

**MEMORANDUM**

**TO:** File

**FROM:** Nandini Acharya  
Attorney-Adviser  
Office of Rulemaking  
Division of Corporation Finance  
U.S. Securities and Exchange Commission

**RE:** Meeting with Robert M. Fields on Title IX of the Dodd-Frank Act

**DATE:** September 24, 2010

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On September 24, 2010, Felicia Kung, Anne Krauskopf, Tamara Brightwell, Sean Harrison and Nandini Acharya of the Division of Corporation Finance met with Robert M. Fields, an attorney specializing in executive compensation issues. The topic discussed was the implementation of Title IX, Subtitle E, Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which relates to compensation committee listing standards and compensation adviser independence criteria. A handout presented by Mr. Fields is attached to this memorandum.

Attachment



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**To: Ms. Meredith Cross**

**Cc: Ms. Felicia Kung**

**Re: Section 952 of the Dodd-Frank Wall Street Reform and  
Consumer Protection Act (“Dodd-Frank”)**

**Date: July 26, 2010**

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As you are undoubtedly aware, in light of Enron, Tyco and the current financial crisis (among other factors), the amount of compensation being paid to many senior corporate executives is an issue that has attracted much public attention and disdain. Section 952 of Dodd-Frank is intended to address this issue by imposing new independence requirements on board compensation committees, legal counsel and compensation consultants. Strict SEC regulations will ensure that the new rules established under Section 952 give compensation committees the ability to operate independently of corporate management and, accordingly, approve no more than reasonable levels of executive compensation. Thus, substantial compensation committee independence would ultimately benefit corporate stockholders and the public at large. The interpretations set forth in this memorandum are crucial to gaining the public’s acceptance of, and trust in, the legislation.

Specifically, this memorandum argues the following:

- That Section 952 “strongly encourages” that any legal counsel sought by compensation committees be independent; and

- That in defining independence, the percentage amount determined under new Section 10C(b)(2)(B) of the Securities Exchange Act of 1934, as amended (the “Act”), must be very small in order to insure compliance with the President’s and Congress’ intent to avoid conflicts of interest.

**“Strong Encouragement” That Compensation Committees Engage Independent Legal Counsel.**

It is my understanding that Section 10C(d) of the Act is intended to provide that corporate boards of directors and management may not prevent compensation committees from engaging independent legal counsel and other advisors. Thus, use of independent legal counsel and compensation consultants is not mandatory under the new law. However, there should be meaningful ramifications resulting from a failure to use independent legal advisors and consultants. SEC regulations should provide that reporting companies will be required to disclose in their proxies whether their compensation committees have elected to utilize independent counsel and, if they do not so elect, they must disclose the reasons why. Such a disclosure requirement would give listed companies a meaningful incentive to adhere to beneficial public policy and follow a “best practices” regime of making the engagement of independent counsel and compensation counsel a standard practice.

**Definition of Independence with respect to Legal Counsel and Compensation Consultants.**

Section 10C(b)(2) of the Act, also included in Section 952 of Dodd-Frank, sets forth guidelines for the SEC to use in defining “independence” for purposes of implementing (i) the requirement that board compensation committees engage independent legal counsel and (ii) an “implied recommendation” that they engage independent compensation consultants.

Section 10C(b)(2) of the Act provides that the SEC shall, by regulation, identify factors to be used in determining the independence of compensation consultants, legal counsel and other advisors. It goes on to state that such factors shall be “competitively neutral” among all classes of consultants, counsel, etc. No provision contained in Section 952 of Dodd-Frank defines the term “competitively neutral.” However, House Financial Services Committee Chairman Frank stated during the televised Conference Committee deliberations that this requirement is intended to protect the interests of small, boutique, compensation consultants and legal counsel.

