limited liability enjoyed by the shareholders of a GmbH. A GmbH & Co KG allows for the participation of a great number of limited partners, where the GmbH structure has difficulties.

3.2 The basic structure of a GmbH & Co. KG

The GmbH & Co. KG is a hybrid legal form in which a limited liability company (GmbH) serves as the general partner of the partnership. This hybrid form is legally considered to be a limited partnership. The specialty of this construction is that the liability of all persons involved is limited. The persons listed as limited partners are liable only to pay their registered contribution (there is no statutory minimum contribution). Although the general partner GmbH as such has unlimited liability, the legal form of the GmbH provides for the limitation of liability of its shareholders.

Usually, the limited partner(s) also holds all shares in the GmbH which acts as general partner. The result of this structure is, that the limited partner(s) are not only holding all interest in the KG directly and indirectly via the GmbH but are also controlling the partnership via their shareholding of the GmbH, even though they are excluded from managing the KG directly. In the end, one natural person, acting as limited partner, shareholder of the GmbH and managing director of the GmbH, can set up this company structure.

Since the GmbH & Co KG under German tax law is not a “legal person”, it is regarded as “transparent” for German income tax and corporate income tax purposes. With respect to these taxes, the profits generated by the partnership are allocated to its individual or corporate partners, and are taxed at their individual level.

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HONG KONG

Doing Business in Hong Kong

1. Form of Business Entities

A private company limited by shares or a limited liability company ("**LLC**") is the most common type of business entity for overseas companies wishing to carry on business in Hong Kong. Overseas companies interested in establishing business presence in Hong Kong can also set up a branch or a representative office.

1.1 *LLC*

1.1.1 A LLC can be incorporated in Hong Kong by registration with the Companies Registry under the Companies Ordinance (Cap. 32 of the Laws of Hong Kong)(the "**Ordinance**"). A LLC can be a private company or a public company and can be limited by shares or limited by guarantee as provided in Section 4(2) of the Ordinance.

1.1.2 As the subsidiary would be a separate legal entity, any liabilities are limited to the subsidiary company itself and would not extend to its overseas parent company.

1.2 *Branch and representative office*

1.2.1 A branch in Hong Kong is a legal entity registered with the Companies Registry and is treated as an extension of the overseas parent company. Branch offices are subject to the same tax and legal consequences as companies incorporated in Hong Kong.

1.2.2 A representative office is not treated as a legal entity and is required to register with the Inland Revenue Department and obtain a Business Registration Certificate. A representative office cannot engage in any profit making activities and can only engage in activities such as promotion or liaison activities and market research.

1.2.3 The overseas parent company would still be accountable for all the liabilities and debts of the branch and the representative office.

2. LLC

As LLC is the most common type of business entity in Hong Kong, this briefing note deals with issues relating to LLCs.

2.1 Board of Directors

Role of directors

2.1.1 The general duties of directors are to manage the business and affairs of the company in good faith and for the benefit of its members as a whole. The Companies Registry has published "A Guide on Directors' Duties" for the reference of the interested parties. Please go to the following link for a copy of the guide.

(http://www.cr.gov.hk/en/publications/docs/director_guide-e.pdf).

2.1.2 The Ordinance imposes numerous duties on directors, for example, to keep proper books and accounts (Section 121) and to lay out a profit and loss account and balance sheet in annual general meetings (Section 122).

Requirement of directors

2.1.3 Section 153A of the Ordinance provides that a private company may have just one director. Section 154A of the Ordinance also states that a corporate body may be a director of a private company which is not a member of a group of companies of which a listed company is a member.

2.1.4 Section 157C of the Ordinance imposes the 18 years of age as the minimum age of a director.

2.1.5 There are no director residency/nationality restrictions.

Frequency of Board meetings

2.1.6 There are no statutory requirements in Hong Kong regarding the frequency of holding Board meetings. Therefore, the frequency of Board meetings varies depending upon the provisions in the articles of association of the company.

Contents of Board meetings

2.1.7 The contents of Board meetings are not prescribed by law. As a matter of best practice, the company may consider the following suggestion with reference to the Listing Rules:

2.1.7.1 the information provided in the Board meetings should include background or explanatory information relating to matters to be brought before the Board, copies of disclosure documents, budgets, forecasts and other relevant internal financial statements. In respect of budgets, any material variance between the projections and actual results should, as a matter of best practice, also be disclosed and explained.

2.2 Shareholders

Role of shareholders

2.2.1 Shareholders are not involved directly in the company's management. They regulate and oversee the act of the Board by voting in the annual general meetings ("**AGMs**") and extraordinary general meetings ("**EGMs**").

2.2.2 The Ordinance requires shareholders' approval for matters concerning, for example, the alteration of the company's articles (Section 13), private companies redeeming or buying back shares out of capital (Section 49I) and removal of directors (Section 157B).

Requirements relating to shareholders

2.2.3 Section 29 of the Ordinance provides that a Hong Kong private limited company can have a minimum of one and maximum of 50 shareholders. There is no residency requirement of shareholder, but he must be at least 18 years of age. The shareholder can be a person or a corporate entity.

Frequency of general meetings

2.2.4 AGM

Section 111 of the Ordinance states that every company shall in each year hold an AGM and that not more than 15 months shall elapse between the date of one AGM and that of the next. A newly incorporated company must hold at least two AGMs in the 3 years following incorporation. The first of these AGMs must be held within 18 months of the date of incorporation.

2.2.5 EGM

Section 113 of the Ordinance provides that an EGM may be held at the request or by direction of directors or members.

Contents of general meetings

There is no statutory requirement regarding the contents of general meetings. As a general practice, the AGM usually includes the declaration of dividend and the distribution of any reports of the directors and auditors.

