Brian Foley & Company, Inc.
Executive Compensation Consultants

September 22, 2010

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **Comments re Executive Compensation Portions**
<u>of Dodd-Frank Act – Sections 951-957</u>

Dear Ms. Murphy:

I appreciate the opportunity to submit this letter in response to the invitation made by the SEC to the public to submit comments on the SEC initiatives called for under Sections 951 to 957 of Subtitle E of Title IX of the Dodd-Frank Act (the "DFA").

I do so as an independent executive compensation consultant and attorney, and frequently cited media commentator, with more than 34 years of experience in advising boards, board committees, senior managements and large shareholders on a wide range of senior executive compensation sizing, design and disclosure matters at a wide variety of large publicly-traded companies.

My comments are as follows:

1. Section 951 – <u>Say-on-Pay and Say-When-on-Pay Votes</u>

A. <u>Waiver of preliminary proxy requirement</u>

For companies subject to TARP, the SEC previously decided to amend the then current Exchange Act rules to waive the requirement that a preliminary proxy statement be filed as a result of the TARP-required inclusion of a mandatory Say-on-Pay vote – in part because the requirement was added so close to the proxy mailing date for many of the companies in question.

I respectfully submit that, with respect to the Dodd-Frank Say-on-Pay and Say-When-on-Pay votes, the better course of action would be to require preliminary filings.

In particular, I submit that requiring the filing of preliminary proxy statements would have the advantage of giving the market at least 10 additional days notice regarding the likely content of the executive compensation disclosures being voted on.

One North Broadway, White Plains, NY 10601-2310
Main: (914) 946-9700 ■ Fax: (914) 946-9700 ■ Email: brian@brianfoleyco.com

In my view, that extra time would be quite helpful as large investors, proxy vote advisors and other analysts/advisors strain to properly and efficiently handle the huge increase in Say-on-Pay vote volume in fairly narrow/tight timing windows – a load much greater than that presented by the TARP Say-on-Pay requirement (which impacted only about 237 companies).

B. Frequency Choices

I submit that the Commission should confirm that companies normally must provide the full range of choices (1 year, 2 years or 3 years), but can elect to reduce the choices to being between 1 year and 2 years (since eliminating the 3-year choice would not adversely impact shareholders).

C. Every other year as the default standard for Say-on-Pay vote frequency where the once-every-6-years frequency vote is split with no majority winner

I respectfully submit that, where the initial and any subsequent Say-When-on-Pay frequency vote is split such that no one choice (between 1, 2 and 3 years) receives majority approval (based on the applicable majority standard), the most appropriate default would be to require a Say-on-Pay vote every other year (i.e., every two years).

This is so since, assuming each choice gets some votes and none gets majority approval, in each case, more than 50% of the votes will be for more than 1 year, and more than 50% of the votes will also be for less than 3 years.

The only scenarios where this would not be true would be the highly unlikely scenarios where the vote is split exactly between two choices (1 and 3, 1 and 2, or 2 and 3) with zero votes for the third choice– in which case, two years would still, on balance, in my view, be a reasonable/appropriate default.

D. Phasing in of Say-on-Pay and Say-When-on-Pay votes pursuant to new Section 14A(e) of the Exchange Act

I am concerned, as a practical matter, about the relative real-world capacity of large institutional investors, various proxy vote advisors and Say-on-Pay analysts and advocates to handle the sheer volume of Say-on-Pay vote campaigns/decisions in 2011 if the Say-on-Pay and Say-When-on-Pay requirements apply across the board to all public companies for 2011.

I therefore urge the Commission to consider delaying application of these new requirements to (or for the present exempting) smaller reporting issuers – e.g., those with market caps as of the last year-end (or a more recent date) of less than $x (e.g., $300 million to $500 million) and annual revenues of less than $y (e.g., $500 million).

This would unfortunately still leave the market at some risk that numerous Say-on-Pay votes will not receive the attention they might deserve and would have gotten under pre-Dodd-Frank rules where Say-on-Pay advocates could, to a large extent, pick and choose their targets, but it would help reduce the likely data absorption/processing problems created by the sheer volume of votes required if Say-on-Pay is done across-the-board.

E. Binding Impact of Say-When-on-Pay votes

Section 951 specifically refers to the Say-When-on-Pay vote as a vote "to determine whether [the Say-on-Pay votes at the company in question] will occur every 1, 2, or 3 years".

Nonetheless, some have suggested that the Say-When-on-Pay votes will themselves be non-binding -- a position which seems at odds with the above statutory language.

I submit that the Commission should clarify that Say-When-on-Pay votes are binding.

F. Hybrid Say-When-on-Pay Choice

Finally, I submit that it would be reasonable/practical for the Commission to permit a hybrid Say-When-on-Pay choice providing for:

> "a Say-on-Pay vote every year unless the Company receives an approval rating of 60%-65% or better, in which case the Say-on-Pay vote would thereafter be held every two years unless and until the approval vote fell below 60%-65%"

so long as the shareholders would have the right, at the time of the initial frequency vote, to instead vote in favor of every-year Say-on-Pay voting without regard to prior approval levels.