Section 10C(b)(2) of the Act sets forth several factors that the SEC should take into account in its rulemaking process with respect to the determination of whether a law firm or compensation consultant is “independent” of a corporation. These factors include (i) the extent to which the legal counsel or compensation consultant is providing other services to the corporation (10C(b)(2)(A)), (ii) the percentage of the counsel’s or consultant’s annual gross fees received from a corporation (10C(b)(2)(B)), (iii) the policies and procedures established by the counsel or consultant to prevent conflicts of interest (10C(b)(2)(C)), (iv) any business or personal relationship of the compensation consultant or legal counsel with a member of the compensation committee

(10C(b)(2)(D)) and (v) the amount of a corporation's stock owned by the compensation consultant or legal counsel (10C(b)(2)(E)). In its rule making process the SEC should apply these factors in a very stringent manner in order to ensure that "independence" has a real and substantive meaning.

In particular, I would like to address Section 10C(b)(2)(B), dealing with the percentage of the consultant's or counsel's annual fees received from a particular corporation. The Act is vague in setting forth the type of fees that will be taken into account making this assessment. Logic would suggest that, as the intent of Section 952 of Dodd-Frank is to ensure that the law firms and compensation consultants are independent of corporate management, Congress is only concerned with fees related to services other than those provided directly to compensation committees. Common sense would lead to this conclusion because it is evident that the fewer compensation committee clients a consultant or legal counsel has, the more attuned such advisors would be to addressing the best interests of their compensation committee clients, and would clearly act independently of corporate management. Thus, under this analysis, even if a law firm or compensation consultant has only one compensation committee client (and, accordingly, receives 100% of its fees from that client) it should clearly be deemed to be independent of the corporation itself because its services are provided only to that compensation committee.

Interpreting Section 952 of Dodd-Frank in this manner would also make it possible to reconcile Section 10C(b)(2)(B) with SEC Rule 16b-3 and the Treasury Regulations promulgated under Section 162(m) of the Internal Revenue Code. Both the Rule and the Treasury Regulations address the issue of whether a corporate director is independent, and both provide that one of the factors to be taken into account is the amount of compensation the director receives from the corporation other than fees paid to him or her in his or her capacity as a director.

In order to clear up this ambiguity, the regulations accompanying Dodd-Frank should specifically include language providing that in determining the percentage of fees received from a corporation by the compensation consultant or legal counsel for the independence test, only those fees relating to services provided to a corporation other than fees related to services provided to the compensation committee will be taken into account.

In this regard, it is very important to note that many large national and international law firms and benefits consultants (which provide pension consulting, actuarial, health and welfare consulting and brokerage, as well as compensation consulting, services) have annual gross incomes in the \$1 billion (or greater) dollar range. Thus, for example, if a 10% cut-off in the percentage test described above were to be applied, it would allow the consulting and law firms to receive up to \$100 million or more from a corporate client for non-compensation committee services and still be deemed to be "independent" of that client. Since virtually no one client pays any law firm or benefits consultant fees in excess of \$100 million per year, the net effect is that, at the 10% level, all law firms and compensation consultants that may be engaged by management would, nevertheless, be deemed independent of management. In such a case Clause (B) would be rendered meaningless.

Accordingly, I recommend that the regulations promulgated by the SEC contain a very stringent requirement (maybe a cut-off of 0.01% of gross fees or a flat dollar amount of anywhere from \$50,000 to \$250,000 (in order to bring the statute more in line with Rule 16b-3 and IRC Section 162(m))). Either of these alternatives would be appropriate as they would more effectively ensure that the compensation committee's legal counsel and compensation consultants would truly be independent of the corporation's management team.

### **Summary**

As stated above, the regulations I suggest that the SEC promulgate would give teeth to Section 952 of Dodd-Frank. They would have an immense impact on the relationship between compensation committees and corporate executives and help insure that these committees would be able to carry out their duties and obligations independently of any undue influence by management, whose interests are all-too-often adverse to those of corporate stockholders and the public in general.

Because the independence requirements are effective upon enactment of Dodd-Frank, the legal and consulting communities need guidance from proposed or temporary regulations as soon as possible so that they, and the compensation committees they serve, can comply with the new requirements in a consistent and meaningful manner.

I want to thank you for your time and consideration. Your interest in this matter is greatly appreciated.