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SWEDEN

1. Types of entity

Swedish limited liability companies (*Sw: aktiebolag*, abbreviated *AB*) are a predominant feature in Swedish business life and are regulated by the Companies Act (the Act) of 2005, as amended. The Act makes a distinction between public companies which are entitled to make public offerings and privately held companies which are not. Public companies must have the abbreviation (publ) in their name.

Setting up a business in Sweden is a straightforward process. Procedures are simple and efficient, based on a transparent system that seeks to facilitate establishment of new enterprises.

2. Limited Liability Company or Branch?

A foreign-based company wishing to establish an enterprise in Sweden will most likely choose one of two main business structures:

2.1 Subsidiary – a limited liability company; and

2.2 Branch (*Sw*: *filial*)

Most foreign investors who set up a business in Sweden chose to incorporate a limited liability company.

3. Representative office

The issue of starting a representative office is sometimes raised. A representative office can perform a very limited range of functions. It is not a legal structure in Sweden and cannot conduct business on its own behalf or through its employees or premises. Also, a representative office cannot be granted a power of attorney to act on behalf of the owner company. A branch or a limited liability company offers much greater flexibility.

4. Few business operations require licenses

It is important to establish whether a license is needed to carry out the business of the company, although it should be noted that it is quite unusual for a business to require a license in Sweden. License requirements are generally regulated by law.

However, foreign banks and other financial institutions with subsidiaries and branches in Sweden are authorized/registered with the Swedish Financial Supervisory Authority (*Sw: Finansinspektionen*).

5. Limited liability companies – the basics

A limited liability company is a legal entity that draws a clear distinction between the company and its shareholders. It can enter into contracts and own property, such as real estate, and other assets. It can also be a party in legal proceedings.

6. Private or public?

There are two forms of limited liability company: private and public. Certain differences exist between them in terms of applicable regulations. Since the vast

majority of international companies choose to set up a private limited liability company that is the focus of this briefing note.

7. Forming a private limited liability company

Very few companies wish to go through the process of forming a limited liability company themselves and therefore this process will not be described in this briefing note.

The easiest and most common way to set up a limited liability company in Sweden is to purchase a dormant off-the-shelf company from a company agent or law firm.

Off-the-shelf companies are brand-new businesses that have not previously traded or engaged in commercial activity and come incorporated and registered ready for sale.

Buying an off-the-shelf company means that the company can start business as soon as the buyer has signed the share purchase agreement and transferred the share capital (minimum SEK 50,000) to a bank account specially opened for the company.

The buyer will thereby receive a general power of attorney enabling him to act on the company's behalf. The new shareholders must then hold an extraordinary general meeting to change the articles of association to reflex the nature of the business and to appoint a new board of directors.

A board meeting must then be held to decide the company's new name and elect a chairman of the board of directors and a managing director where applicable. The changes shall be registered with the Swedish Companies Registration Office.

The cost of buying a company "off-the-shelf" is generally approximately SEK 10,000 for the company plus legal cost depending on the services provided in connection with the acquisition. The vast majority of foreign companies that set up a limited liability company use the off-the-shelf company solution.

8. Share capital

The legal minimum share capital is SEK 500,000 in a public company and SEK 50,000 in a private company.

The share capital of a limited liability company is divided into shares of equal face value.

9. Registering a company name

The company name is registered with Swedish Companies Registration Office to ensure it will not be taken by another business. The name protection for a limited liability company is valid for Sweden and for the business activity that the company has registered. Certain rules apply when applying for company names. The name must i.e. not be similar to any other registered company name or trademark and it must not be misleading. All company names also include the Swedish word for limited liability company, a*ktiebolag*, or its abbreviated form, *AB*.

10. Registering for tax

By filling the form Notification of Tax and Contributions Liability (*Sw Skatte- och avgiftsanmälan*) to the Swedish Tax Board *(Sw: Skatteverket)*, the company will automatically be sent all documents, e.g. VAT returns and information required accounting for and paying VAT, income tax and social security contributions.

11. Shareholders, board of directors and managing director

The Act basically acknowledges three levels within an AB, the shareholders, the board of directors (*Sw: styrelse*) and the managing director (*Sw: verkställande direktör*).

In addition to this there are authorised signatories (*Sw: firmatecknare*) who are authorised to sign for and on behalf of the company and – of course – the auditor with his particular task.

12. Shareholders - shareholders' meetings

The powers of the shareholders of an AB are exercised at shareholders' meetings. Among the prerogatives of the shareholders is the right to change the articles of association, to increase or reduce the share capital, to issue convertible bonds and certain other securities, to appropriate the result of the company, to appoint directors and auditors and to wind up the company. Of these, the right to issue new shares and securities may be delegated to the board of directors for a limited period of time.

Without such explicit delegation, the board of directors may not issue any shares or other securities with the effect of diluting the existing share capital.

13. AGM, other meetings

An annual general meeting is to be convened by the board of directors within six months from the end of the company's financial year. The purpose of the annual general meeting is to adopt the annual report, to appropriate the result of the company's business, to discharge the board from liability and to elect the directors and the auditors.

Other shareholders' meetings may be called as and when needed, and shall be called if required by an auditor or holders of one-tenth of all shares issued.

14. Voting

At shareholders' meetings, every person who is registered as a shareholder in the share register of the company is entitled to vote.

Physical possession of the share certificate representing a share is vital to shareholders in any company not linked to the central system of instrumentless securities.

Differences in voting power may exist between different classes of shares in proportions of up to 1:10, but no shares may be issued without voting rights.

Representation and voting by proxy is permitted, but proxies are not valid for more than one year.

15. Shareholder liability

Cases where the courts have lifted the corporate veil and have declared a shareholder liable for debts of an AB are rare. Such rulings are only known in cases where a company has been abused by its shareholders, insufficiently capitalised and conducting no independent business.

16. **Board composition**

The number of directors and alternate directors must be stated in the articles of association (*Sw: bolagsordning)*.

