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webcast

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Say-on-Pay: Practical Proxy Advice

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Dodd-Frank Shareholder Votes

- The Dodd-Frank Wall Street Reform and Consumer Protection Act requires three separate nonbinding shareholder votes.

- At least once every three years, shareholders must be allowed to vote whether to approve the compensation of company named executive officers as disclosed pursuant to Item 402 of Regulation S-K ("Say-on-Pay").

- At least once every six years, shareholders must be allowed to vote whether the say-on-pay vote will occur every one, two, or three years ("Say-on-Frequency").

- At the time of any shareholder vote to approve certain business combination transactions, shareholders must be allowed to vote whether to approve compensation arrangements triggered by the transaction ("Say-on-Golden-Parachutes"). Detailed disclosure is required of compensation payable in connection with the transaction.

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SEC Final Rules

- On January 25, 2011, the SEC issued final rules with respect to Say-on-Pay, Say-on-Frequency and Say-on-Golden-Parachutes.
- The Say-on-Pay and Say-on-Frequency requirements will generally apply with respect to annual shareholder meetings or other shareholder action at which directors are elected on or after January 21, 2011, but will not apply to smaller reporting companies (companies with a public float of less than $75 million) until the first annual shareholder meeting or other shareholder action occurring on or after January 21, 2013.
- The Say-on-Golden-Parachutes rules will become effective for initial proxy and information statements and other schedules and forms relating to corporate transactions filed on or after April 25, 2011.

SEC Final Rules

- A company must disclose in future annual CD&As whether, and, if so, how, the compensation committee has taken into account the results of the most recent Say-on-Pay vote and how the results affected the compensation committee's policies and decision-making processes.
- A company need not address its consideration of earlier Say-on-Pay votes unless material to the compensation policies and decisions disclosed in the annual CD&A.

SEC Final Rules

- Within four days after Say-on-Pay and Say-on-Frequency votes, a company must file a Form 8-K disclosing the results of the votes.
- A company must disclose its decision on the frequency of future Say-on-Pay votes in an amendment to this Form 8-K, filed no later than 150 calendar days after the vote, but in all events at least 60 calendar days prior to the deadline for submitting shareholder proposals for the next annual meeting.
- If a company implements the frequency of future Say-on-Pay votes favored by a majority of shares, the company will be able to seek SEC staff concurrence under Rule 14a-8(i)(10) with the omission of certain shareholder proposals on Say-on-Pay and Say-on-Frequency in future proxy statements.

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Say-on-Pay So Far

- Are companies including a separate supporting statement?
- Are companies using the CD&A to support the Say-on-Pay proposal?
- Do companies include any additional disclosure if the agenda also includes a proposal for binding shareholder approval of a separate compensation plan or matter?
- Are companies disclosing how they intend to respond to the Say-on-Pay vote?

Say-on-Pay So Far

- Are companies including the new Say-on-Golden- Parachute disclosures?
- Does the proxy include Say-on-Golden-Parachute disclosures but say nothing about the vote including the Say-on-Golden-Parachutes?

Say-on-Pay So Far

- How are proxy advisory firms and shareholders reacting to date?
  - Public statements
  - Reported votes to date

Practical Considerations: Say-on-Pay

- Advance Planning
  - Talk with largest shareholders, shareholder advisory firms and proxy solicitors
  - Educate management and the board
  - Identify pay for performance issues, problematic compensation arrangements and problematic corporate governance policies and practices

Practical Considerations: Say-on-Pay

- Considerations for 2011 Proxy Statement
  - Address pay for performance issues, problematic compensation arrangements and problematic corporate governance policies and practices
  - Reasons for recommendation on Say-on-Pay
  - Say-on-Golden-Parachute votes and disclosures
  - Impact of other agenda matters on Say-on-Pay vote, including the company's recommendation for the Say-on-Frequency vote

Practical Considerations: Say-on-Pay

- Additional Considerations for 2011 Proxy Statement
  - Disclosure of Say-on-Pay statement of intent
  - What will be considered a favorable Say-on-Pay vote?
  - Disclosure about the effect of the Say-on-Pay vote
  - Should companies include a Say-on-Pay resolution and, if so, what should it say?

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Say-on-Frequency So Far

- Are companies including a 1-, 2-, or 3-year recommendation for their Say-on-Frequency votes?
- What reasons are companies giving to support their Say-on-Frequency recommendations?
- Are companies disclosing how they intend to respond to their Say-on-Frequency votes?
- What voting standards are companies disclosing as governing their Say-on-Frequency votes?

2011 Proxy Season: Say-on-Frequency Results So Far

- How are proxy advisory firms and shareholders reacting to date?
  - Public statements
  - Reported votes to date
  - Impact of a company’s recommending a 2- or 3-year Say-on-Frequency vote on separate Say-on-Pay or compensation plan/matter votes

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Practical Considerations: Say-on-Frequency

- Advance Planning
  - Position the company for an overwhelmingly favorable Say-on-Pay vote at this meeting
  - Talk with largest shareholders, proxy advisory firms, and proxy solicitors about Say-on-Frequency
  - Educate management and the board about Say-on-Frequency

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Practical Considerations: Say-on-Frequency

- Formulate the company's Say-on-Frequency position and the reasons therefor
  - Whether to recommend a 1-, 2, or 3-year Say-on-Pay vote
  - Whether the company will hold an early follow-on Say-on-Frequency vote
  - What the Rule 14a-8(i)(10) "break" means and whether it is worth it
  - What vote governs the Say-on-Frequency vote and the possible need for a by-law amendment to hold a plurality vote

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Practical Considerations: Say-on-Frequency

- Considerations for 2011 Proxy Statement
  - Present a compelling case for an overwhelmingly favorable Say-on-Pay vote
  - Present a compelling case for a 2- or 3-year Say-on-Frequency vote recommendation
  - Consider disclosing
    - *How the company intends to respond*
    - *The Rule 14a-8(i)(10) effect if the company implements the frequency favored by a majority vote*
    - *The standard that governs the Say-on-Frequency vote and why*

Practical Considerations: Say-on-Frequency

- Item 5.07 of Form 8-K
  - The initial Form 8-K report of the outcome of the Say-on-Frequency vote within 4 business days after the meeting
  - The follow-on amendment to the Form 8-K within 150 calendar days after the meeting disclosing the frequency of future Say-on-Pay votes

Say-on-Golden-Parachutes in Target Merger Proxy Statements

- Coordination of Say-on-Golden-Parachutes Item 402(t) disclosures with
  - Principles-based Item 402(b) CD&A and Item 402(j) if transaction crosses year-end
  - Transaction-related “interests,” “background” and “reasons” disclosures

Say-on-Golden-Parachutes in Target Merger Proxy Statements

- Treatment of post-transaction employment/consulting agreement
  - Say-on-Golden-Parachutes disclosures do not cover and golden parachute arrangements may be reduced or waived entirely
  - "Interests" section may cover
  - Possible need for tables comparing post-transaction agreement payments and benefits with
    - *Target golden parachute arrangements reduced or waived*
    - *Compensation had individual continued to be employed by target*

Say-on-Golden-Parachutes in Target Merger Proxy Statements

- Possible state law substantive and disclosure issues
  - Vote to “approve” advisory Say-on-Golden-Parachutes vote vs. binding merger vote
  - Relation of binding merger vote on merger “agreement” and matters “contemplated thereby” or “related” thereto
  - Possible need for binding compensation vote or other heightened “cleansing” mechanisms in conflict situations

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