



Tuesday, October 26
9:00am-10:30am

508 - Who Really Has a “Say on Pay?”

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Partner

Sutherland Asbill & Brennan LLP

Suzanne Forlidas

Vice President & Deputy General Counsel

Coca-Cola Enterprises

Beth Knickerbocker

Senior Vice President & Chief Risk Officer

Marshall & Ilsley Corporation

Cynthia Krus

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Faculty Biographies

Adam Cohen

Adam B. Cohen, a partner in Sutherland's Tax Group, focuses his practice on employee benefits and executive compensation. He assists a diverse group of clients, including public and private companies and tax-exempt organizations, in matters including executive compensation disclosures, nonqualified deferred compensation plans, equity compensation arrangements, executive employment and separation agreements, employee benefits due diligence and transaction agreement provisions arising in mergers and acquisitions. Mr. Cohen's clients include a number of Fortune 100 companies.

Mr. Cohen is an adjunct professor at Georgetown University Law Center, where he currently teaches "Retirement Plan Qualification Requirements." He is vice-chair of the Executive Compensation Subcommittee in the Taxation Section of the ABA and he has been named a Nolan Fellow by Tax Section of the ABA, recognizing outstanding service.

Mr. Cohen is a graduate of Harvard Law School and the University of Virginia.

Suzanne Forlidas

Suzanne Forlidas is the vice president, deputy general counsel and assistant secretary of Coca-Cola Enterprises Inc. In this role, Ms. Forlidas leads the Compensation and Benefits Group of CCE's legal department and serves as the secretary to the Human Resources and Compensation Committee of the Board. She is responsible for executive compensation disclosures and advising on the tax and regulatory compliance aspects of the company's executive compensation programs, including equity compensation, executive severance, and nonqualified deferred compensation plans, as well as its broad-based compensation and employee benefits programs. This year, Ms. Forlidas has primarily focused on the executive compensation and benefits matters related to the proposed transaction between Coca-Cola Enterprises Inc. and The Coca-Cola Company. Following the sale of the North American bottling operations to The Coca-Cola Company, Ms. Forlidas will continue in her current role with the new public company, Coca-Cola Enterprises Inc., which will own bottling operations in Western Europe.

Prior to joining Coca-Cola Enterprises Inc., she practiced with the firm of Miller & Martin in Chattanooga, Tennessee.

Ms. Forlidas earned her bachelor's and graduate degrees at the University of Tennessee at Chattanooga, and is a graduate of the University of Tennessee Law School.

Beth Knickerbocker

Beth Knickerbocker is senior vice president and chief risk officer for Marshall & Ilsley Corporation. She is primarily responsible for the coordination of risk management activities throughout the corporation.

Prior to joining Marshall & Ilsley Corporation, Ms. Knickerbocker practices as an attorney in Washington, DC at the law firm Sutherland Asbill & Brennan LLP where she advised a variety of financial services clients, including banks, broker dealers, insurance companies and mutual funds on compliance and regulatory issues. Prior to joining the law firm, Ms. Knickerbocker was an attorney at the Office of the Comptroller of the Currency in Washington, DC where she served in the Enforcement and Compliance and Community and Consumer Law divisions.

Ms. Knickerbocker is the vice chairman of the American Bankers Association Risk Management Group and a director of the Girl Scouts of Wisconsin Southeast and is a member of the Audit Committee and the Corporate Governance Committee. She serves on the Emerging Leaders Council of United Way of Greater Milwaukee.

She received a BA (magna cum laude and Phi Beta Kappa) from Cornell College, and a JD (high distinction) from the University of Iowa College of Law.

Cynthia Krus

Cynthia M. Krus is a partner with the law firm of Sutherland Asbill & Brennan LLP, where she is co-leader of the firm's Corporate Practice Group. Ms. Krus counsels public companies in a broad range of corporate and securities matters, such as the Sarbanes-Oxley Act, corporate governance, disclosure, executive compensation and shareholder matters. She also advises companies on the structure and formation of various entities and the establishment and operation of private and public venture equity, including business development companies, special purpose acquisition companies and structured trust acquisition companies.

Ms. Krus has been involved in numerous public and private securities offerings and has advised clients in connection with a variety of corporate transactions including mergers and acquisitions, proxy contests, exchange and rights offerings, going-private transactions and reorganizations. In addition, she serves on Sutherland's Climate Change law team, working with clients to identify and capitalize on opportunities and respond to business challenges impacted by climate change policies and regulations. Earlier in her career, she served as a law clerk for the Honorable Robert J. Klees of the Louisiana Court of Appeals for the Fourth Circuit.

Ms. Krus is a member of the Advisory Board of TheCorporateCounsel.net.

She is a graduate of Tulane University Law School and Emory University.