If the company is private, the board can consist of one or two directors with at least one deputy and then it is also optional to have a managing director.

If the company is public, the board shall consist of minimum three directors and it is mandatory to have a managing director.

Further, a chairman of the board has to be appointed if the board consists of more than one director. The chairman of the board of a private limited liability company may also serve as managing director.

17. **Board composition - local residency requirements**

It is required that a majority of the directors is resident within the EEA, unless otherwise permitted in an individual case by the Swedish Companies Registration Office.

If the company has no authorized representative resident in Sweden, the board must authorize a person resident in Sweden to receive service of process on the company's behalf (*Sw: delgivningsbar person*) and file such authorization for registration with the Swedish Companies Registration Office.

18. **Power to sign**

If no individual is registered as having power to sign, the board is entitled to sign on the company's behalf. In such cases, more than half of the board members must sign jointly.

19. **Duties of the board of directors and managing director**

The duties of the board of directors vary according to the size of the company and whether a managing director has been appointed. The board is in charge of the organization and management of the company and appoints the managing director. In private limited companies, the board may appoint a managing director if it wishes.

The board convenes the general meeting of shareholders and decides who is authorized to represent the company (power to sign).

The chairman leads the work of the board and has an overall responsibility for the board's work and must ensure that the board fulfils its assignments.

The board of directors has e.g. the following duties:

19.1 the board shall continuously monitor that any division of work or delegation of work can be maintained;

19.2 subject to the managing directors duty under Chapter 8 section 29 of the Act, the board of directors shall ensure that the company's organisation in respect of accounting, management of funds and the company's financial position in general includes satisfactory controls;

19.3 prepare annual accounts and all other financial reports including interim report;

19.4 convening shareholders' meeting in accordance with the Act and the company's articles of association;

19.5 appoint the company's managing director;

19.6 decision regarding the company's authorization; and

19.7 ensure that the company adhere relevant legislation on the labour market.

20. **Rules of procedure**

If the board appoints a managing director it is required to adopt instructions for the allocation of work between itself and the managing director. It also adopts rules of procedure for its own work.

A company whose board has only one member needs no rules of procedure.

21. **Board meetings – quorum - resolutions**

The chairman of the board of directors shall ensure that meetings are held when necessary. Meetings of the board of directors shall always be convened where so requested by a board member or the managing director.

If an ordinary director is not in a position to participate at a board meeting, then his alternate (if any) must be given an opportunity to participate.

The board constitutes a quorum if more than half the number of directors is present and if they represent more than one-third of all directors, unless the articles of association provide for a greater number.

Resolutions are passed by simple majority of votes, with the chairman holding a casting vote (again unless the articles of association provide otherwise).

No resolutions may be passed unless all directors have been given, to the extent possible, the opportunity to participate in the discussion on the matter and have been given sufficient facts to resolve it.

A director who is overruled in voting against a proposition is entitled to have his dissent registered in the minutes. This of course means that he cannot be held responsible for the resolution.

22. **Director's responsibility**

The board is responsible for ensuring that taxes are paid in due time and that annual accounts are prepared and filed with the Swedish Companies Registration Office. The board must also report any changes in the company.

Although the powers of the directors are collective, their responsibility is individual. At the outset, each director carries equal responsibility and cannot

excuse himself for lacking the necessary professional qualifications to act as a director.

As an exception to this, the Act lays a particular responsibility on the chairman who is to lead the work of the board and to supervise that the board fulfils its duties.

It is further generally recognised that directors being experts in a specific field carry a greater burden of liability for matters within their expertise.

23. **Discharge from liability**

At the annual general meeting the shareholders have to decide whether or not to discharge the directors from liability in respect of their management of the company's business during the past financial year.

Discharge from liability is granted on an individual basis, meaning that some directors may be discharged and others not.

For more information, please contact:

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Director Change Form

A

Jurisdiction	PRC (excluding Hong Kong, Taiwan, and Macao)
Entity Type	Foreign Invested Limited Liability Company
According to local law – Minimum number of Directors required at all times.	Three for Board of Directors, or a sole executive director for small companies.
According to local law – Residency requirements of Directors.	No particular requirement
According to local law – When does an appointment become effective?	At the time the new director is appointed by the Company. Note: such change needs to be filed at the administration for industry and commerce ("AIC").

B

Please provide a list of information required to draft documentation to effect change of Director.
The relevant provisions in the articles of association regarding replacement of directors
A list of the existing directors of the company
Name, passport (or ID card) copy and CV of the new directors
A copy of the company's business licence

C

Please provide a list of documents which will be prepared by you to effect the change, once you are in receipt of the information in Box B.

Document	Action required on it	Deadline for action
Change of foreign-invested enterprises registration application Form	Signed by legal representative of the company and chopped by the company	N/A
Letter of dismissal for existing directors	Signed by the relevant shareholder	N/A
Letter of appointment for new directors	Signed by the relevant shareholder	N/A
Copies of the new directors' passports or ID cards		N/A
A copy of business licence of the company	chopped by the company	N/A
Power of attorney to agent to handle the filing	Signed by legal representative of the company and chopped by the company	N/A
Other documents may be required by the AIC		

D

Please provide details on how Directors change is registered in jurisdiction?
Be filed with the AIC.
Is there a deadline for registration?

No.
Are there any penalties incurred for not complying with this requirement?
No.

E

Please record any red flag issues or matters requiring special attention
If one of the replaced directors is the current legal representative of the company, then the articles of the association of the company will need to be amended and it needs to be approved by the approval authority before registration. Additional documents will be required in this circumstances.

