



# Governance & Proxy Review

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Edited by Francis H. Byrd

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## **As We See It - Commentary from The Altman Group**

### **Review of RiskMetrics Group 2010 U.S. Corporate Governance Policy Update**

**Reid Pearson, Managing Director and Corporate  
Governance Practice Co-Leader**

The 2010 proxy season unofficially kicked off on November 19th as RiskMetrics Group (RMG), the largest and most influential proxy advisory firm, released their new policy updates for the upcoming year. The release of the RMG policies around the Thanksgiving holiday is becoming a tradition. Individuals in the proxy world digest not only plates of turkey, stuffing, and cranberry sauce but also how the updates will impact them in the following year. The new policies will go into effect for all companies with shareholder meeting dates beginning February 1, 2010. Some of the highlights include vote recommendations on directors, renewals or adoption of a shareholder rights plan, increases in common stock, and of course new rules related to RMG's equity compensation policies.

### **Poison Pills Not Welcome**

Not that they have ever truly been welcome with RMG, but the pressure has been ratcheted up on companies that have shareholder rights plans, commonly called poison pills. RMG will issue a withhold or against recommendation against ALL board nominees (except new nominees) if a company adopts a poison pill without shareholder approval. Starting in 2010 RMG will analyze companies with a classified board every year, and an annually elected board once every three years, and they will issue a withhold or against recommendation from all Board members if a company maintains a non-shareholder approved pill. In prior years RMG would only issue a negative recommendation at the shareholders meeting immediately following adoption or renewal of the pill. The new policy is not retroactive, and only applies to companies adopting or renewing pills after November 19, 2009. However, please note that RMG states in future years it may apply the new policy retroactively.

RMG is also making a distinction between long-term pills (a term of more than 12 months) and short-term pills (a term of less than 12 months). Companies that adopt

## **Governance News & Views from across the spectrum**

### **>>Executive Compensation**



### **December 8th, Feinberg Said to Lift \$500,000 Cap for AIG Executives**

Hugh Son has an exclusive report on a salary cap exemption for AIG executives being offered by Pay Czar Kenneth Feinberg.

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### **The New York Times**

### **December 8th, Bailout Refund Is All About Pay, Pay, Pay**

Andrew Ross Sorkin reports on the rush by major banks to escape TARP and offer competitive salaries to prospective senior executives and the conflict among the federal oversight authorities over whether to allow them to leave the TARP program.

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### **December 7th, Is Financial Reform Happening?**

Interview segment with Robert Kimmitt, former deputy secretary of the U.S. Treasury and Chairman of the Deloitte Center for Cross-Border Investment on finance and banker compensation.

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short-term pills have a little more leeway with RMG as they will consider other factors before issuing a negative recommendation. These other factors include the date of the pill adoption relative to the next shareholder meeting, the rationale for adoption or renewal, the company's governance practices, and the company's track record of accountability to their shareholders.

This update is no doubt a negative development for companies with poison pills. Companies have always had to consider the RMG implications for adopting or renewing a pill. However, now companies have to consider the fact that RMG will be issuing a withhold or against recommendation every three years or every one year depending on the Board structure. Among other things companies will need to consider is the level of influence of RMG among their shareholders, how a negative recommendation may impact the vote (e.g. plurality versus majority voting), and whether or not to adopt a shareholder friendly pill.

### **Increases in Stock Authorization**

In evaluating proposals to increase common stock, RMG has historically used a proprietary model to determine the amount of shares a company could reasonably ask for. This model was accompanied by an analysis of the rationale the company gives for the increase, the governance structure, and the risks to shareholders of not approving the proposal. In addition to these tests, starting in 2010 RMG will be reviewing the company's use of shares for the past three years. Of course a company will get more credit for uses such as stock splits and mergers, and lose credit for uses such as poison pills. In addition RMG will analyze a company's one and three year total shareholder return compared to peers.

Although RMG has always considered a company's rationale for the increase in stock, it appears that going forward RMG will give more weight to a company's rationale as disclosed in the proxy statement. "Enhanced narrative" seems to be a common theme in the 2010 updates not only as it pertains to increases in stock, but also in defining a "new" director, and is very prominent in the new compensation policies. This emphasis on narrative may make some issues more subjective and harder to quantify. On the other hand it may give companies the opportunity to explain themselves and overcome negative quantitative RMG tests.

### **Compensation**

Like every recent year, RMG's equity compensation updates are taking center stage. RMG will revert back to its standard 200-day stock price and 200-day volatility for its shareholder value transfer and burn rate tests. Last year, because of the volatility in the market, RMG used a 400-day volatility and 90-day stock price. As they do every year, RMG updated its industry thresholds for their burn rate test.

## AGENDA

### **December 7th, Boards Face Pressure for Internal Pay Equity**

Josh Martin discusses concerns from activist institutional investors on "internal pay equity."

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## THE WALL STREET JOURNAL

### **December 7th, Fresh Pay Skirmish Erupts at AIG**

Deborah Solomon and Serena Ng report on a challenge to Feinberg-ordered pay cuts by five AIG executives.

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### **December 6th, Darling Lines Up Assault on Bonuses**

George Parker, Chris Giles and Nicholas Timmins discuss Chancellor Alistair Darling's proposed crackdown on bankers' bonuses.

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### **November 29th, Oil and Gas Chief Executives: Are They Worth It?**

Carola Hoyos explores executive compensation in the energy field and oil patch.

