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Say on Pay—Questions for Institutional Investors

With the advent of mandatory "say on pay" votes this year for all public companies as required by the Dodd-Frank Act, institutional shareholders must consider not only whether to support a company's executive compensation arrangements, but also, more broadly, how to ensure that their decision-making process will take into account the particular circumstances of the company, the impact that a negative vote could have on the company, the institutional shareholder's fiduciary and other duties to its own investors, and the extent to which voting decisions should be dictated or influenced by recommendations of proxy advisory firms. In this regard, institutional shareholders may find it useful to bear in mind the following questions:

- Should the shareholder accept a negative voting recommendation of a proxy advisory service without independent consideration of the company's compensation program?
- To what extent is independent review and consideration by an institution of a say on pay vote, including consideration of the reasons put forward by a company as to why a negative voting recommendation by a proxy advisory service should not be followed, necessary to satisfy fiduciary duties under ERISA, the Investment Company Act and state corporate law?
- Are the compensation policies of the Council of Institutional Investors and proxy advisory services unduly influenced by certain union and public pension funds, activist hedge funds and academics that may have objectives that conflict with or are inconsistent with supporting management's strategy for long-term shareholder value creation?
- Could a letter or phone call expressing the institution's views to the CEO, the board of directors and/or the compensation committee be just as, or even more, effective than a negative say on pay vote?
- Will a negative vote adversely affect the company's ability to attract, retain and incentivize outstanding executives? Should exceptions be made for make-whole awards, tax gross-ups or other provisions which may be necessary to attract key executives from another company or which reflect the company's particular circumstances?
- Will a negative say on pay vote, and any resulting changes to executive compensation arrangements, encourage key executives to leave for private companies not subject to public say on pay scrutiny?
- Will a negative vote embarrass the board in a way that could undermine rather than promote a constructive relationship between the board and management on sensitive, complex matters such as executive compensation?
- Will a negative vote influence compensation consultants to be unduly conservative to the point of impeding the company's ability to compete for talent with organizations that have more attractive compensation programs? Will the inflexible guidelines and policies of proxy advisory firms stifle candid assessment and advice from compensation consultants?
- Are compensation features (e.g., excise tax grossups) that may alone result in negative voting recommendations from proxy advisory services sufficiently problematic to shareholder interests to warrant following recommendations of the advisory service, regardless of other features of the compensation program?
- Is the "peer group" used by proxy advisors to measure a company's relative performance a valid representation of comparable companies against which the company should be measured?

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