CLIENT MEMORANDUM

RiskMetrics Policy Updates Suggest Increased Risk of Withhold/Against Vote Due to Poor Performance

January 29, 2009

INTRODUCTION

RiskMetrics Group, a proxy advisory firm influential with institutional investors, recently published its list of those companies that it considers to be "under performers" for purposes of its evaluation of directors. The present list consists of those companies that are in the bottom half of their respective four digit GICS (Global Industry Classification Group) industry group (Russell 3000 companies only) measured by one and three-year stockholder returns. This list is much broader than in prior years when RiskMetrics only focused on the bottom five percent of performers within GICS industry groups measured by a weighting of four metrics.

POLICY POSITION

For those companies that are identified as underperformers, RiskMetrics will recommend a WITHHOLD/AGAINST on all director nominees if the board lacks "accountability and oversight." This is a departure from prior year's policies, which only "considered" whether to recommend a WITHHOLD/AGAINST vote if the company were identified as one of the worst performers (bottom five percent).

RiskMetrics considers it problematic when companies lack what it views as appropriate oversight mechanisms and board accountability, especially in the context of substantial underperformance. RiskMetrics will view the existence of several anti-takeover measures as inconsistent with director accountability.[1]

[1] Problematic provisions for RiskMetrics include but are not limited to:

- a classified board structure;
- a supermajority vote requirement;
- majority voting with no carve out for contested elections;
- the inability for stockholders to call special meetings;
- the inability for stockholders to act by written consent;
- a dual-class structure; and/or
- a non-stockholder approved poison pill.

RiskMetrics will also consider recent board and management changes, board independence and other factors that may have an impact on stockholders. If a company exhibits sustained poor performance coupled with a lack of board accountability and oversight, RiskMetrics may also consider the company's five-year total stockholders return and five-year operational metrics.

IMPLICATIONS

The likelihood that a listed company will receive a WITHHOLD/AGAINST recommendation from RiskMetrics will be mitigated both by the fact that almost one-third of the Russell 3000 is identified by RiskMetrics as underperforming and the prevalence of anti-takeover provisions. Our expectation that only a relatively small portion of identified companies will be subjected to a WITHHOLD/AGAINST recommendation is based on the assumption that RiskMetrics recognizes that issuing WITHHOLD/AGAINST recommendations for hundreds of companies will raise credibility issues. Such WITHHOLD/AGAINST votes were relatively rare in the past and our instinct is that the number of WITHHOLD/AGAINST recommendations will not increase materially from last year, although there is a "wild card" element to the policy and there may be some high profile examples. In addition, RiskMetrics may insert warnings or cautionary language in recommendations contained in RiskMetrics reports. The unpredictability of the current situation is, unfortunately, only exacerbated by the amorphous nature of the phrase "accountability and oversight."

PAY FOR PERFORMANCE POLICY

The list of identified companies is also applicable to RiskMetrics's pay for performance policy. The pay for performance policy provides that RiskMetrics will generally recommend WITHHOLD/AGAINST votes from the compensation committee members if there were a pay for performance disconnect between the CEO's pay and the company's stock performance. A pay for performance disconnect is defined as an increase in a CEO's total compensation when the company's one-year and three-year stockholder returns are in the bottom half of the applicable GICS group. The most significant change from prior policy is a focus on relative returns rather than negative returns (in conjunction with relative returns). RiskMetrics analysis examines the Compensation Discussion & Analysis ("CD&A") to identify the source of any increase in compensation (i.e., is the increase a result of performance–based compensation with pre-established performance measures). RiskMetrics notes that this is a case-by-case analysis that requires a detailed examination of the company's CD&A. The pay for performance disconnect also arises in connection with RiskMetrics's potential opposition to proposed equity plans which, in addition to a performance disconnect, will also take into account whether (i) the main source of the pay increase (over half) is equity based and (ii) the CEO is a participant of the equity proposal.

To potentially mitigate the WITHHOLD/AGAINST vote recommendation, RiskMetrics will consider whether a company evidenced a commitment to pay for performance principles by (1) stating that the compensation committee has reviewed all components of CEO compensation, (2) providing a tally sheet under various termination scenarios, (3) disclosing performance measures and goals for all performance-based compensation, (4) committing to grant at least 50 percent of equity awards where the grant or vesting is tied to pre-established performance conditions, and (5) committing that the compensation committee has the sole authority to hire or fire compensation consultants. To provide complete transparency to stockholders, the commitment must be publicly disclosed.

INDEPENDENT CHAIRMAN

The identified list of underperforming companies is also relevant to stockholder proposals requesting that the chairman's position be filled by an independent director. RiskMetrics will recommend a vote for such proposals if, among other criteria that must be satisfied, the company has sustained poor performance (i.e., company's one and three-year stockholder returns are in the bottom half of the applicable GICS group), unless there has been a change in the Chairman/CEO position within that time.

POTENTIAL NEXT STEPS

Once a company has been identified on the list, the most constructive actions to mitigate the risk of a WITHHOLD/AGAINST vote is disclosure. The typical Chairman's letter delivered with the annual report could put performance issues in context, including any recent leadership changes (this letter could be separately provided to RiskMetrics to ensure review). With respect to the governance evaluation for directors, the proxy statement (such as the governance disclosure) offers an opportunity to address "accountability and oversight." In addition, as directors address how to respond to stockholders' proposals to dismantle takeover defenses or adopt a rights plan without stockholder approval, the board should take into account the impact of its actions for RiskMetrics's evaluation of its "accountability and oversight." With respect to pay for performance, counsel should be attentive to the CD&A stating the case of the compensation committee. As alluded to earlier, disclosure evidencing support for a commitment to pay for performance principles can mitigate the likelihood of WITHHOLD/AGAINST vote recommendation.

This memorandum is for general information purposes and should not be regarded as legal advice. If we can be of assistance regarding the matters discussed in this memorandum, please contact your relationship partner or any of the following partners:

Joshua Ford Bonnie
(212) 455-3986
jbonnie@stblaw.com

John G. Finley
(212) 455-2583
jfinley@stblaw.com

Avrohom J. Kess
(212) 455-2711
akess@stblaw.com

Mario A. Ponce
(212) 455-3442
mponce@stblaw.com

Eric M. Swedenburg
(212) 455-2225
eswedenburg@stblaw.com

The names and office locations of all of our partners, as well as memoranda regarding recent corporate reporting and governance developments, can be obtained from our website, www.simpsonthacher.com.

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
212-455-2000

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
310-407-7500

Palo Alto
2550 Hanover Street
Palo Alto, CA 94304
650-251-5000

Washington, D.C.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004
202-220-7700

EUROPE

London
Citypoint
One Ropemaker Street
London EC2Y 9HU England
+44-20-7275-6500

ASIA

Beijing
3119 China World Tower One
1 Jianguomenwai Avenue
Beijing 100004, China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road
Hong Kong
+852-2514-7600

Tokyo
Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037, Japan
+81-3-5562-6200