Fee Estimate: GBP500 plus agent fees

Jurisdiction	PRC (excluding Hong Kong, Taiwan and Macao)
Entity Type	Foreign Invested Limited Liability Company

Name Details	
Does the name of the company require approval by the Registry or other authorities?	A company name pre-approval is required from the administration for industry and commerce ("AIC").
How many prospective names will you require?	Usually one proposed name and three backup names.
Are there any restrictions or limitations on words that can be used in company names?	A name must be composed of the name of the place (usually municipal level), the trade name, industrial sector and organizational form in the abovementioned sequence, unless otherwise provided for by law. The names must be in Chinese characters and must not use foreign words, the Chinese phonetic alphabet or Arabic numbers. The English name of the company cannot be registered and therefore is not an official name of the company.

Address Details	
Does the company need to provide a registered address?	Yes.
Are there any limitations on the registered address (i.e. must be in-country, must not be a PO box)	Yes. The company must have premises which are suitable for the envisaged business of the company. The company needs to provide lease documents or title certificates to evidence such premises.
If the client has no physical location in-country, can they use your address for the purposes of registration?	No.

Officer Details	
How many Directors are required?	3-13 for a board of directors or a sole executive director for small companies.
Are any other officers required (i.e. Secretary)?	A board of supervisors, or 1-2 supervisors for small companies. Managers are optional, although they are compulsory used for JVs and, for EJVs, the GM and deputy GM must be appointed separately by each of the JV partners . Secretary is not required.
What personal details will you need for each officer?	CV and photos of the proposed legal representative (usually the chairman of the board or the general manager). Passport/ID card copy for all the

	directors, supervisors and managers.
Is there a requirement for any in country resident directors?	No.
Do you need proof of address or Identity for officers? If YES, in what format?	Yes. Passport/ID card copy for all the directors, supervisors and managers is required.

Shareholders Details	
How many shareholders are required?	1-50, depending on the nature of the entity.
Are there any restrictions on who can be a shareholder?	Generally no. However, depending on the industry the company is to engaged in, there may be some restrictions in respect of experience and size of the shareholder.
What information will you require about shareholder?	Bank credibility information plus certain other information in certain cases.
Will you require proof of address or ID from the shareholders?	Certificate of incorporation for company shareholder or identification documents for individual shareholder, which must be notarized and legalized by the local Chinese embassy or consulate.

Share Capital	
Will the company need to specify a maximum number of shares that can be issued?	Limited liability companies do not issue shares, but rather have registered capital which the shareholders must contribute within 2 years after the incorporation of the company.
Is any stamp duty paid on the issued share capital? If YES, at what rate is this calculated.	Stamp duty is not applicable in this instance.

Other Details
Do you require any further information about the company or its officers? If YES, please specify. We will also need a feasibility study report regarding the business plan of the company prepared by the shareholders.

Timescale	
How long will it take to complete incorporation?	It depends on the type of entity to be established, the business industry of the company, the location and the scale of investment. The time can be from 2 months to several years.

Is there any way to expedite the incorporation for an extra fee?	No.

Costs	
Fees for Incorporation	The fees for incorporating a wholly foreign owned consulting company in Shanghai are approximately GBP20,000-25,000. The fees will be higher if more than one shareholder is involved, or if additional government approval is required. Fee for incorporating other entities in China vary according to the type of entity in question.
Anticipated Disbursements/Expenses	Agent service fees of approximately GBP1800-3,000, plus government charges

Jurisdiction	PRC (excluding Hong Kong, Taiwan and Macao)
Entity Type	Foreign Invested Limited Liability Company

	Annual recurring requirements	
1	Do companies need to hold a meeting of the members/shareholders to, for example, approve the accounts; and if so	No.
1.1	Do members/shareholders meetings need to take place in the country of incorporation;	
1.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	
1.3	May a company resolve or elect not to have annual meetings of the members/shareholders	
2	Does the company need to hold a meeting of the directors or officers? and if so	Yes. At least once a year for EJVs and CJVs.
2.1	Do such director meetings need to take place in the country of incorporation?	Board meetings generally should take place at the location of the JV's legal address.
2.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	Subject to the Articles of Association.
3	Do the annual accounts need to be filed at the companies registry or similar	The company needs to submit the audited account to the local administration for industry and commerce ("AIC") and other 5 authorities.
4	Are there other annual filing requirements such as an annual return of information?	The company needs to complete an annual inspection with the local AIC and other 5 authorities during the second quarter each year.
	Continuing requirements	
7	When a shareholder changes during the year in the normal course is there a requirement to notify the local registry; and Does this need to be done at the time the change or at some later point in the year?	Yes. The change of shareholder is not effective until it is approved by the competent approval authority. It also needs to be registered with the local administration for industry and commerce("AIC").
8	Are there other annual ongoing requirements in order to keep the company in good standing?	The company needs to register with the local AIC when the following items change: 1. company name 2. registered address 3. scope of business 4. type of company 5. legal representative

		6. shareholder details 7. branch details 8. registered capital 9. paid in capital 10. directors, supervisors or managers For items 1-7, the company needs to obtain approval from its approval authority before it can register the changes with the local AIC.

Costs	
Anticipated Disbursements/Expenses	Due to PRC law requirements, we are not permitted to handle annual inspection for clients. The costs for change of registrations vary from item to item. There will be a disbursement for agent fees as all the applications need to be submitted through a local agent due to the PRC law constraints on foreign law firms.

Director Change Form

A

Jurisdiction	Sweden
Entity Type	Aktiebolag (Limited liability company)
According to local law – Minimum number of Directors required at all times.	-Private limited liability company: One. (If less than three at least one deputy member must be appointed). -Public limited liability companies: three.
According to local law – Residency requirements of Directors.	At least half of the board members and the deputy members (counted separately) must be resident within the EEA. Furthermore, the following persons must be resident within the EEA - the managing director - the deputy managing director - at least one of the signatories (being board member, deputy member or another person authorized to sign on behalf of the company). If the company has no authorized representative resident in Sweden, the board of directors can authorize us to receive service of process on the company's behalf.
According to local law – When does an appointment become effective?	When the notification of the change has been received by the Swedish Companies Registration Office.