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More on Say on Pay: What Will It Mean?

Panelists:

Suzanne Forlidas – Coca-Cola Enterprises

Beth Knickerbocker – M&I Corporation

Adam Cohen – Sutherland Asbill & Brennan LLP

Cynthia Krus – Sutherland Asbill & Brennan LLP

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Presentation Overview

- Say on Pay: What Will It Mean?
 - Introduction to Say on Pay
 - Recent Developments
 - What to Do Next
 - Case Studies
 - Conclusion

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Introduction to Say on Pay

- What is it?
 - Non-binding proposal included in proxy materials that calls for annual shareholder advisory vote on a company's executive compensation program
- What is the History?
 - Required practice for London Stock Exchange companies in 2003
 - Say on Pay proposals were adopted by shareholders at five publicly traded companies in 2006....
 - More than 50 in 2007
 - More than 80 in 2008
 - Exceeding 100 in 2009

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Goals of Say on Pay

- Encourage consideration of *how* and *why* of executive compensation decisions and create better disclosures
- Limit excessive executive compensation and directly link pay with performance
- Promote dialogue with and feedback from shareholders
- Give shareholders a sense of empowerment
- But...
 - Offers limited information about specific components to which shareholders object
 - Requires more time engaged with corporate governance activists and proxy advisory firms

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Say on Pay Votes

	2010	2009	2008
Total Votes	140	140	6
Pass	128	140	6
Fail	3	0	0
Average Support	87.8%	85.4%	94.2%
ISS For	112	99	4
ISS Against	28	40	1
ISS Refer	0	1 (RMG)	1 (RMG)

Stats from Russell 3,000

Stats for meeting dates between January 1 and June 30 for each year

Source: ISS Voting Analytics

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Say on Pay Actions to Date

- MSOP failed at three companies in 2010
 - Motorola
 - Occidental Petroleum Corp
 - KeyCorp
- Percentage of vote received for Say on Pay proposals:
 - EMC - 51%
 - Johnson & Johnson - 47.9%
 - IBM - 45.3%
 - Number of votes exceeded the support levels for same resolutions last year
- Voluntary adoption of Say on Pay in response to public pressures
 - E.g., Aflac, Alaska Air, Apple, Intel and Verizon Communications all had voluntary advisory votes on executive compensation in 2009

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Say on Pay Lessons Learned

- No “check the box”
- Difficult to “read the tea leaves”
- Weight of ISS uncertain
 - Not indicative of whether proposal will fail or not
 - ISS guidelines different from Glass Lewis and different from large institutional shareholders
- Importance of doing your homework

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Legislative and Regulatory Developments

- Say on Pay in Dodd-Frank Act
 - Companies must hold advisory votes at any annual or other shareholder meeting that occurs on or after January 21, 2011 (six months of enactment)
 - During 2011 meetings, companies required to hold separate vote on the frequency of future advisory votes
 - One, two, or three years
 - Afterwards, companies required to hold shareholder votes at least every six years on “say on pay” frequency
 - SEC permitted to draft rules exempting issuers, including smaller companies

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Legislative and Regulatory Developments

- Other related provisions in Dodd-Frank Act
 - Say on Pay votes on “golden parachutes”
 - Disclosure of Say on Pay votes by institutional investment managers
 - Executive officer pay-versus-performance disclosure
 - CEO pay equity disclosure (ratio of CEO to average employee compensation)
 - Executive compensation clawbacks
 - Compensation committee independence
 - Disclosure relating to compensation consultants

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Dodd-Frank Act – Issues to Consider

- Effective date
 - Requirement will be in effect for the 2011 proxy season
- Frequency of vote
 - What happens when none of annual, biennial or triennial options receive majority support?
 - Not entirely clear whether frequency vote binding
- Companies covered
 - SEC authority to exempt an issuer or class of issuers
- Preliminary proxy
 - Unclear whether advisory vote will necessitate filing of preliminary proxy statement (TARP example says no)

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What to Do Next

- Although a Say on Pay vote against a compensation plan has no legal ramifications and is merely advisory...
 - Bottom line = shareholder vote will be heard
- Preparing for the inevitable
 - Only 12% of companies consider themselves “very well prepared”
 - 6% of companies currently offering MSOP or planning to roll it out
 - 46% of companies said only “somewhat prepared”
 - 22% do not know where their companies stand
 - (Source: Towers Watson survey)
 - While notion of Say on Pay has been in the works for years, only 80 companies currently offer Say on Pay votes

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What to Do Next

- Learning from TARP
- Identify Vulnerabilities
- Internal Communications
- External Communications
 - Directly with large shareholders
 - Proxy CD&A