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## **>>Global Dispatches**



### **December 7th, Dubai World Creditors Await Court Definition of Sukuk**

Edward Russell discusses the importance of a court decision on the Shar'iah-compliant bonds

More interestingly, starting in 2010 RMG will adopt an Executive Compensation Evaluation (ECE), which might impact RMG's recommendation on election of directors (most commonly compensation committee members), equity compensation plans, and management proposals for say-on-pay (MSOP). The ECE will consider the pay-for-performance, poor pay practices, and votes on MSOP (all existing RMG policies but updated for 2010).

With respect to pay-for-performance, RMG will continue to review a company's one and three year total shareholder return to see if they are in the bottom half of their industry group. As in the past a CEO's pay over the past two fiscal years will be a consideration; however, RMG will also review the CEO's pay relative to shareholder returns over at least a five year period. Again, narrative and disclosure is encouraged. CEO pay that is performance-based (note RMG does not consider options and time based stock awards to be performance awards) will help companies. RMG states, and The Altman Group agrees, that disclosure of performance metrics and goals should be clearly disclosed.

As in years past, if there is a pay for performance disconnect, RMG will issue a negative recommendation on MSOP and/or compensation committee members. And if a sizable portion of the pay disconnect is due to equity, RMG may also recommend against an equity plan if there is one on the ballot.

Under its poor pay practices policy RMG lists some of its most problematic issues, including the old standbys of repricing without shareholder approval, tax gross-ups, reimbursement on perks, single trigger change-in-control agreements, dividends or equivalents on unvested performance shares, etc.

One very interesting development with the new policies is that RMG states the MSOP will be the main ballot item for expressing concerns about a company's pay practices. Meaning they will recommend against MSOP (if on the ballot) first, and will only recommend withhold or against votes on compensation committee members if the pay practices in question are particularly egregious or re-occurring. Given RMG's level of influence among institutional holders this is a clear push for companies to adopt MSOP. How companies react to this push will be interesting. On the one hand, MSOP is a routine ballot item, thus the broker discretionary vote will count, whereas beginning in 2010 the broker vote will no longer apply to the election of directors. That could be helpful for companies if they believe they might run afoul of RMG's poor pay practices. However, The Altman Group feels most companies are very unlikely to adopt MSOP in 2010 just to appease RMG. In addition, the popular consensus is that MSOP will likely be mandatory in 2011. The Altman Group will closely follow how RMG applies this new policy in 2010.

On balance, there is nothing earth-shattering in the 2010

called sukuk.

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### **December 7th, Dubai World May Sell Some of Its Assets**

Summer Said reports on debt repayment strategies connected to asset sales for Dubai World.

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### **December 7th, Parliamentary Committee Passes Bill to Widen BOK's Role**

The Yonhap News Agency reports on a bill working its way through the Korean parliament that would increase the authority and scope of the Bank of Korea, the country's central bank, to include investigations.

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### **December 6th, Sovereign Funds Pressured to Invest Locally**

Henny Sender discusses pressure on some Sovereign Wealth Funds (SWF) to support homegrown ventures.

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## THE ECONOMIC TIMES

### **December 1st, Draft Corporate Governance Code Released**

Reporting on an Indian governance best practices code developed by the Confederation of Indian Industry.

Report of the Confederation of Indian Industry Task Force On Corporate Governance

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RMG policy updates. As in past years, we expect to see a few inconsistencies in the application of the policy as unresolved questions arise. As stated above the common theme is enhanced disclosure around a number of issues, thus making some policies more subjective. In theory this should allow companies to explain their particular case in the proxy and hopefully override a negative quantitative RMG test. However, it remains to be seen whether this will work in practice. Let the 2010 proxy season begin!

## >>[Proxy Contests/Battles for Control](#)

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#### **December 7th, Hostility Returns to Sluggish M&A Market**

Marc Hogan reports on the rise in hostile deals.

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### THE WALL STREET JOURNAL

#### **December 7th, Companies Must Flex Spending Muscles**

Liam Denning discusses the environment for M&A in 2010.

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#### **December 6th, Bloomberg Eyes More Acquisitions**

Andrew Edgecliffe-Johnson and Chrystia Freeland discuss ambitions of the global financial news services. Story includes 'View from the Top' video of interview with Peter Grauer, Bloomberg chairman, by Chrystia Freeland.

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## >>[Investor Action](#)

### New York Law Journal

#### **November 30th, Focus Renewed on Risk Management**

Martin Nussbaum, Web Editor, discusses the proposed SEC risk and director nominee disclosure. (Free registration required)

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#### **November 29th, Shareholder Rights**

A Financial Times editorial discusses shareholder rights and responsibilities.

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>>[The Boardroom](#)

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### **December 7th, Why Coca-Cola Directors Might Go Without Pay**

Katie Wagner reports on 2007 director compensation at Coca-Cola under a plan with specific performance targets.

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### **December 7th, Calculating the 'New Normal'**

Timothy W. Martin interviews Supervalu's new CEO Craig Herkert.

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### **December 7th, Auto Critic Takes a Seat in GM's Turnaround**

John D. Stoll and Joann S. Lublin discuss the role of Stephen J. Girsky as advisor to GM's interim CEO Edward E. Whitacre, Jr.

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### **December 4th, Why Changing the CEO May Not Change the Company**

The Intelligent Investor column remarks on the effectiveness of CEO changes.

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### **November 30th, Why Reprisal Risk Should Be On the Board Agenda**

Tony Chapelle discusses the risk of data theft from

departing employees.

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**November 26th, A Welcome Call for Engaged Investment**

Guy Jubb, Investment Director and Head of Corporate Governance at Standard Life Investments comments on the Institutional Shareholders Committee (ISC) code on the responsibilities of institutional investors, and conclusions from the Walker report.

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