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Corporate Governance Developments in the United States May Affect Canadian Companies

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The Securities and Exchange Commission is proposing to give shareholders of U.S. public companies the right to have their nominees for election as directors included on the company's proxy alongside the board's nominees. This development is significant because it means that shareholders wishing to nominate a director would no longer have to incur the expense of mailing their own proxy circular. The proposal does not apply to foreign private issuers, including Canadian MJDS¹ issuers, because they are not subject to the SEC's proxy rules. However, this development in the United States could result in Canadian lawmakers and securities regulators considering a similar proxy access rule in Canada.

Under the SEC's proposal, shareholders would have to meet certain eligibility requirements, including having held the issuer's voting securities for at least one year, owning a certain minimum percentage of shares and certifying that they do not currently intend to change control of the company or gain more than minority representation on the board (although they could change their minds once their nominees are in place). One or more candidates could be nominated, provided that, in the case of multiple nominations, the total number of nominees would make up less than 25% of the issuer's board. Nominees would have to meet the independence criteria of the applicable stock exchange (but would not need to be independent of their nominators).

The proposal is controversial. The issue of proxy access for shareholders has been considered and debated repeatedly by the SEC, U.S. courts and market participants over the past several years. Most institutional shareholders are strongly in favour of proxy access as a matter of shareholder democracy and board accountability, particularly in light of current hot-button issues like executive compensation and risk management. Others are critical of proxy access on the basis that it could give shareholders, especially small groups of them that may be promoting a special interest, a means of disrupting the board nomination process.

In addition to the proxy access proposal, broader shareholder rights legislation has recently been introduced in the U.S. Senate. The proposed legislation would, among other things, give shareholders of U.S. companies a non-binding, advisory vote on executive compensation (already required of companies receiving federal bailout funds) and require listed companies to maintain certain corporate governance standards, including separating the chair and CEO roles, having mandatory annual

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¹ Multijurisdictional Disclosure System

elections for every director (no staggered boards), having majority voting policies for directors and having a fully independent risk committee responsible for establishing and evaluating the issuer's risk-management practices. By imposing additional mandatory requirements, the proposed legislation would, if adopted, move the U.S. approach to corporate governance further from Canada's more principles-based approach. It will be up to the SEC to decide whether or not foreign private issuers will be subject to the new U.S. stock exchange requirements or will be given an exemption. **1**