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Learning from TARP

- Applicable provisions (in addition to Say on Pay)
 - Prohibition on executive compensation programs that create excessive risk
 - Prohibition on compensation plans that encourage manipulation of earnings
 - Compensation committee independence
 - Clawback provisions
 - Prohibition on “golden parachute” payments
 - Prohibition on bonus, retention award or incentive compensation
 - Limitation on “luxury” expenditures

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Identify Vulnerabilities

- To avoid a negative Say on Pay vote, companies should focus on the following areas of their executive compensation programs:
 - Compensation Committees
 - Golden Parachutes
 - Tax Gross-Ups
 - Performance-Based Equity Compensation
 - Clawbacks

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Identify Vulnerabilities

- Compensation Committees
 - Securities law today does not require wholly independent compensation committees for listed companies (best practice)
 - Investors likely won't consider compensation committees sufficiently independent unless all members are completely independent from management
 - Includes “soft” relationships, such as pre-existing friendships and interlocks on charitable foundation boards
- What you can do now ...
 - Ensure compliance with Dodd-Frank Act and 2009 SEC disclosure reforms
 - Revise committee charters to provide for total independence of compensation committee members
 - Encourage compensation committee to engage independent compensation consultants, legal counsel and other advisers

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Identify Vulnerabilities

- Golden Parachutes
 - Payments to executives upon change in control
 - Dodd-Frank Act requires non-binding shareholder vote on and disclosure of “golden parachute” compensation
 - Long subject to scrutiny, watched for by proxy advisory firms and individual shareholders
- What you can do now...
 - Modify/revise agreements to address shareholder concerns
 - Switch from single trigger to double trigger equity vesting
 - Modify severance arrangements to provide severance following change in control only if executive is involuntarily terminated or if executive voluntarily terminates employment for certain “good reason” events
 - Establish change in control compensation arrangements in advance, so that they can be approved under a Say on Pay vote (instead of separate vote in connection with a merger)

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Identify Vulnerabilities

- Tax Gross-Ups
 - Companies have paid an individual's excise and related income taxes in an effort to offset the excise tax on "parachute payments" and keep the individual whole
 - Providing gross-up or modified gross-up added in 2009 to RiskMetrics' list of "poor pay practices" for new or materially amended agreements
 - Shareholder groups also view gross-ups for imputed income tax imposed on use of corporate aircraft unfavorably
- What you can do now ...
 - Modify or eliminate excise tax gross-up altogether
 - Replace excise tax gross-up with "best payment" provision that pays executive either the full parachute payment or a reduced amount, whichever will leave the executive in the best after-tax position taking into account the excise tax
 - Eliminate other types of income tax gross-ups, in some cases replacing them with a fixed cash allowance intended to provide the executive with funds that can be used to pay the taxes or for other purposes

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Identify Vulnerabilities

- Performance-Based Equity Compensation
 - Critics of executive compensation practices often focus on extent to which compensation is tied to company performance
- What you can do now ...
 - Ensure compliance with Dodd-Frank Act and 2009 SEC disclosure reforms
 - Replace traditional restricted stock or restricted stock units with performance-vesting stock or stock units
 - Utilize design in which dividends and dividend equivalents are accumulated and paid out if/when underlying equity award becomes vested
 - Determine whether compensation committee has too much discretion

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Identify Vulnerabilities

- Clawbacks
 - Require bonuses and long-term incentive compensation to be repaid to company in the event of financial restatement or other circumstances
 - Provisions can take variety of forms
 - Time period for enforcing a clawback also varies
 - Significantly more common
 - § 304 of the Sarbanes-Oxley Act (applies to CEO and CFO)
 - Dodd-Frank Act (applies to current and former executive officers)
 - Although clawback provisions have proliferated in recent years, the enforceability of clawback provisions remains relatively untested

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Identify Vulnerabilities

- Other potential no-vote triggers:
 - A CEO base salary of more than \$1 million
 - The award of a bonus to the CEO in addition to non-equity incentive compensation
 - A lack of correlation between company performance and annual cash incentives awarded to the CEO
 - A pay differential between the CEO and other named executive officers (NEOs) of more than three to five times the average of other NEOs
 - A change in pension value and non-qualified deferred compensation earnings that is larger than other elements of pay

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Identify Vulnerabilities

- Other potential no-vote triggers
 - An “all other compensation” column that is disproportionately large and contains excessive perks
 - Profits made on the exercise of stock options and value realized on the vesting of equity awards that does not match long-term performance
 - Annual performance and long-term incentive bonuses that are based on the same, single performance metric
 - Payment of incentives for below-median performance
 - Any perception of conflict of interest in change of control payments

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Internal Communication

- Identify internal interest groups
 - Legal/Corp. Secretary
 - NEOs
 - HR
 - Compensation Committee (especially the chair)
 - Investor relations/public affairs
- Ensure understanding of say-on-pay requirements
- Reach some degree of alignment on compensation strategy and vulnerabilities
- Determine overall approach to say-on-pay – modifying arrangements as necessary and communicating externally regarding purposes of elements of pay

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External Communication Road Map

- Who are your shareholders?
- Who speaks for the company?
- When should you engage?
- Who should you hire as an outside adviser?

