



PIRC RESPONSE – 18 NOVEMBER 2010

PIRC's comments on the SEC's proposed rules relating release numbers: 33-9153 and 34-63124.  
File number: S7-14-10



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Sent via email to: rule-comments@sec.gov. File Number S7-31-10

November 18, 2010

Elizabeth M. Murphy, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Release numbers: 33-9153 and 34-63124  
File Number S7-31-10 (Concept Release on the U.S. Proxy System)

Dear Ms. Murphy:

Pensions Investment Research Consultants (PIRC Ltd) are a proxy advisory service providing institutional shareholders with advice on how to exercise their ownership responsibilities for almost 25 years.

We support the Securities and Exchange Commission's (SEC), proposed rules relating to Shareholder Approval of Executive Compensation and Golden Parachute Compensation and offer the following comments.

**General comments relating to shareholder approval of executive compensation**

We have been supportive of the move towards a say-on-pay vote and were involved in researching the UK experience, and if there were any benefits derived from the move to having a vote on remuneration. The findings of the report, *Say on Pay: Six Years On*<sup>1</sup>, are that the shareowner advisory vote on remuneration in the UK has largely been favorable, and key findings included:

- Both investors and companies report that since the introduction of the vote there has been an increase in engagement over remuneration;
- There has been a sharp reduction in directors' typical notice periods since the introduction of the shareholder vote. 75% of directors were on one year in 2001, compared to over 95% now. This has reduced the risk of payment for failure;
- Performance-related elements of remuneration now account for a much larger percentage of the total, with long-term incentive plans (LTIPs) becoming a more significant element;
- Between 2000 and 2008 there was a clear movement away from the use of option schemes towards LTIP share awards; and
- Some shareholders do not appear to have used their voting rights effectively, with the average vote against a company's remuneration report falling from a peak in the 2004 season.

It is in light of this research that we recommended that there be a 'say-on-pay' in the U.S. and Deborah Gilshan, Corporate Governance Counsel at Railpen Investments and co-author of the report, said: "Our analysis of the UK suggests that shareholders are better placed to engage with directors on issues around pay if this is backed up with the right to vote. As global investors, we are concerned that the rights we have in other parts of the world are not evident in the USA... We see the

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<sup>1</sup> *Say on Pay: Six Years On (2009)* – A PIRC and Railpen report on the shareowner advisory vote on remuneration in the UK. Available free at:  
<http://www.pirc.co.uk/sites/default/files/documents/SayonPay.pdf>

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implementation of Say on Pay as part of the larger corporate governance reform agenda that is needed in the USA.”<sup>2</sup>

We congratulate the SEC for making the move towards giving shareholders an input into a key governance issue at U.S. companies, and offer the following comments.

### **Shareholder approval of executive compensation (II.A.)**

*Proposed Amendments to Item 402(b) of Regulation S-K: Disclosure of the consideration of the results of prior say-on-pay votes*

The Proposal amends Item 402(b) of Regulation S-K to add a new requirement to the Compensation Discussion and Analysis (CD&A) to discuss “[w]hether and if so, how the registrant has considered the results of previous shareholder advisory votes on executive compensation required by Section 14A of the Exchange Act.”

Where it is the case that a company has made changes in its executive compensation programs in response to shareholder input, it is reasonable to request that companies describe the changes made and the reasons for them as a result of their engagement and review processes. Our clients view it as a necessity that companies are transparent with regards to their policies and discussions and to assist their evaluation of compensation packages. Therefore, we support the mandatory disclosure and discussion of the considerations that companies’ took into consideration as a result of the shareholder advisory vote on compensation.

We would support the idea that the results of the two previous advisory votes on compensation be disclosed in the proxy materials.

### **Shareholder approval of the frequency of shareholder votes on executive compensation (II.B.)**

We view that companies that engage with shareholders’ on compensation matters frequently are better positioned to respond to market conditions and have a better alignment between rewarding performance and potential concerns of shareholders. As the findings of the *Say on Pay: Six Years On (2009)* report would indicate it is of benefit for long-term shareowners to regularly check that the company and the shareowners’ interest are aligned. From our experience in the U.K. we would surmise that an annual review is the most beneficial for this process.

We would not support provisions which would unfavourably restrict the ability of shareholders to exercise their rights to initiate shareholder proposals. There should be the ability of shareholders to propose a different frequency than the one adopted by the issuer, especially where significant changes have occurred in a company’s compensation package and practices.

*Proposed Rule 14a-21(b): Frequency of say-on-pay and initial public offerings*

The Commission has requested comment as to whether a new issuer should be permitted to disclose the frequency of its say-on-pay vote in the registration statement for its initial public offering and be exempted from conducting say-on-pay and frequency of say-on-pay votes until the year disclosed.

We view that a new issuer should allow new shareholders to have ‘say-on-pay’ and the ‘frequency of say-on-pay’ votes at their first annual meeting. Our clients’ perceive this as a core governance issue that should be embedded within the corporate structure at the earliest opportunity.

