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Fifth Analyst Call

A group of institutional investors recently publicly proposed that U.S. public companies should host "a dedicated conference call" for institutional investors focusing exclusively on corporate governance matters, as reflected in a company's annual meeting proxy statement. The group of investors, which is predominantly international in flavor but includes T. Rowe Price and Walden Asset Management, is referring to the proposed call as the "Fifth Analyst Call" and is comparing the call to the traditional four quarterly earnings calls. The call would follow the public filing of the company's proxy statement for the annual shareholders meeting, but would precede the meeting by 10 to 15 business days. According to the group, goals of holding such calls would include:

- Utilization of rights and responsibilities embedded in the Dodd-Frank Act to encourage good governance by issuers and responsible ownership by investors
- Enhancement of investor understanding of the company's governance strategies
- Facilitation of dialogue on governance matters and, to enable more informed shareholder voting, concerning the contents of the proxy statement

The group of institutional investors suggests that a majority of U.S. public companies could benefit from such a corporate governance call. But as a pilot project, the group states that it has identified to date a list of companies that it believes would most benefit from the call "due to unique, company-specific circumstances." The investors did not specify those circumstances and, to our knowledge, have not publicly named their target companies. Presumably, those companies that are on the list and that will hold an annual meeting in the near future have already heard directly from the investors.

The group anticipates that each Fifth Analyst Call would include the participation of institutional shareholders of the company who "have a commitment to actively vote their shares" along with the company's independent board chairman or lead director and the company secretary. The group also encourages chairpersons of key board committees to participate. The group also indicated that such calls might include the company's general counsel or director of investor relations, while pointing out that the primary dialogue should be between investors and directors. In addition, governance analysts and equity analysts are both encouraged to join the call. However, participation in the call would be by invitation only, and at the outset, proxy advisory firms would not be invited. The proposal does not expressly address whether the investors contemplate that a company could Webcast the call so that all shareholders would have an opportunity to hear the dialogue. But the implication is that the investors do not contemplate such participation.

As envisioned by the group, the company would act as the host of the call "or other virtual meeting," and the company and a "lead investor" would act as the co-chairs. The proposal does not specify how this lead investor would be chosen. The call would take 60 to 90 minutes. The company and the lead investor would agree to the Fifth Analyst Call agenda — "including allocated time slots" — prior to the call. The investors anticipate that the agenda would likely include, among other discussion points:

- The company's governance framework and philosophy
- A summary of the audit and/or risk committee report, including committee reviews of internal controls and risk management
- Compensation discussion and analysis
- Board structure, effectiveness, and succession planning
- Any proposals up for a shareholder vote, including the upcoming "say on pay" and "say when on pay" shareholder votes mandated by the Dodd-Frank Act
- The board's responses to negative proxy recommendations from proxy advisory firms

Any company receiving a request to host a Fifth Analyst Call should carefully consider the potential advantages and disadvantages of agreeing to participate in such a call in light of the company's individual circumstances. At this time, we expect that most companies will choose not to hold a Fifth Analyst Call.

Potential factors weighing against participation in a Fifth Analyst Call include the following:

- The information discussed on such a call (corporate governance as reflected in the annual proxy statement) would be repetitive of matters set forth in the proxy statement and/or presented on the company's Web site. To the extent that a company's current proxy statement disclosures are lacking, such disclosures should be improved rather than supplemented by a Fifth Analyst Call.

- Preparing directors to answer the types of questions that might be asked on a Fifth Analyst Call could be time consuming and would divert director and officer time away from other governance and operational matters. It also could involve the preparation of materials that a company would need to file publicly with the SEC as additional soliciting material.
- To the extent that matters discussed on such a call go beyond mere repetition of the materials discussed in the annual meeting proxy statement, the previously undisclosed matters may require public disclosure through the filing with the SEC and/or extra mailing to shareholders of additional proxy solicitation material and/or through the issuance of a press release or filing of a Current Report on Form 8-K before the call to comply with the disclosure requirements of Regulation FD (assuming that the call is not Webcast).
- Due to the lack of time in a conference call setting for the careful consideration of analyst questions, there is a potential risk of violating Regulation FD and the heightened possibility of liability due to time-pressured erroneous or misleading responses by directors.
- Rather than participating in a conference call with multiple institutional investors, company management and/or certain directors may engage in one-on-one conferences with significant institutional investors with a focused agenda and well-prepared dialogue, prior to the annual meeting of shareholders, although this, too, could involve the preparation of materials that a company would need to file publicly with the SEC as additional soliciting material.

On the other hand, in the view of the group of institutional investors, a Fifth Analyst Call could provide an efficient and inexpensive forum for the discussion of governance matters with large investors, when compared to individual meetings and/or calls with such investors. Also, companies and directors could glean more direct and accurate information regarding the views of specific institutional investors regarding compensation and governance matters than they receive from proxy advisory firm reports and the results of shareholder voting.

Even those companies that do not hold a Fifth Analyst Call should take seriously any request to hold such a call, engage with those institutional investors making the request, carefully explain the reasons why the company will not engage in such a call, and offer an alternative to such a call. In this regard, a growing number of companies are offering meetings or similar opportunities for direct communications between directors and investors; there are fewer disadvantages to such direct communications if they occur outside the context of an annual meeting and if they are Webcast.

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