2. Section 951 –
Say-on-Golden-Parachutes Vote & Related Disclosures

A. Where is the added M&A disclosure?
Missing M&A compensation information

Looking at target companies in M&A deals, it is at best unclear just how much new added executive compensation disclosure (if any) is required under the Dodd-Frank legislation in an M&A setting compared to the "interested party" discussion currently required in a merger proxy.

I urge the Commission to promptly clarify what new types and forms of disclosure (if any) would apply over and above what is already required.

In this regard, I respectfully submit that the Commission should:

(i) clarify that the required disclosures relate not only to agreements between the target issuer and its NEOs, but also to agreements between the same NEOs and the acquirer;

(ii) require the M&A disclosures to separately itemize (by person) all target company NEO compensation actions and transactions occurring in or prior to the year of the transaction and not covered by the last proxy statement's tabular and text disclosures (at least to the extent such items impact amounts payable by reason of or after the M&A transaction in question) – since such items currently are often/generally not disclosed (except on a limited basis in Form 4 filings or on a "lumped in" basis);

(iii) require timely supplemental proxy / S-4 disclosure on an itemized (by person) basis of any NEO compensation/agreement developments (changes, additions, etc.) occurring after the initial mailing of the merger proxy, and prior to when the actual voting closes; and

(iv) consider whether or not to require the disclosure of verbal understandings and commitments between the target NEOs and the acquirer -- to reduce the instances where the parties avoid/skirt disclosure by delaying the execution of written agreements.

B. Prior Say-on-Pay approval exception

While Section 954 provides that agreements and arrangements previously disclosed and subject to a prior Say-on-Pay vote would not be subject to a Say-on-Golden-Parachutes vote, the Commission should clarify that this exception:

(i) would only apply if the NEO agreements and arrangements were in fact approved by shareholders in connection with the prior vote;

(ii) would not apply to material new compensation, new awards or material (e.g., more than 10%) increases in severance due to a switch to a higher formula or multiple occurring after the last Say-on-Pay approval; and

(iii) would not apply to NEOs who become NEOs after the last Say-on-Pay approval.

I also urge the Commission to address the question of whether and at what point (if any) severance increases after the last Say-on-Golden-Parachute vote due to material increases in the underlying pay components need to be newly approved – e.g., if, after the last vote, the severance amount jumps 25% or 50%, does prior approval of the formula suffice or must the additional severance be voted on?

3. Section 951 –
<u>Institutional Investment Manager Vote Disclosures</u>

I respectfully submit that the Commission should specify that the vote reporting by institutional investment managers on Say-on-Pay, Say-When-on-Pay and Say on-Golden-Parachutes should be disclosed in writing in a publicly available filing within 10-20 business days after the month in which the vote in question is cast.

4. Section 952 –
Compensation Committee Independence;
<u>Committee Advisor Independence</u>

A. <u>Application to issuers with no publicly-traded equity</u>

I respectfully submit that the Commission should clarify whether the new DFA compensation committee independence rules apply only to equity issuers or to all issuers, including those that have no publicly traded equity but do have publicly traded debt.

B. <u>Impact of "affiliate" status</u>

I respectfully submit that the mere fact that a board member is employed by or otherwise affiliated with an affiliate of the issuer who is an affiliate by reason of its ownership of more than 10% (and less than 50%) of the issuer's equity should not automatically disqualify the director as an "independent" for Compensation Committee purposes … e.g., if other shareholders own more, or if the affiliate owns less than 15% overall.

C. <u>Advisor independence factors and analysis</u>

With respect to the new Section 10C(b)(2) of the Exchange Act, I support the view that, in testing for "independence" by comparing the amount of professional fees billed by a Compensation Committee's consultant for work done for the Committee to the total other fees billed to the Company by that consultant (or a colleague, parent, subsidiary or other affiliate) for any other work, the focus with respect to such "other fees" should be on the total fees billed to the Company "other than any fees billed for executive compensation work done at the request or direction of the Compensation Committee for the Committee".

I also respectfully submit that a Compensation Committee's compensation consultant should not be required to disclose its total annual fees from sources unrelated to the Committee, management and Company in question for any period -- unless the consultant (or a parent, subsidiary or affiliate) is doing non-Committee work for the Company, or, if the Commission so chooses, is paid more than a stated de minimus dollar amount for such "other" work.

D. Legal advisor disclosures

I respectfully submit that, given the significant role(s) played by many outside counsel with respect to important compensation sizing and design issues addressed by Compensation Committees, the Commission should consider requiring proxy disclosure of the identity of such legal advisors and whether such advisors do work for the Company as well as for the Compensation Committee, or only advise the Committee.

E. Other Items

New Section 10C(b)(2)(A) should, in my view, also refer to any "parent, subsidiary or affiliate of the issuer" as well as the issuer.