B

Please provide a list of information required to draft documentation to effect change of Director.
Personal and address details: Full name; residential address; date of birth; nationality.
Name of person representing the shareholder at the board meeting.
Chairman of the board (to be appointed if the board of directors consists of more than one board member).
Signatory power for the company.
Certified copy of passport/other identification document for each person who is not registered in the Swedish population register.

C

Please provide a list of documents which will be prepared by you to effect the change, once you are in receipt of the information in Box B.

Document	Action required on it	Deadline for action
Filing application	to be signed by a board member/the managing director	
Extra shareholders' meeting minutes	to be signed	
Inaugural board meeting minutes	to be signed	

D

Please provide details on how Directors change is registered in jurisdiction?
A form is sent to Swedish Companies Registration Office for registration.
Is there a deadline for registration?
No, but it shall be done immediately after appointment.
Are there any penalties incurred for not complying with this requirement?
No.

E

Please record any red flag issues or matters requiring special attention
The articles of association can contain minimum and maximum requirements regarding
the number of directors.
Fee Estimate: Details available on request.

Jurisdiction	Sweden
Entity Type	Aktiebolag (Limited liability company)

Name Details	
Does the name of the company require approval by the Registry or other authorities?	Yes, by the Swedish Companies Registration Office.
How many prospective names will you require?	It's preferable to state more than one proposal.
Are there any restrictions or limitations on words that can be used in company names?	The name must not be similar to any other registered company name or trademark, must not be misleading, and it must do more than merely describe the business activity. All company names shall include the word "aktiebolag" or the abbreviated form, "AB".

Address Details	
Does the company need to provide a registered address?	Yes.
Are there any limitations on the registered address (i.e. must be in-country, must not be a PO box)	No, but the company shall have its registered office in Sweden.
If the client has no physical location in-country, can they use your address for the purposes of registration?	Yes.

Officer Details	
How many Directors are required?	Please see the "Director Change Form".
Are any other officers required (i.e. Secretary)?	No, except for an auditor.
What personal details will you need for each officer?	Please see the "Director Change Form".
Is there a requirement for any in country resident directors?	Please see the "Director Change Form".
Do you need proof of address or Identity for officers? If YES, in what format?	No.

Shareholders Details

How many shareholders are required?	One person/enterprise.
Are there any restrictions on who can be a shareholder?	No.
What information will you require about shareholder?	Name, personal code number/ Org. Reg. No. and address.
Will you require proof of address or ID from the shareholders?	No.

Share Capital	
Will the company need to specify a maximum number of shares that can be issued?	Yes, the articles of associations shall state a minimum and maximum number of shares.
Is there a minimum number of shares that must be issued?	
Is any stamp duty paid on the issued share capital? If YES, at what rate is this calculated.	No.

Other Details
Do you require any further information about the company or its officers? If YES, please specify
Yes, name of person representing the shareholder.

Timescale	
How long will it take to complete incorporation?	The registration time is approximately 4 weeks.
Is there any way to expedite the incorporation for an extra fee?	No, but an alternative is to buy an off-the-shelf company.

Costs	
Fees for Incorporation	SEK 15 000 (also, please note that the share capital shall amount to not less than SEK 50 000).
Anticipated Disbursements/Expenses	SEK 3 100

Jurisdiction	**Sweden**
Entity Type	**Aktiebolag**

	Annual recurring requirements	
1	Do companies need to hold a meeting of the members/shareholders to, for example, approve the accounts; and if so	Yes.
1.1	Do members/shareholders meetings need to take place in the country of incorporation;	Yes, formally where the company has its registered office but meetings can be held per capsulam.
1.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	Yes, within six months of the expiry of each financial year.
1.3	May a company resolve or elect not to have annual meetings of the members/shareholders	No.
2	Does the company need to hold a meeting of the directors or officers? and if so	Yes, an inaugural meeting incl adoption of rules of procedure, MD instructions and instructions for the financial reporting.
2.1	Do such director meetings need to take place in the country of incorporation?	Yes, formally where the company has its registered office but meetings can be held per capsulam.
2.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	Yes, immediately after the annual shareholders' meeting.
3	Do the annual accounts need to be filed at the companies registry or similar	Yes.
4	Are there other annual filing requirements such as an annual return of information?	No.
	Continuing requirements	
7	When a shareholder changes during the year in the normal course is there a requirement to notify the local registry; and Does this need to be done at the time the change or at some later point in the year?	No.
8	Are there other annual ongoing requirements in order to keep the company in good standing?	No.

Costs	
Anticipated Disbursements/Expenses	Drafting of minutes are covered under the fixed fee arrangement

Director Change Form

A

Jurisdiction	France
Entity Type	S.A.S /S.A.
According to local law – Minimum number of Directors required at all times.	For an SAS:1 at least, a President General Director For an SA: 3
According to local law – Residency requirements of Directors.	- If French or a citizen of (i) a foreign country that is a member of the EU, (ii) Switzerland or (iii) OECD country, whether residing in France or not: a copy of the currently valid passport; - If he is a foreigner not residing in France and a citizen of a non-EU or non- OECD country: a copy of the currently valid passport + prefectural authorization; - If he is a foreigner residing in France: a copy of the currently valid passport; - In all cases, a certificate of non conviction indicating filiation must also be produced.
According to local law – When does an appointment become effective?	For a SAS: date of Minutes of the decision of the (Sole) shareholder(s) For a SA: date of Minutes of the decision of the Shareholders' Meeting

B

Please provide a list of information required to draft documentation to effect change of Director.
A copy of passport
A certificate of non conviction with: parent's name, date and place (city and country) of birth, Nationality, Current address.

