Business Law Section
AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654
(312) 988-5588
Fax: (312)988-5578
www.ababusinesslaw.org
businesslaw@abanet.org

Via Email: rule-comments@sec.gov

September 29, 2010

U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Attention: Ms. Elizabeth M. Murphy, Secretary

Re: Request for Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act Title IX: Investor Protections and Improvements to the Regulation of Securities; Subtitle E Accountability and Executive Compensation

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association (the "ABA") to address certain executive compensation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") in response to the July 27, 2010 request for public comments by the Securities and Exchange Commission (the "Commission").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the ABA Section of Business Law.

The Committee thanks the Commission for this opportunity to comment on the initiatives the Commission is authorized to undertake in connection with the Dodd-Frank Act. In accordance with the Commission's efforts to organize the submission of comments relating to each major initiative under the Dodd-Frank Act, the Committee expects to submit a number of comment letters, each addressing one of the major initiatives identified by the Commission. This letter comments on the provisions relating to executive compensation matters set forth in Sections 951 through 955 of the Dodd-Frank Act. Because our comments are being presented prior to formal rulemaking, certain of our comments are intended to highlight matters we believe the Commission should consider in formulating its proposed rules relating to these provisions. On other points, we offer more specific suggestions for the rule proposals.

Summary of Our Comments

In our view, in connection with the rulemaking the Commission is required or permitted to undertake pursuant to Sections 951 through 955 of the Dodd-Frank Act, the Commission should consider:

1. The rulemaking to be undertaken by the Commission pursuant to the Dodd-Frank Act will provide the Commission a valuable opportunity, in formulating its proposals, to re-evaluate existing executive compensation disclosure rules and to consider means to enhance the quality of disclosures without unnecessarily lengthening executive compensation disclosures. We therefore encourage the Commission (to the extent it is able to do so within statutorily prescribed rulemaking deadlines) to afford commenters responding to any proposed rulemaking the opportunity not only to respond to specific questions, but also the opportunity to suggest means by which existing compensation disclosure rules can be improved.

2. The Commission should propose rules under the “Say on Pay” provisions of Section 951 of the Dodd-Frank Act not only to align the Commission’s disclosure requirements with the statutory provisions, but also to provide important guidance with respect to the interpretation and implementation of those provisions.

3. In proposing “Pay versus Performance” disclosure rules pursuant to Section 953 of the Dodd-Frank Act, we encourage the Commission not to prescribe a single inflexible standard for measuring financial performance, but instead to use this opportunity to mandate enhanced disclosures regarding the operation of performance-based compensation arrangements while affording companies the ability to determine and disclose appropriate measures of financial performance in view of their industry characteristics and their peer group standards.

4. The Commission should use its rulemaking authority to clarify the calculations required under the pay ratio disclosure provisions of Section 953 of the Dodd-Frank Act in order to further Congressional intent and provide meaningful disclosures, while mitigating burdens placed on issuers.

5. For the reasons set forth in this letter, the Commission should consider, to the extent it has the authority to do so, exempting foreign private issuers from the provisions of Sections 951 through 955 of the Dodd-Frank Act.

Discussion

General Comments

We encourage the Commission to use the rulemaking required or permitted under these provisions of the Dodd-Frank Act as an opportunity to propose enhancements or refinements to existing disclosure rules. In particular, although each of Sections 951 through 955 of the Dodd-Frank Act contain disclosure requirements, the Commission’s existing executive compensation disclosure rules already touch upon each of the disclosures topics that are subject to Sections 951 through 955 of the Dodd-Frank Act. Thus, we view the Dodd-Frank Act as calling upon the Commission to enhance, instead of add to, its existing disclosure requirements. An important goal of the Commission's rulemaking should be to elicit from companies more meaningful disclosures, rather than merely adding to the length, complexity and density of the disclosures. For example, as discussed further below, some of the executive compensation disclosure provisions in the Dodd-Frank Act correspond with topics that under Item 402(b)(2) *may* need to be discussed in a company's Compensation Discussion and Analysis, if material and "depending upon the facts and circumstances." The Dodd-Frank Act can be viewed as a Congressional determination that such topics are important to investors and should in all cases be discussed. Thus, we suggest that the Commission build upon the strength of its principles-based disclosure rules by integrating the disclosure requirements mandated by the Dodd-Frank Act with the Commission's existing rules (and modify the existing rules to the extent appropriate), rather than adopting entirely new and accretive disclosure requirements. We believe this approach is particularly important in facilitating shareholders' assessments of companies' executive compensation in light of the advisory votes on executive compensation mandated by the Dodd-Frank Act.

Unless otherwise indicated, all Section and rule references herein are to the Securities Exchange Act of 1934 and the rules thereunder, and all Item references are to Regulation S-K.

