

# FOLEY'S NATIONAL DIRECTORS INSTITUTE

## 2009 WEB CONFERENCE SERIES



**AON**

Boardroom Bound

**Deloitte.**

Chicagoland Chamber of Commerce

*D. F. King*

Chicagoland Entrepreneurial Center



EVERSHEDS

Corporate Secretary

RR DONNELLEY

NASDAQ

NYSE

08.4975

**FOLEY**  
FOLEY & LARDNER LLP

## FOLEY'S EIGHTH ANNUAL NATIONAL DIRECTORS INSTITUTE 2009 WEB CONFERENCE SERIES



# Latest Corporate Governance Developments

Patrick Quick, *Foley & Lardner LLP*  
Maureen Errity, *Deloitte & Touche LLP*  
Richard Grubaugh, *D.F. King*  
Brendan Sheehan, *Corporate Secretary*

08.4975

**FOLEY**  
FOLEY & LARDNER LLP



## Majority Voting

- Latest trends
  - More than 2/3 of S&P 500 companies have adopted some form of majority voting
  - Shareholder proponents are targeting next tier of companies
  - Can a company avoid adopting majority voting?
  - Is “majority voting *light*” (a/k/a “plurality plus”) ever enough?

06.4973



## Majority Voting

- What if “withhold” vote exceeds “for”?
  - If a company has majority voting
  - If a company does not

06.4973





## Shareholder Proposals

- Some of the latest shareholder proposal subjects
  - Compensation-related topics
  - Takeover defenses
  - Independent Board chair
  - Social issues – Sustainability, “Green”
  - Ability for shareholders to call a special meeting
  - Reincorporation in North Dakota

06.4973



## Shareholder Proposals

- What can a company do to induce the proponent to withdraw a proposal?
- What can a company do to avoid a negative proxy advisory recommendation?
- Is a negative proxy advisory recommendation fatal? How does a company overcome it?

06.4973





## Shareholder Proposals

- What to do if a shareholder proposal receives over 50% support
  - Including impact of majority voting

06.4973



## Withhold Vote Recommendations

- How should the company and the Board respond if an advisory firm recommends a withhold vote for one or more directors?
  - Audit issues
  - Compensation issues
  - Governance issues
  - Company performance issues

06.4973





## Takeover Defenses

- Staggered Board of Directors
  - Is there any way to maintain this?
- Shareholder Rights Plan alternatives
  - On the shelf
  - Risk Metrics-friendly and shareholder approved
  - Standard plan and forget Risk Metrics

06.4973




## Takeover Defenses

- Advance notice bylaws
  - Requiring “full disclosure”
  - Proxy advisory firm time limits
- Golden parachutes
  - Including gross ups
- Appetite to push back against proxy advisors’ recommendations
  - Rights plan
  - Staggered board

06.4973





## *Gantler v. Stephens*

- Greater scrutiny of Board decisions to not pursue a merger
  - Court will look closely at facts that may undercut independence
  - What implications beyond the merger context?
- Clear duties, and potential liabilities, of corporate officers
  - No liability shield for Officers

08.4973



## CEO Succession

- Apple example
- Planning
- Retaining the current CEO
- Attracting (compensating) a successor
- Politics

08.4973





## TARP and Governance

- Restrictions on compensation
- Say-on-pay requirements
- Questions a Board may ask:
  - How do we evaluate whether to seek or accept government assistance?
  - How does TARP affect a company that has not accepted government assistance?
  - Do our compensation programs encourage “unnecessary and excessive risks”?

06.4973



## Proxy Access

- Not a new topic on the agenda
- Current rules
  - Shareholders may nominate candidates
  - Board may decide not to place candidates on the ballot
- Alternative is a proxy contest, which is expensive
- Many companies believe “access” will be disruptive and bad for Board dynamics
- Changes in the composition of the SEC may lead to some form of proxy access in the medium term
- Regulatory hurdles exist, but there are pockets of sympathy in the new Congress and SEC

06.4973