C

Please provide a list of documents which will be prepared by you to effect the change, once you are in receipt of the information in Box B.

Document	Action required on it	Deadline for action
Report of the President		
Text of resolutions		
Convening letters		Must be sent according to the provisions set forth in the by-laws (maximum: 15 days before the date of the meeting)
Minutes of the (sole) shareholder(s) meeting/		

Jurisdiction	**France**
Entity Type	**SAS/SA**

Name Details	
Does the name of the company require approval by the Registry or other authorities?	It is necessary to verify with the INPI or with the Register of companies if somebody already uses this name. INPI: 26 bis rue de Saint Petersbourg 75 008 paris
How many prospective names will you require?	
Are there any restrictions or limitations on words that can be used in company names?	It's not possible to use: - name of a regulated activity - the term "*fondation*" - the term "*solde*" - the symbol "€" - an ambiguous term (on the signification) - a third's trademark for similar products - a famous trademark - the third's surname if it's a specific surname - a famous pseudonym

Address Details	
Does the company need to provide a registered address?	Yes
Are there any limitations on the registered address (i.e. must be in-country, must not be a PO box)	Yes, the registered address must correspond to the place of effective management of the company. It can't be a PO box.
If the client has no physical location in-country, can they use your address for the purposes of registration?	No

Officer Details	
How many Directors are required?	For an SAS : 1 (President General Director) For an SA: 3
Are any other officers required (i.e. Secretary)?	A President
What personal details will you need for each officer?	Last name, First name, Place and date of birth, Address, Nationality. Parent's names.

Is there a requirement for any in country resident directors?	No
Do you need proof of address or Identity for officers? If YES, in what format?	- Yes: passport

Shareholders Details	
How many shareholders are required?	1 for an SAS 7 for an SA
Are there any restrictions on who can be a shareholder?	No
What information will you require about shareholder?	- Legal entity: corporate name, registered office, share capital, legal representative's name and position. - Individuals: last name, first name, place and date of birth, address, nationality.
Will you require proof of address or ID from the shareholders?	No, a written confirmation by the client is sufficient.

Share Capital	
Will the company need to specify a maximum number of shares that can be issued?	No (Except otherwise provided in the by-laws)
Is there a minimum number of shares that must be issued?	Capital minimum: 1 euro for a SAS Capital minimum 37,000 euros for an SA
Is any stamp duty paid on the issued share capital? If YES, at what rate is this calculated.	No

Other Details
Do you require any further information about the company or its officers? If YES, please specify.
The purpose of the activity
The date of closing of the financial year
Contact details and letters of acceptation of their duties of the statutory auditors
Number of employees
Copy of the lease or domiciliation agreement for the registered office.
Bank deposit certificate for the moneys corresponding to the share capital

Timescale	

How long will it take to complete incorporation?	Approximately 15 days from the deposit of documents in the Commercial court.
Is there any way to expedite the incorporation for an extra fee?	No

Costs	
Fees for Incorporation	For an SAS: approximately 900 € For an SA:1,100 €
Anticipated Disbursements/Expenses	

Decision Minutes of the Shareholders' Meeting		
Power of Attorney		

D

Please provide details on how Directors change is registered in jurisdiction?
You have to perform formalities with the Clerk of the Commercial Court and/or with the Prefecture (see above)
Is there a deadline for registration?
One month
Are there any penalties incurred for not complying with this requirement? In case of a SA, the decisions adopted by the Board may be declared null and void if the Company does not have at least 3 Directors. In case of a SAS, a company cannot be registered without a *Président Directeur-Général* being appointed.

E

Please record any red flag issues or matters requiring special attention
If the director to be appointed is a foreigner not residing in France and is a citizen of a non-EU or non-OECD country, please note that it takes generally one month to obtain the prefectoral authorization to exercise a commercial activity in France. If said director is a US citizen for instance, we will need to obtain a copy of a recent police/criminal record from the FBI which takes time.

Fee Estimate:€ 705 (taxes excluded and fee registration)

Jurisdiction	France
Entity Type	SAS/SA

	Annual recurring requirements	
1	Do companies need to hold a meeting of the members/shareholders to, for example, approve the accounts; and if so	Yes
1.1	Do members/shareholders meetings need to take place in the country of incorporation;	Normally not, but the by-laws of each company must be checked.
1.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	The accounts must be approved 6 months at the latest after the close of the fiscal year
1.3	May a company resolve or elect not to have annual meetings of the members/shareholders	No
2	Does the company need to hold a meeting of the directors or officers? and if so	- Report of the President in an SAS - Board of Directors Meeting in an SA
2.1	Do such director meetings need to take place in the country of incorporation?	No
2.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	The accounts must be approved 6 months at the latest after the close of the fiscal year
3	Do the annual accounts need to be filed at the companies registry or similar	Yes
4	Are there other annual filing requirements such as an annual return of information?	- general report of the statutory auditors on the annual accounts - special report of the statutory auditors on the regulated agreements
	Continuing requirements	
7	When a shareholder changes during the year in the normal course is there a requirement to notify the local registry; and Does this need to be done at the time the change or at some later point in the year?	No
8	Are there other annual ongoing requirements in order to keep the company in good standing?	

Costs	
Anticipated Disbursements/Expenses	Fee registration: for an SAS approximately 150 €; for an SA, approximately 400 €.

Director Change Form

A

Jurisdiction	UK
Entity Type	Private Company Limited by Shares
According to local law – Minimum number of Directors required at all times.	One
According to local law – Residency requirements of Directors.	No requirement
According to local law – When does an appointment become effective?	The date on which the board meeting is held to approve the appointment

B

Please provide a list of information required to draft documentation to effect change of Director.
Director name, Residential/service address, Date of Birth, Occupation, Nationality,
Appointment Date
Three pieces of the following information for the purposes of electronic filing:
First three letters of colours of eyes, First three letters of fathers forename, First three
letters of mothers maiden name, First three letters of town of birth, Last three digits of
telephone number

C

Please provide a list of documents which will be prepared by you to effect the change, once you are in receipt of the information in Box B.