<u>Section 951: Shareholder Vote on Executive Compensation Disclosures</u>

Section 951 of the Dodd-Frank Act creates a new Section 14A. Section 14A(a) mandates periodic advisory votes on the compensation of executives as disclosed under Item 402 ("Say on Pay") and periodic advisory votes on the frequency of a company's Say on Pay votes ("Say on Frequency"). Section 14A(b) mandates disclosure and quantification of, and in some cases a separate advisory vote on, certain agreements or understandings concerning compensation that is based on or otherwise relates to certain acquisitions, mergers, consolidations, sales or other dispositions of all or substantially all of the assets of an issuer ("Say on Parachutes").

Say on Pay Advisory Vote

The Commission's experience in adopting rules under Section 111(e) of the Emergency Economic Stabilization Act of 2008 ("EESA"), which required companies with obligations arising from financial assistance under the Troubled Asset Relief Program to provide an annual Say on Pay vote, is instructive for rulemaking under the Dodd-Frank Act. Specifically, the Commission's rulemaking should provide that:

(i) Section 14A(a)(1) applies to meetings of shareholders for which proxies will be solicited for the election of directors,

(ii) smaller reporting companies entitled to provide scaled disclosure pursuant to Item 402(l) will not be required to include a compensation discussion and analysis in their proxy statements in order to comply with this section (a point that is even clearer given the wording differences between Section 14A(a)(1) and Section 111(e) of EESA), and

(iii) providing a Say on Pay vote does not trigger an obligation to file a preliminary proxy statement.

In view of the similarities between the vote called for in Section 14A(a)(1) and Section 111(e) of EESA, the Commission also should clarify that companies subject to both provisions are able to satisfy both statutory requirements through a single resolution.

The Commission should amend Rule 14a-6 to provide that any management-sponsored advisory vote on executive compensation does not trigger the requirement to file a preliminary proxy statement. This relief should be available not only for advisory Say on Pay votes pursuant to Section 14A(a)(1) and Section 111(e) of EESA, but also to any other management-sponsored non-binding vote on executive compensation. We believe that the advent of periodic Say on Pay votes may lead companies to submit proposals seeking an advisory vote on only one aspect of executive compensation. For example, if a company does not receive the level of shareholder approval it desires in a Section 14A(a)(1) Say on Pay vote, the company may revise one aspect of its executive compensation program and the following year submit only that revised program to shareholders for a non-binding advisory vote. A company may also submit new change-in-control plans, agreements or understandings for an advisory vote. In addition, although shareholders may vote for longer intervals, a company may choose to submit a Say on Pay vote more frequently than the Say on Frequency vote has advised. We believe that in all of these situations the burden of filing a preliminary proxy would not be justified in light of (i) the Commission's, shareholders' and companies' experience with other advisory votes that do not trigger a preliminary proxy filing, such as votes on precatory shareholder proposals and votes ratifying the selection of auditors, and (ii) the comparability of an advisory vote on executive compensation to other matters that routinely arise at annual meetings. Moreover, it does not make sense for an advisory vote on executive compensation to trigger a preliminary proxy filing when under Rule 14a-6(a)(4) a binding vote on an executive compensation plan or arrangement does not require a preliminary proxy filing. Finally, widespread preliminary proxy filings will make it more difficult for the Commission and shareholders to identify proxies with truly significant, non-routine matters.

In view of the broader applicability of Section 14A(a)(1) across public companies, there are a number of issues that the Commission should address in its rulemaking that were not as pressing with Section 111(e) of EESA. We recommend that the Commission more specifically state what disclosures are required to accompany the resolution, instead of maintaining the existing language of Item 20 that calls for companies to "briefly explain the general effect of the vote, such as whether the vote is non-binding." For example, the Commission could propose that companies be required to "state or to briefly explain that the proposal is non-binding." We are concerned that a more general instruction to explain the general effect of the vote could be read as requiring disclosure of what action may be taken by the company in the event of a negative vote on the matter by shareholders, which could result in generalized and boilerplate disclosures, because companies typically will not be in a position to address how they intend to respond to a negative Say on Pay vote until after they have had an opportunity to determine and assess the basis or bases for such vote. In addition, because the obligation to hold an advisory Say on Pay vote will apply to companies with a wide range of capital and voting structures and because there is no state law addressing this item, the Commission should clarify what class of securities is entitled to vote on a Say on Pay vote. For example, because the vote is an advisory vote on executive compensation, we believe it would be appropriate to provide that only securities that would be entitled to vote on an executive compensation plan proposed by the company should be entitled to vote on a Say on Pay proposal.

Say on Frequency of Advisory Votes

The language of Section 14A(a)(2) raises a number of interpretive issues that the Commission should address in its rulemaking. One issue is whether the frequency vote is binding or advisory. Some who have suggested that the vote is intended to be binding have pointed to the statutory language that the vote is "to determine" the frequency of Say on Pay votes. However, we note that this language is no more definitive than the language under Section 14A(a)(1), stating that the Say on Pay advisory vote is a vote "to approve" the compensation of executives, and therefore the "to determine" language should not be viewed in isolation in interpreting the Say on Frequency provision. In our view, there are reasonable bases to conclude that the Say on Frequency vote is a non-binding advisory vote. In particular, Section 14A(c) states that the shareholder vote referred to in subsection (a) "shall not be binding on the issuer or the board of directors of an issuer." This language does not suggest a distinction between the Say on Pay vote under subsection (a) and the Say on Frequency vote under the same subsection. In the face of at best ambiguous language, the Commission should not lightly assume that Congress intended to create an unprecedented federal shareholder right to dictate the frequency of Say on Pay advisory votes. As well, consistent with the provisions of Section 14A(c)(1), the Say on Frequency vote should not be construed as overruling a decision by a company's board of directors to hold a Say on Pay advisory vote at more or less frequent intervals than that which may be approved under a Say on Frequency vote.