Clarification is also needed as to whether and to what extent Section 10C(b)(2)(E) would apply to (i) any stock options or warrants held, (ii) any stock, options or warrants held by immediate family members, and (iii) any stock of any "parent, subsidiary or affiliate" of the issuer or options/warrants thereon.

5. Section 953 –
Pay vs. Performance

With respect to the "pay for performance" requirement in Section 953(a), I am concerned about how amorphous and poorly defined this provision is.

In my view, the key issues here include:

(i) Will the format be "one-size fits all" or can each company craft its own disclosure solution, subject to certain stated minimums/limits?

(ii) Who is to be included in calculating executive compensation?

(iii) What pay components need to be included?

(iv) How is performance to be measured?

(v) What timeframe(s) are to be used in the comparisons?

In this regard, I believe that the focus should at least be on the NEO group, on performance-based pay (with or without base salary added in), on performance periods of at least 1 year and 3 years, and on stock price, dividend and earnings performance, with companies having the right to provide more information if they wish.

The biggest challenge presented by Section 953(a) relates to the typical timing mismatch between the pay reported for proxy purposes for a given year and the financial performance results for such year. For example, the Summary Compensation Table total for Executive X for year 2 can include:

(i) some compensation which has been earned and paid in year 2,

(ii) some compensation earned in year 1 but not paid until year 2,

(iii) some compensation earned in year 2, but not paid until year 3, and

(iv) some compensation merely awarded in year 2 but not earned, vested or paid out as of the end of year 2 (or year 3).

I concur with the view that, as a practical matter, issuers will need to be, and should be, allowed to segment their pay for performance disclosures, if and as needed, so that each of the pay components being discussed can be matched to the right performance period(s) for that component.

6. Section 953 – <u>Required CEO Pay Ratio Disclosure</u>

Section 953(b), in my view, with limited possible exceptions, realistically provides little serious added analytical value, and presents, in its current form, a variety of practical issues and potentially significant calculation costs.

That said, the Commission will need to address a variety of practical issues with respect to the new CEO pay ratio calculations, including, among others:

(a) Can companies exclude part-time and seasonal employees and focus only on full-time employees? How should leased employees be handled?

(b) Can companies limit the calculation to U.S.-based employees only?

(c) How are employees of parents, subsidiaries (including partial subsidiaries), affiliates and joint ventures to be treated?

(d) What can the Commission do to simplify the calculations involved and reduce the compliance costs involved at least for 2011 -- given the expenses that would be otherwise have to be incurred to do a full blown "median" analysis if a full blown "Summary Compensation Table" compensation definition is used for all employees

(e) Should the Commission permit the "CEO pay ratio" calculation to be done on an "average" basis vs. a "median" basis at least for 2011 – which would reduce some but not all of the calculation costs?

(f) Should the Commission permit the "CEO pay ratio" calculation to be delayed to 2012?

In my view, as a practical matter, the Commission should delay the pay ratio disclosures for at least one year, or permit them, at least for 2011, to be done on an average (vs. median) basis, looking only at full-time U.S.-based employees and only at salary, wages, bonuses, commissions, over-time pay, stock-based awards and long-term cash incentives.

7. Section 954 –
<u>Expanded Clawback Provision</u>

Section 954 raises fairness issues to the extent it impacts executives regardless of fault (i.e., whether or not they were involved in, or even aware of, the conduct/activities that trigger the restatement), and is likely to push some companies to restructure incentive compensation and/or revisit "executive officer" determinations to reduce or eliminate the clawback impact of possible future restatements on executives who have not engaged in misconduct – which may or may not be a good thing.

Mechanically, the Section 954 issues requiring clarification would include, among others:

(a) With respect to compensation "received" in a year covered by a restatement triggering Section 954, guidance as to whether and how clawbacks under Section 954 would apply to / impact:

    (i) stock option and SAR grants vs. exercises in such year,

    (ii) restricted stock, restricted stock unit ("RSU") and other stock-based awards granted vs. earned vs. vesting vs. paid out in such year, and

    (iii) long-term cash incentives granted vs. earned vs. vesting vs. paid out in such year;

(b) Guidance with respect to what is meant by "material noncompliance"; and

(c) Clarification of whether Section 954 applies to:

    (i) issuers of publicly-traded debt with no publicly-traded stock, and

    (ii) foreign private issuers.

8. Section 955 –
Hedging

In my view, in the case of executive officers and non-employee directors, the Commission should not only require disclosure of whether hedging is permitted, but should also require disclosure of any such hedging that has occurred – both in promptly filed Form 4 filings and in the annual proxy statement.

9. Section 957 –
Broker Non-Votes – Application to Vote on Non-Equity Plans

I also urge the Commission to clarify whether the new broker non-vote rules are intended to apply to votes on NEO cash-based incentive plans requiring shareholder approval for IRC Section 162(m) purposes.

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Again, I appreciate the opportunity to submit the above comments for consideration by the Commission and its staff.

I would be pleased to answer any questions that the Commissioners or the Staff may have about the above comments.

Sincerely,

Brian T. Foley

Brian T. Foley, Esq.
Managing Director