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External Communication - Shareholders

- Build constructive relationships between investors, directors
 - Identify key shareholders, trade associations, proxy agents and potential media outlets with capacity to influence investor and public opinion on compensation matters
 - Identify other potential non-compensation governance concerns
 - Prepare and execute outreach plan in the “off-season”
 - Consult with institutional shareholders before compensation plan finalized
 - Offer meetings with chair of compensation committee and/or other board members to key market players and consultants

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External Communication - Shareholders

- Conduct outreach program
 - Calling or email campaign
 - Group meetings
 - One-on-one meetings
 - E-forum
- Issues to consider
 - Understand ISS and voting guidelines
 - Regulation FD
 - If a company is considering running proposed changes by shareholders before publicly announcing them, key is to avoid sharing material non-public information

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External Communication – Proxy Statement

- Compensation Discussion & Analysis (“CD&A”)
 - In addition to reviewing and revising your executive compensation programs, companies should review the description of their programs in their CD&A
 - Use to tell a story
- What you can do now ...
 - Consider additional charts/graphics and bullets
 - Possible expanded comparisons with peer groups
 - Consider executive summaries/overviews
 - Seek more input on CD&A from compensation committee (and others?)
 - Analysis/Best Practices
 - Wealth accumulation
 - Full walk away number
 - Internal pay equity

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Case Studies

- Company A
 - Co-CEO #1 earned total direct compensation of \$104 million in 2008 (mainly restricted stock and options)
 - Highest pay of any CEO in the U.S. that year
 - In 2009, Co-CEO #1 earned \$3.8 million in total compensation, while Co-CEO #2 earned \$8.5 million (\$24.2 million in 2008)
 - Company announced it would split in two by the first quarter of 2011
 - If it happens, Co-CEO #1 would get 1.8% - 3% stake of new company
 - If the split doesn't happen by June 30 of next year, gets \$38 million.
 - ISS advises vote against
 - Based on: repeated failure to address payment if business separation does not occur; increased from \$30 million to \$38 million (inappropriate “pay for failure” arrangement); contains a modified excise tax gross-up provision
 - Compensation plan receives only 46% support in May 2010
 - Company gave its shareholders a Say on Pay vote in 2009
 - Comp plan received 64% support (one of four companies in 2009 to receive less than 65% approval)

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Case Studies

- Company B
 - CEO one of highest paid chiefs in the U.S.
 - Total direct compensation of \$52.2 million in 2009
 - Earned almost \$375 million, including value of exercised stock options and newly vested restricted stock over past three years
 - Received press attention based on pay practices
 - No announced CEO succession plan, even though CEO exceeds director retirement age of 75
 - ISS advised vote against
 - Based on repeated failure to address pay disparity; peer group disparity; performance target issues; CEO change in control agreement contains excise tax gross-ups
 - Voluntarily began offering shareholders Say on Pay in 2009
 - Did road show during 2010 proxy season
 - Failed to receive majority support from shareholders in May 2010

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Case Studies

- Company C
 - CEO 2009 base salary rose to \$1.6 million (from \$1 million) and compensation committee increased annual base salary by \$2.3 million in September 2009
 - Overall pay package rose from \$4.5 million in 2008 to \$5.1 million in 2009
 - Accumulated supplemental pension benefit totaling more than \$21 million
 - Shift to salary stock to get around TARP restrictions on incentive pay
 - Comp committee considered peer group benchmarks for total pay (vs. separate benchmarking for each significant compensatory element)
 - Company posted losses of \$1.34 billion and \$1.47 billion, respectively, for 2008 and 2009
 - -34% one-year shareholder return and -45.3% return over three years
 - ISS advised vote against
 - Based on: pay for performance disconnect; short-term incentive plan more discretionary and performance results only generally referenced; same metrics used for short-term and long-term plan for increasing risk profile
 - Say on Pay plan receives 45% support
 - Received 87.2% approval during 2009 advisory vote (required as TARP recipient)

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Say on Pay “To Do” List

- Revisit your executive compensation program
- Revisit the manner in which your executive compensation program is presented in your proxy statement
- Familiarize yourself with guidelines published by proxy advisory firms
- Review compensation committee membership for independence
- Reach out to your shareholder base, especially institutional investors
- Follow the SEC rulemaking process
 - Guidance on how Say on Pay proposal should be phrased
 - Determination regarding applicable voting standard for vote on selection of annual, biennial or triennial vote

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Q&A



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