A second issue relates to the format of the Say on Frequency vote: whether the Board may select one of the three alternative frequencies (annual, biennial or triennial) for submission to the shareholders in the proxy statement, and the shareholders would then vote for or against (or to abstain from choosing) such alternative, or whether the proxy statement would set forth each of the three frequency alternatives, and the shareholders would be able to select among them or to abstain. In addition, there may be further alternatives, such as "no more frequently than" or "no less frequently than" choices). We believe that there is a basis for each of these approaches and alternatives, and that the Commission should make clear which format, or formats, a company may appropriately submit to shareholders. We believe there are a number of considerations that can support the first approach (for, against or abstain with respect to one specified frequency choice). First, we note that the language calls for a vote on "a separate resolution." The common understanding of the term "resolution" is that a specific action is being proposed for approval or disapproval. Second, a vote among numerous alternatives currently would violate Rule 14a-4(b)(1).[1] Although a Congressional mandate would, of course, override a Commission rule, we do not believe that ambiguous language should be presumed *sub silentio* to reverse the policy considerations and long-standing principle of Rule 14a-4(b)(1). Third, a novel voting system would require the Commission to develop new standards regarding the vote. Consistent with Rule 14a-4(b)(1), most companies' governing documents only contemplate proposals upon which shareholders vote either For or Against (or abstain); in our experience most companies provide for some version of a majority voting standard[2] to apply to votes on proposals outside of the context of an election of directors, and very few companies' governing documents provide for a plurality voting standard on proposals. This may be mandated by state corporation law (see, *e.g.*, Section 8.24(c) of the Model Business Corporation Act). Under these standards, if shareholders were asked to vote on a preference among three alternatives (or to abstain), there may be uncertainty as to what level of vote would be needed for one of the alternatives to be approved, and it is possible that a majority of shares voted may not be obtained for any of the three alternatives.[3] Although an advisory vote may be viewed as only a "sense of the meeting" and not subject to statutory or by-law provisions regarding actions taken by the shareholders at the meeting, even in the context of an advisory vote, the policy objective underlying Rule 14a-4(b)(1) of having a clear outcome pursuant to a shareholder vote weighs in favor of providing for a traditional For or Against vote on a frequency proposed by the company.[4] Finally, because of the absence of clear state law standards for addressing such issues, a novel voting format may raise many interpretive questions which the Commission and its staff would need to address, such as whether, if a person selects two of the alternatives, both votes are counted, neither vote is counted, or the vote for the more or less frequent alternative is counted.

On a more practical level, we have concerns as to whether every transfer agent and other entity involved in the shareholder voting process would be able to implement and accommodate a non-traditional voting system within the relatively short period of time available before Say on Frequency votes are required to be held. For example, telephonic and electronic voting systems may need to be revised to permit proxy tabulators to record votes on multiple alternatives, and systems and programs for tabulating voting results may need to be revised as well. Thus, if the Commission determines to seek comment on allowing shareholders to express a choice among three alternatives, or to abstain, the Commission should also seek comment to confirm that such a voting system can be timely implemented by a significant number of the

---

1 Item 5.07(b) of Form 8-K likewise anticipates only For, Against or Abstain votes.

2 For example, a majority of votes cast, a majority of shares present and entitled to vote or a majority of shares outstanding.

3 For example, if all shares voted (no abstentions) and 32% of the shares voted for annual, 38% voted for biennial and 30% voted for triennial, then each of the three alternatives have a majority of the shares not supporting it.

4 We assume that, pursuant to Section 14A(c)(4), in years in which a company does not put forth a Say on Frequency resolution, shareholders can continue to submit shareholder proposals proposing a different frequency than that last proposed by the company.

participants in the proxy voting system. Even if such a change were feasible for some participants in the proxy voting system, given the ambiguity of the statutory language and the fact that the Say on Frequency votes are required to be held only once every six years, we question whether the cost of developing voting systems for such a non-traditional vote (or effectively requiring companies to utilize only a proxy tabulator that is large enough to incur such costs) is appropriate.

As with Say on Pay votes, the Commission should clarify that the Say on Frequency advisory vote applies to meetings of shareholders for which proxies will be solicited for the election of directors, and should amend Rule 14a-6 to provide that the Say on Frequency proposal does not trigger an obligation to file a preliminary proxy statement.