Document	Action required on it	Deadline for action
Board minutes approving appointment	Signature and date	7 days
Letter of consent to act	Signature and date	7 days
Form AP01	Signature and date	7 days

D

Please provide details on how Directors change is registered in jurisdiction?
AP01 form is filed with the Registrar of Companies
Is there a deadline for registration? 15 days from the date of signature
Are there any penalties incurred for not complying with this requirement? No

E

Please record any red flag issues or matters requiring special attention

Fee Estimate: £150 (approx)

Jurisdiction	UK
Entity Type	

	Annual recurring requirements	
1	Do companies need to hold a meeting of the members/shareholders to, for example, approve the accounts; and if so	Shareholder meetings are only required for private limited companies if there is a specific provision contained in the Company's Articles of Association
1.1	Do members/shareholders meetings need to take place in the country of incorporation;	See above
1.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	See above
1.3	May a company resolve or elect not to have annual meetings of the members/shareholders	See above
2	Does the company need to hold a meeting of the directors or officers? and if so	Yes, in respect of the approval of Annual Accounts (and to approve any changes to the board and membership)
2.1	Do such director meetings need to take place in the country of incorporation?	Only if there is a specific provision in the Company's Articles of Association
2.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	No, CA2006 requirements is that "reasonable" notice should be given to all directors who are entitled to attend the meeting.
3	Do the annual accounts need to be filed at the companies registry or similar	Yes, private limited companies should file their accounts within 9 months of the ARD and public limited companies should file their accounts within 6 months of the ARD
4	Are there other annual filing requirements such as an annual return of information?	The company must file an Annual Return which details

		information regarding its officers and shareholders
	Continuing requirements	
7	When a shareholder changes during the year in the normal course is there a requirement to notify the local registry; and Does this need to be done at the time the change or at some later point in the year?	Any share allotments should be registered at Companies House at the time of issue. Share transfers are included in the company's next Annual Return
8	Are there other annual ongoing requirements in order to keep the company in good standing?	No, however, it is important to ensure that filings remain up to date

Costs	
Anticipated Disbursements/Expenses	Details available on request.

Jurisdiction	**UK**
Entity Type	**Private Company Limited by Shares**

Name Details	
Does the name of the company require approval by the Registry or other authorities?	The proposed name of a company will only require approval of the Government Department/body or secretary of the state if the chosen name suggests a connection with the Government, a devolved administration or a local authority or specified public authority. The name will also need approval if it contains a sensitive word or expression these are words which may imply a business pre-eminence, a particular status or function.
How many prospective names will you require?	One proposed name is required, we can then check the name on the Companies Names Index. A company may already have or be too similar to the proposed company name. In this case, another company name would be requested.
Are there any restrictions or limitations on words that can be used in company names?	As above, the full list of sensitive words can be found at the link below. http://www.companieshouse.gov.uk/about/gbhtml/gp1.shtml#ch3

Address Details	
Does the company need to provide a registered address?	Yes
Are there any limitations on the registered address (i.e. must be in-country, must not be a PO box)	The registered office address cannot be a PO Box address and must be situated in England and Wales (or Scotland for Scottish registered companies).
If the client has no physical location in-country, can they use your address for the purposes of registration?	Yes. Eversheds LLP, Manchester do offer a registered office address service for £400 plus VAT per company per annum. We will forward all correspondence received to the client contact.

Officer Details	
How many Directors are required?	One director is required, however, if appointing a sole director they cannot also be secretary of the company.
Are any other officers required (i.e. Secretary)?	Under the Companies Act 2006, a private company limited by shares is no longer required to appoint a company secretary. However, should you wish to appoint a secretary we are able to offer a named company secretary for £200 plus VAT per company per annum.
What personal details will you need for each officer?	For each director we require their full name, residential address, service address (if different to the residential address. Please note this address will appear on the public register), date of birth,

	nationality and occupation. In order to send the incorporation form electronically to Companies House we would also require their electronic filing information. This is three pieces of information from the list below, this would then form a electronic signature: • first three letters of colour of eyes; • first three letters of father's forename; • first three letters of mother's maiden name; • first three letters of town of birth; • last three digits of passport number; • last three digits of national insurance number; • last three digits of telephone number.
Is there a requirement for any in country resident directors?	N/A
Do you need proof of address or Identity for officers? If YES, in what format?	N/A

Shareholders Details	
How many shareholders are required?	One
Are there any restrictions on who can be a shareholder?	A person, corporate entity or limited liability partnership can become a member of a company. However, an unincorporated body, such as a partnership, club or association, not registered under the Companies Act cannot be registered as a member. Additionally, the company cannot be a member of itself.
What information will you require about shareholder?	We will require the shareholders name, address, information on the number and class of shares to be issued to the shareholder. If the shareholder is a different to the persons being appointed to the company we will require their electronic filing information as detailed above. If the shareholder is a corporate entity we will require the name, address and electronic filing information for one of the officers of the corporate entity.
Will you require proof of address or ID from the shareholders?	N/A

Share Capital	
Will the company need to specify a maximum number of shares that can be issued?	Yes. Information on the class of shares and their value must also be provided.
Is there a minimum number of shares that must be issued?	A minimum of one share must be issued at incorporation.

Is any stamp duty paid on the issued share capital? If YES, at what rate is this calculated.	N/A

Other Details
Do you require any further information about the company or its officers? If YES, please specify.
Accounting Reference Date - we will require information on whether the company would like its accounting reference date to be changed. Upon incorporation this automatically defaults to the last day of the month on which the anniversary of the incorporation falls.
Chairman - the name of the chairman is to be provided only if it is to be confirmed in the first board minute.
Auditors and Bankers - the name and address of the auditors and bankers of the company should be provided only if it is to be confirmed in the first board minute.