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<sup>2</sup> Railpen and PIRC press release:

[http://www.railpen.co.uk/tiny\\_mce/plugins/filemanager/files/pdf/ResearchPapers/Say\\_on\\_Pay\\_report.pdf](http://www.railpen.co.uk/tiny_mce/plugins/filemanager/files/pdf/ResearchPapers/Say_on_Pay_report.pdf)

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Having say-on-pay and frequency of say-on-pay votes in the first annual meeting after a company becomes public will be meaningful and establish the metrics and performance criteria for annual and long-term compensation. Although there may have been compensation arrangements disclosed within the IPO registration statement shareholders should still be afforded the opportunity to vote upon how the shareholders' funds are distributed in the form of compensation.

*Proposed Amendment to Rule 14a-4: Corresponding changes to Item 5.07 of Form 8-K*  
The amendment to require issuers to present four choices to their shareholders with respect to the frequency of say-on-pay vote (a choice of one, two or three years or abstain) will require changes to Item 5.07 of Form 8-K to allow for these options to be reported. Our suggestion is that where there is not an overall majority for a particular option the default should be the annual vote option.

*Facilitating engagement*

We would like to support the suggestion from RAILPEN Investments (Railpen) and Universities Superannuation Scheme (USS)<sup>3</sup> to see the proposals modified to encourage issuers to conduct a meeting, conference call and/or internet forum (after release of the proxy but at least one week prior to the voting deadline) in order for the issuers to respond to questions from shareholders on executive compensation related matters and other issues relevant to the proxy materials. This so called "Fifth Analyst call" would serve a purpose similar to standard quarterly results calls but follow the publication of the proxy statement and precede the annual shareholders meeting (see Appendix A).

We would recommend the SEC allow shareholders the ability to file shareholder resolutions on the frequency of the say on pay votes at companies in years following a material change in executive compensation policy or practices.

**Disclosure and shareholder approval of 'Golden Parachute' arrangements (II.D.)**

In order to provide a full picture of remuneration being received in connection with a change in control, agreements for the acquirer to provide compensation or employment to named executive officers should be disclosed. Ongoing consulting or employment agreements, for example, can be very material to determining whether or not golden parachute/change in control provisions is reasonable. We think the rule should require such disclosures and view that the current disclosure makes it difficult to compare arrangements. The tabular based disclosure being proposed would improve this situation.

Thank you for the opportunity to comment.

Yours sincerely



Alan MacDougall  
PIRC's Managing Director

Compiled by Adam Rose. For any further questions please contact:  
[adam.rose@pirc.co.uk](mailto:adam.rose@pirc.co.uk)

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<sup>3</sup> <http://www.sec.gov/comments/s7-31-10/s73110-28.pdf>

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## **APPENDIX A – FIFTH ANALYST CALL ON CORPORATE GOVERNANCE AND THE PROXY STATEMENT**

### ***Request for a Fifth Analyst Call on Corporate Governance & the Proxy***

The undersigned institutional investors, representing approximately \$2 trillion in assets under management as of September 1<sup>st</sup> 2010 are proposing that US companies host a dedicated conference call for institutional investors focused exclusively on corporate governance as reflected in the annual proxy statement. The “Fifth Analyst Call” would serve a purpose similar to standard quarterly results calls but follow the publication of the proxy statement and precede the annual shareholders meeting.

While the undersigned institutions believe that a majority of companies would benefit from this type of collaborative discussion with their shareholders, as a pilot project we have identified a number of companies that, in our view, would benefit the most from such engagement due to unique, company-specific circumstances.

The Fifth Analyst Call aims to:

- Utilise the rights and responsibilities embedded in the Dodd-Frank Act to encourage good governance by issuers and responsible ownership by investors;
- Enhance investor understanding of the company’s corporate governance strategies so as to better reflect governance in valuations;
- Improve company-investor dialogue so that corporate governance protects long-term value and enables sustainable business growth;
- Serve as a common platform of education and dialogue for both equity analysts and governance specialists within the institutional shareholder base, ensuring that voting decisions are made within the context of the company’s competitive environment and performance; and
- Facilitate dialogue around the proxy statement so as to enable more informed voting of shares.

### ***Participants***

Proposed participants in a “Fifth Analyst Call” would be institutional investors who are shareholders in the company and have a commitment to actively vote their shares. Governance analysts and equity analysts are both encouraged to join the call. A full list of institutional investors and asset owners that have already agreed to support the ‘Fifth Analyst Call’ is included below:

APG Asset Management (The Netherlands);  
Australian Council of Superannuation Investors (Australia);  
BC Investment Management Corporation (Canada);  
Cooperative Asset Management (UK);  
DWS Investment GmbH (Germany);  
F&C Asset Management (UK);  
Florida State Board of Administration (US);  
PGGM Investments (The Netherlands);  
Railpen Investments (UK);  
Standard Life Investments (UK)  
T. Rowe Price (US) Universities Superannuation Scheme (UK);  
Walden Asset Management (US)

Investors request that the independent board chairman or lead director attend the call. The chairs of key board committees are also encouraged to participate although this is not a prerequisite for conducting the call. It is assumed the Company Secretary would attend as well. It may be advisable for the General Secretary or Investor Relations to attend this call although the primary dialogue should be between investors and their board representative(s).

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