Shareholder Approval of Golden Parachute Compensation

Disclosure Requirement

We believe the existing disclosure requirements under Item 402(j) provide an adequate and appropriate framework for disclosure of the agreements, understandings and amounts that are called for by Section 14A(b), and that the only deficiency in the existing disclosure rules is that the disclosure of agreements, understandings and amounts triggered by a transaction are not updated to reflect post-fiscal year-end changes or to reflect the fact of the transaction.[5] In particular, we believe that the five topics of disclosure specifically enumerated under Item 402(j) provide an appropriate and sufficient framework for disclosure that is useful for shareholders and that accommodates the wide range of arrangements that are covered by the disclosure rules. Accordingly, to implement new Section 14A(b)(1), Schedule 14A should be amended to provide that a company's proxy statement soliciting a vote to approve an acquisition, merger, consolidation, sale or other disposition of all or substantially all the company's assets (a "Covered Transaction") is required to include the disclosures required under Item 402(j) to the extent that they relate to any agreement, understanding or compensation that is based on or otherwise triggered by the proposed transaction, with the calculation of any such compensation to be based on the amounts paid, payable or expected to be paid in connection with the Covered Transaction, instead of the Item 402(j) calculations being based on information as of the most recent fiscal year-end. The disclosure obligation should apply to a company's named executive officers as determined in the same manner as under Instruction 4 to Item 5.02(e) of Form 8-K; that is, the determination of named executive officers should be based on the most recently filed disclosure under Item 402(c). As is currently the case under Item 402, disclosure would be required not only of amounts payable pursuant to agreements or understandings between the company and its named executive officers, but also amounts payable pursuant to agreements or understandings between the company and the acquirer.[6]

---

[5] M. Maremont, "Option Grants Draw Scrutiny," The Wall Street Journal (Oct. 12, 2009).

[6] Consistent with the Staff's Compliance and Disclosure Interpretation No. 217.02 under Regulation S-K, we believe the agreements or understandings that are subject to Section 14A(b) are those that relate to compensation with respect to the issuer that is being acquired. If an acquiring issuer has entered into

As under existing Item 402(j), the company would be required to provide a reasonable estimate (or a reasonable estimated range) of amounts attributable to the payments or benefits when uncertainties exist, and to disclose material assumptions underlying such estimates or estimated ranges in its disclosure.[7] Specifically:

(i) To the extent necessary, the company should make a reasonable assumption as to the date of any future event that is necessary to determine the amount of compensation. For example, if compensation is payable upon the closing date of a merger, the company should be able to specify a reasonable future closing date that it uses for making such calculations, although the Commission may want to specify that any subsequent triggering events (such as termination of employment) should be assumed to occur on the same date as the Covered Transaction.

(ii) To the extent that any amounts are based upon a company's stock price, the value of the compensation should be based on the value of the stock ascribed in the Covered Transaction. For example, if the transaction is a cash merger for $24 per share, then calculations should be based on the $24 per share number. If the value ascribed to the company's stock in the transaction fluctuates (for example, in a stock-for-stock transaction with a fixed exchange ratio) then a reasonable assumed value (which could include the stock price on a date prior to the mailing of the proxy statement) should be specified and used by the company in making the required disclosures.

Disclosure would be provided regardless of whether any such agreement, understanding or compensation is or has already been triggered, is deferred or is contingent on future events. For some companies, this type of presentation would result in quantification of amounts triggered solely by the Covered Transaction and separate quantification of amounts triggered by certain types of termination of employment within a specified period of time following a Covered Transaction; although depending on the arrangements involved there may be a larger or smaller number of scenarios that would be evaluated.

We believe that it is appropriate to continue to allow companies to format this information in a clear and understandable manner that is appropriate for the specific arrangements and circumstances, and that attempting to mandate a prescribed tabular format would be difficult given the variety of arrangements and situations covered.

Basing the merger proxy statement disclosure requirement on the existing Item 402(j) disclosures also is consistent with the provision under Section 14A(b) that does not require an advisory vote in the merger proxy statement if the change in control agreements or

---

agreements with executives of the target company relating to services to be provided to the acquiring issuer following the Covered Transaction, those arrangements should not be subject to Section 14A(b). They may, however, be subject to other, existing merger proxy disclosure requirements, such as the requirement to disclose the interests of certain persons in a proposed transaction.

[7] See Instruction 1 to S-K Item 402(j).

understandings have been previously disclosed and subject to a Say on Pay vote. This situation would only be possible if the Section 14A(b)(1) disclosure requirements relating to change in control agreements and understandings are identical to the Item 402(j) disclosure requirements.

Vote Requirement

Under Section 14A(b)(2), a separate advisory vote is required to approve the agreements, understandings and compensation disclosed pursuant to Section 14(b)(1) unless the agreements or understandings have been subject to a previous Say on Pay vote. The statutory language recognizes that even if agreements or understandings were previously subject to a Say on Pay vote, the amounts payable under those agreements or understandings may differ from amounts that were previously disclosed (for example, due to the fact that vesting may have occurred under outstanding equity awards, or because a Covered Transaction ascribes a higher value to the company's stock than the price used in calculating the value of arrangements as of fiscal year end under Item 402(j)). In short, the fact that the amounts attributable to agreements or understandings may differ from amounts previously disclosed does not affect the availability of the exception under Section 14A(b)(2). Nevertheless, the exception from the Say on Parachute vote requirement raises a number of interpretive issues that the Commission should address through its rulemaking in order to clarify when an agreement or understanding will be deemed to have been subject to a previous Say on Pay vote.