Timescale	
How long will it take to complete incorporation?	For incorporation requests received before 12pm, we can guarantee a same day incorporation. For incorporations received after 12pm we cannot guarantee a same day incorporation however we will process it as soon as possible.
Is there any way to expedite the incorporation for an extra fee?	N/A

Costs	
Fees for Incorporation	£650.00 plus VAT This also includes: • preparation of the company's first board minutes and required resolutions; and • preparation of the company's statutory registers.
Anticipated Disbursements/Expenses	The above fee of £650.00 includes disbursements

We can also assist the company to keep up-to date with their annual obligations. Our annual compliance service includes includes:

• maintaining a company's Statutory Registers;

• preparing and filing annual returns;

• filing accounts and reminding you of deadlines for the annual accounts;

• preparing a company information sheet of the current details of the Company;

• provision of access to statutory information to the company's auditors; and

• preparing board minutes to make changes to the Company (i.e. appointment of new directors, change of auditors etc).

The cost of providing this service is £650 (plus VAT) per Company per annum.

The details and statutory records of the companies we maintain are kept in computer form on specialist company secretarial software. The information is both clear and concise and company details can be easily e-mailed internally (to fee-earners) and externally (to the company or any other third party). The software also has a computerised compliance diary, which assists us in advising on filing deadlines for annual returns and annual accounts, helping to ensure that client companies do not end up having to pay late filing penalties.

Director Change Form

A

Jurisdiction	Germany
Entity Type	GmbH (Limited Liability Company)
According to local law – Minimum number of Directors required at all times.	one
According to local law – Residency requirements of Directors.	none
According to local law – When does an appointment become effective?	On the date of signature of the resolution appointing the director

B

Please provide a list of information required to draft documentation to effect change of Director.
Full name of MDs to be appointed, revoked or who are resigning
Date of birth of MDs to be appointed, revoked or who are resigning
Residential address of MDs to be appointed, revoked or who are resigning
Type of power vested: sole or joint of MDs to be appointed
Exemption from restrictions of section 181 German Civil Code desired? (MD will be able to represent two entities at the same time or enter into agreements between the company and himself of MDs to be appointed
Is the MD to be appointed based in Germany or abroad- will he be able to appear in front of a German notary public?

C

Please provide a list of documents which will be prepared by you to effect the change, once you are in receipt of the information in Box B.

Document	Action required on it	Deadline for action
Shareholders resolution on appointment/revocation	Signature of representatives of shareholders	Depends on the date of effect desired
Proof of authorisation of the shareholders' representatives e.g. excerpt from the foreign commercial register showing the power of representation of the signatories, which will have to be translated and certified or secretary's certificate, notarised and apostilled	Original excerpt from respective authority, translation into German and certification; or: signature of company secretary and notarisation and apostille (respectively other form of legalisation)	Before registration
Resignation letter if another MD resigns	Signature of resigning MD	Before registration
Application to commercial register including all changes and including instructions of MD	Signature of MD to be appointed in front of German notary public, maybe additional signature of another MD in case of joint power of representation. If MD is abroad, signature of MD has to be notarised	Before registration

	and apostilled or legalised in some other form	
Special instructions in case MD is abroad	Signature of local counsel as instructing person and signature of MD to be appointed.	Before registration

D

Please provide details on how Directors change is registered in jurisdiction?
The originals of all documents mentioned above will be submitted electronically together with the application to the register court, through a German notary public
Is there a deadline for registration?
No official deadlines, but after appointment/revocation/resignation the registration should take place as soon as possible in order to minimise liability risks as the MDs are externally still authorised to act as MD as long as they are registered. MDs acting in their function of a MD before they are registered will have problems if they need to prove their authorisation if they have not been registered yet.
Are there any penalties incurred for not complying with this requirement?
The main risk is personal liability.

E

Please record any red flag issues or matters requiring special attention
The person to be appointed as MD has to be eligible ie will have to declare this (in the instructions)
The process of appointing MDs located abroad will generally require more time and more documents to be prepared.

Jurisdiction	**Germany**
Entity Type	**GmbH**

	Annual recurring requirements	
1	Do companies need to hold a meeting of the members/shareholders to, for example, approve the accounts; and if so	Yes, annually
1.1	Do members/shareholders meetings need to take place in the country of incorporation;	No, not necessarily. This depends on the AoA
1.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	Latest: 12 months after the end of the fiscal year
1.3	May a company resolve or elect not to have annual meetings of the members/shareholders	Usually not. If the company is part of a group the requirements may be different and the entity might be exempted from certain publication requirements
2	Does the company need to hold a meeting of the directors or officers? and if so	No
2.1	Do such director meetings need to take place in the country of incorporation?	N/A
2.2	Is there a particular time frame within which the meeting needs to be held and if so what is it?	N/A
3	Do the annual accounts need to be filed at the companies registry or similar	Yes- Federal Gazette
4	Are there other annual filing requirements such as an annual return of information?	No
	Continuing requirements	
7	When a shareholder changes during the year in the normal course is there a requirement to notify the local registry; and Does this need to be done at the time the change or at some later point in the year?	Yes. This needs to be done in the moment of change.
8	Are there other annual ongoing requirements in order to keep the company in good standing?	Yes- all essential changes (eg capital increase, capital reduction, mergers, changes of proxy holders, change of name or address,

		changes of shareholders) have to be registered at the time of change and need not necessarily be annually

Costs	
Anticipated Disbursements/Expenses	Filings to the Federal Gazette are usually around € 20 per page, fees for filings to the register court depend on the amount of documents filed and on the underlying transaction value (eg amount of capital increase, value of shares transferred)

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