The Commission's rules should provide that if the material terms of an agreement or understanding, as they relate to or are triggered by the Covered Transaction, were disclosed and such disclosures were subject to a previous Say on Pay vote, then the exception under Section 14A(b)(2) will be available. The Commission's rulemaking should address four situations that are likely to arise that raise the issue of whether a Say on Parachute vote will be required:

(i) If previous disclosures that were subject to a Say on Pay vote identified and described the effect of contingencies, then the fact that those contingencies are being resolved in the Covered Transaction should not affect the availability of the exception. For example, if prior Item 402 disclosures that were subject to a Say on Pay vote disclosed that restricted stock units (RSUs) would fully vest on a change in control if the acquiring company did not agree to assume them, then the fact that the acquiring company in a Covered Transaction has not agreed to assume the RSUs (thereby resolving the contingency) should not affect the availability of the exception.

(ii) If a form of award agreement or a feature under a plan that is relevant in a Covered Transaction has been previously disclosed and subject to a Say on Pay vote, then the fact that additional grants have been made to an executive or additional benefits have accrued to an executive since the last Say on Pay vote should not affect the availability of the exception. This is because new grants under a previously described equity award program or additional accruals under other plans affect only the amount payable under the agreements or understandings, and the availability of the exception under Section 14A(b)(2) is not contingent upon the amount of compensation having been subject to a previous Say on Pay vote. Of course, the value of the new grants and the value of benefits under other plans reflecting the additional accruals will be disclosed and included in the value of benefits quantified under Section 14A(b)(1) and we expect that the new grants or accruals would be described consistent with the requirements under Item 402(j)(3) and (5) (for example, we would expect companies to disclose whether new RSU grants were part of an annual grant program or whether the timing of such grants changed due to the Covered Transaction).[8]

(iii) If an agreement or understanding has been amended since it was last subject to a Say on Pay vote, but the amendment does not affect a provision that is relevant in the context of the proposed transaction and does not affect the amount that is or may be paid to named executive officers in the proposed transaction, then that amendment should not affect the availability of the exception.

(iv) Likewise, if a company has not entered into new agreements or understandings following its most recent Say on Pay vote and has not amended agreements or understandings that were subject to a previous Say on Pay vote in a manner that is relevant to the Covered Transaction, but has new named executive officers who participate in plans or arrangements and were not named executive officers or did not participate in such agreements or understandings at the time of the prior Say on Pay vote, then that should not affect the availability of the exception. Again, this is because the agreements or understandings are not new, and only the amounts payable to a particular named executive officer have changed.

The Commission's rulemaking should clarify what is to be voted on when a Say on Parachute vote is required under Section 14A(b)(2) if some but not all of the agreements or understandings that are disclosed pursuant to Section 14A(b)(1) were subject to a previous Say on Pay vote. This could arise, for example, if some but not all of a named executive officer's agreements or arrangements were amended since the date of the company's last Say on Pay vote, or if a new plan or form of agreement has been established or entered into since the company's previous Say on Pay votes. In this context, we believe that all of the agreements and understandings that are disclosed and quantified pursuant to Section 14A(b)(1) should be subject to the Say on Parachute vote, not just those that were not subject to a previous Say on Pay vote. This approach is supported by the language of Section 14A(b)(2) and should be easier for shareholders to understand, since all of the agreements and understandings will be disclosed and quantified, avoiding any need to attempt to distinguish between the significance of a vote on some but not other arrangements.

The Commission should consider and seek comments on other circumstances in which a separate Say on Parachute vote should not be triggered. For example, as noted above, we expect that some companies may submit new change-in-control plans, agreements or

---

[8] M. Maremont, "Companies May Need to Disclose Pre-Deal Options," The Wall Street Journal (Oct. 14, 2009) (if grants were not part of an annual award program, the Commission's rulemaking should consider whether such awards would be treated as part of a previously disclosed and voted upon compensation agreement or understanding).

understandings for a separate advisory vote, or may otherwise seek to conduct a voluntary Say on Parachute advisory vote outside of the context of a pending Covered Transaction, and we expect that shareholders would welcome the opportunity to have such votes put before them. When a company has provided this opportunity to its shareholders, the agreements and understandings that were the subject of such votes do not again need to be voted upon at the time of the Covered Transaction. As well, if an agreement or understanding, such as an equity plan, that provides benefits upon a change in control or other Covered Transaction has been approved in a binding shareholder vote, such agreement or understanding should not trigger a subsequent non-binding Say on Parachute vote.

Applicability of the Requirements

The Commission's rulemaking should clarify when a proxy statement is required to include the disclosures and votes mandated under Section 14A(b). Even though the provision refers to meetings of shareholders occurring more than six months after adoption of the Dodd-Frank Act, other language indicates that Section 14A(b) is applicable in the context of the solicitation of consents, and we concur that applicability is appropriate in the context of consent solicitations on a Covered Transaction.

As noted above, we believe that the disclosure provision applies to any agreements or understandings that a target company has with its named executive officers or that the target company has with the acquiring company. For example, if a company has the discretion to accelerate the vesting of RSUs upon a change in control, such that the named executive officers do not have a contractual right to that benefit, but the company and the acquirer have agreed that the company will accelerate RSU vesting, then the value of the accelerated RSUs would be included in the Section 14A(b)(1) disclosure. Nevertheless, there is some ambiguity and uncertainty over the application of Section 14A(b) in that context which the Commission should clarify in its rulemaking. One question the Commission should address is whether the provision applies if an acquiring company is soliciting votes in connection with a Covered Transaction. If so, we believe that the provision should not be interpreted to apply to compensation arrangements that are entered into between the acquiring company and executives of the acquired company that are dependent on the performance of services following the Covered Transaction, as any such disclosure requirement could be problematic.[9] First, it will be difficult to determine whether such executives would become named executive officers of the acquiring company. In addition, in that context agreements often are the subject of on-going negotiations after an acquisition has been agreed to and while shareholders are being solicited to approve the

[9] While the provision may apply to arrangements between an acquiring company and its named executive officers, we expect that it will be unusual for acquiring companies to have such arrangements in effect, and thus that it will not be common for acquiring companies to have Say on Parachute disclosure or a vote. More commonly, completing a successful acquisition may be a factor that is taken into account in providing discretionary compensation in the ordinary course of an acquiring company's compensation programs, and in those circumstances would be disclosed and explained in the acquiring company's next annual meeting proxy containing Item 402 information for the year in which the Covered Transaction occurs.

transaction. Requiring such arrangements to have been finalized in time for the solicitation of shareholders would give target company executives inappropriate negotiating leverage. Finally, the Commission should clarify how Section 14A(b) applies in the context of a person who is soliciting shareholders to vote against a Covered Transaction.

Exemptions

Just as smaller reporting companies are not subject to disclosure requirements comparable to those required under Item 402(j), the Commission should consider exempting them from new Section 14A(b).

Section 952: Compensation Committee Independence

Section 952 of the Dodd-Frank Act requires the Commission to direct the national securities exchanges to establish and enforce listing standards for independent compensation committee members, and addresses the authority of board compensation committees to select and retain compensation consultants, legal counsel and other advisers.

Independence of Compensation Committees

We believe that directors who may be affiliates of a company through stock ownership should not be disqualified from being deemed independent for purposes of serving on a compensation committee. In contrast to the language under Section 10A(m)(3)(B)(ii),[10] Section 10C(a)(3)(B) does not specify that affiliated directors can not be independent, but only provides that in defining independence of directors serving on a compensation committee, consideration should be given to whether a director is affiliated with an issuer. It is common for large stakeholders who may not be controlling shareholders, such as private equity and venture capital firms, to have a representative on a portfolio company's compensation committee. Even if one were to take the view that large shareholdings may give rise to a concern over a director's objectivity in oversight of financial reporting, no such concern should arise in the context of a director's oversight of executive compensation matters, where large shareholders' interests are aligned with the interests of other shareholders in ensuring that compensation is structured appropriately and is reasonable in terms of the executives' and company's performance. Accordingly, the Commission should propose standards under Section 10C(a)(3)(B) providing that stock ownership is a factor that boards are required to consider in assessing a director's independence for purposes of serving on a compensation committee, but is not a bar to such service.

We urge the Commission to consider and seek comment on whether, at least with respect to listed companies, the standard of independence adopted by the Commission under Section 10C(a)(3) is adequate to address the independence objectives under Rule 16b-3, such that

---

[10] Section 10A(m)(3)(B)(ii) provides that in order to be independent a director serving on a listed company's audit committee may not be an affiliated person of the issuer.

references in Rule 16b-3 to "non-employee directors" could be replaced with the term "independent directors as defined pursuant to Section 10C(a)(3) of this Act."

Independence of Compensation Consultants and Other Compensation Committee Advisors

The provisions of Section 10C(b) on the whole serve to empower, but not mandate, board compensation committees to select and retain compensation consultants, independent counsel and other advisors. These provisions further develop the Commission's rules under Item 407, which recognizes that often compensation committees and companies retain separate compensation consultants. As such, the Commission's rules should clarify that the provisions of Section 10C(b) apply only in the context of a consultant or other advisor that is engaged by the compensation committee and that has a role in determining or recommending the amount or form of executive or director compensation (that is, in situations covered by Item 407(e)(3)(iii)(A)). Moreover, because consultants described in Item 407(e)(3)(iii)(B) (those not retained by the compensation committee) are not typically viewed as being independent, the provisions of Section 10C(b) should not be applicable with respect to such consultants, as there is no clear benefit of the compensation committee conducting an independence assessment in those circumstances.

The language in Section 10C(b) and (c) refers to compensation consultants as individuals and in several places draws a distinction between the consultants and the consulting firms (referred to as "the person that employs the compensation consultant"). In contrast, the Commission's existing rules under Item 407 are generally understood to use the term "compensation consultant" to refer to the consulting firm. In order to avoid confusion as to what assessments and disclosures are to be made, the Commission should conform the use of the terms in its existing rules and in any new rules with the terminology in Section 10C so as to clearly distinguish when the rules relate to the individual providing consulting services and when they relate to the consulting firm.

Section 10C(d) in a number of cases specifically refers to a compensation committee's retention of independent legal counsel, whereas Section 10C(b) addresses the committee's selection and retention of legal counsel but does not use the term "independent legal counsel." As stated above, we understand the provisions of Section 10C(d) to be empowering, not prescriptive. Accordingly, the provisions should not be read as mandating that compensation committees engage independent legal counsel or as restricting their ability to engage or rely upon "other advisers," including legal counsel who may not be viewed as independent.

<u>Section 953: Executive Compensation Disclosures</u>

Disclosure of Pay versus Performance

New Section 14(i) provides that Commission rules shall require issuers to disclose a clear description of any compensation required to be disclosed by the issuer under Item 402, which disclosure shall include information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions. We believe that the goals of this provision can be carried out through the Commission's Compensation Disclosure and Analysis ("CD&A") requirements, which (as described in the Instructions to Item 402(b)) are designed to provide investors a clear description of each element of compensation by providing investors material information that is necessary to an understanding of the information contained in the tables and otherwise disclosed pursuant to Item 402.

As stated above, Section 14(i) presents an opportunity to refine and enhance existing Commission rules, as opposed to simply adopting additional disclosure requirements. In practice, companies' CD&A often are not as clear as we believe the Commission intended and as Section 14(i) now mandates. Although the Commission's rules on the CD&A address disclosure of the relationship between compensation and relevant performance standards, this information is called for under Item 402(b)(2) as information that may, depending on the facts and circumstances, be material, and thus the type of information that may need to be discussed in CD&A.[11] Section 14(i) reflects a determination that the relationship between compensation actually paid and performance should be required disclosure. Accordingly, we suggest that the Commission amend the CD&A requirements to provide that an issuer's CD&A is required to clearly state what, if any, financial performance measure(s) it uses in determining the amount of executive compensation actually paid, and to present, preferably graphically,[12] how the amount actually paid to named executive officers under any such performance-based measure compared with the performance criteria. Because this disclosure would reflect amounts "actually paid," it would reflect amounts granted, earned or accrued based on financial performance goals, and not the "target" amount. Thus, it should also reflect and clearly distinguish the effect of any decision to pay more or less than what is dictated by financial performance, regardless of whether that decision is based on the compensation committee's exercise of discretion or on other, non-financial performance considerations that would be discussed in the disclosures. To reflect that

---

11 Regulation S-K Item 402(b)(2) states:

"While the material information to be disclosed under Compensation Discussion and Analysis will vary depending upon the facts and circumstances, examples of such information may include, in a given case, among other things, the following : …
(v) What specific items of corporate performance are taken into account in setting compensation policies and making compensation decisions;
(vi) How specific forms of compensation are structured and implemented to reflect these items of the registrant's performance, including whether discretion can be or has been exercised (either to award compensation absent attainment of the relevant performance goal(s) or to reduce or increase the size of any award or payout), identifying any particular exercise of discretion, and stating whether it applied to one or more specified named executive officers or to all compensation subject to the relevant performance goal(s)…"

12 Companies should have the option of determining whether to present the disclosure required under Section 14(i) on either an aggregate basis with respect to all named executive officers, or on an executive-by-executive basis, as performance criteria may or may not vary among the compensation arrangements for different executive officers.

the disclosure is required, the rule should appear as part of Item 402(b)(1) instead of Item 402(b)(2).[13]

The foregoing approach has the benefit of providing a stricter mandate for disclosure of the connection between compensation actually paid and financial performance, while maintaining the benefits of principles-based disclosure under the CD&A so that companies may present information in a manner that best reflects any financial performance measure that they actually use. Although some commentary on Section 14(i) has suggested that it calls for a return of the stock price performance graph that formerly was required under Item 402, the statutory language only states that change in the value of shares of stock and dividends/distributions by a company are to be "taken into account," and that the disclosure required under the provision "may include" use of a graph. We do not believe that this requires, or that the Commission should mandate, the use of a graph comparing compensation with stock price performance, as stock price performance is not typically viewed as an element of "financial performance of the issuer."[14]

Moreover, the strong policy reasons that led the Commission to move the stock price performance graph from the executive compensation disclosure requirements and to maintain it as a separate required disclosure are equally applicable today.[15] Companies use a variety of financial performance measures in executive compensation programs and there is no consensus among shareholders or consultants that one performance measure is superior to another across the universe of all U.S. public companies. In fact, we believe that it is widely recognized that financial performance standards applied for determining executive compensation, and the period over which those standards are measured, should be tailored to the company's business. Accordingly, we do not believe that there is a need for a uniform basis of presentation under Section 14(i), and we encourage the Commission not to adopt a rule that prescribes stock price

---

[13] At the same time, we encourage the Commission to consider whether other changes should be proposed to the CD&A requirements to enhance the disclosure's utility. For example, the requirement under Item 402(b)(1)(i) requiring a discussion of the objectives of a company's compensation programs has in practice been applied by companies including a "compensation philosophy" section in their CD&As, which in practice tend to contain very generic disclosures regarding attracting and retaining qualified personnel, etc. We believe this item could be deleted and that companies would more effectively address the objectives of their programs when describing the extent of any connection between pay and performance.

[14] Indeed, many institutional shareholders do not view stock options and RSUs that vest based on continued employment as a form of performance-based compensation unless granted based on achieving some type of financial performance goal.

[15] In adopting the existing compensation disclosure rules, the Commission stated,

"In particular, as noted above, the disclosure in the Compensation Discussion and Analysis regarding the elements of corporate performance that a given company's policies consider is intended to encourage broader discussion than just that of the relationship of executive compensation to the performance of the company as reflected by stock price. Presenting the Performance Graph as compensation disclosure may weaken this objective." See Executive Compensation and Related Person Disclosure, Release No. 33-8732A, 34-54302A (August 29, 2006) [71 FR 174].

performance, or any other single measure of financial performance, as a standard by which all compensation programs would be compared, or that requires such performance to be measured over a single mandated time period. Instead, the Commission's goal should be to require companies to present clear disclosure on how and over what period they evaluate financial performance and to demonstrate the extent to which they tie compensation actually paid to such performance measures, so that shareholders may assess whether they concur that the performance measure and measurement period is appropriate and that there is a sufficient nexus between actual compensation and performance.

Pay Ratio Disclosure

Section 953(b) of the Dodd-Frank Act requires the Commission to amend Item 402 to require companies to disclose the median of the annual total compensation of all employees other than the chief executive officer, the annual total compensation of the chief executive officer and the ratio of the two amounts.

We expect that determining the median of the annual total compensation of all employees under Section 953(b) of the Dodd-Frank Act will be extremely difficult for most issuers. Most companies currently calculate "total compensation" for named executive officers on a manual case-by-case basis due to the divergent sources of information required and the fact that the standards for calculating compensation for both tax and accounting purposes differ from the standard applied under Item 402(c)(2).[16] Accordingly, once the Commission adopts rules implementing this provision, it should provide for a much delayed effective date (at least one fiscal year) in order to allow companies time to implement the systems required to collect the information and perform the calculations required. In this regard, we note that no effective date is prescribed for the required disclosure.

There are a number of ambiguities in Section 953(b) of the Dodd-Frank Act, and the manner in which the Commission addresses those issues in its rulemaking may help to minimize the costs and burdens of providing the required disclosure and make the disclosures more meaningful. First, although total compensation that is reported in a company's Summary Compensation Table is determined under Item 402(c)(2)(x), Instruction 1 to Item 402(a)(3) requires certain adjustments to be made for purposes of identifying a company's most highly compensated executive officers (specifically, change in pension value and nonqualified deferred compensation earnings are excluded). While it is clear that the total compensation reported under Section 953(b) for the median employee and for the chief executive officer are to be determined in accordance with Item 402(c)(2)(x), it is not so clear that the determination of the median compensated employee must be based on the same amounts. Accordingly, the Commission should consider providing guidance in its rules on how to identify the median compensated employee. Among other things, those rules could specify: (i) that consistent with Instruction 1 to Item 402(a)(3) and for the policy reasons reflected in that rule, amounts

[16] In our experience, TARP companies found that calculating "total compensation" to identify their 100 highest paid employees required weeks of work, and presented numerous interpretive issues that do not typically arise when calculating total compensation of executive officers.

calculated pursuant to Item 402(c)(2)(viii) are not to be counted in determining the median compensated employee (although such amounts do get included when reporting the total compensation of the chief executive officer and the median compensated employee), (ii) that pursuant to Item 402(a)(6)(ii), companies need not value benefits provided to employees under group life, health, hospitalization, or medical reimbursement plans in determining the median compensated employee, and (iii) that by definition any fringe benefit provided to employees at the level of the median compensated employee do not constitute perquisites, and thus such benefits do not need to be valued for purposes of identifying the median compensated employee. In addition, just as the determination of a company's three most highly compensated executive officers (other than the chief executive officer and the chief financial officer) is determined based on persons who were employed as of the end of the fiscal year, the determination of the median compensated employee should be determined from those employees who were employed as of the end of a company's fiscal year. Similarly, because Section 953(b) specifies that "annual" total compensation is to be reported, the Commission could clarify that only employees employed for the full fiscal year are to be considered in determining the median compensated employee.

Even with standards such as those described above facilitating the determination of median employee total annual compensation, we believe that there will be limitations on issuers' ability to validate their disclosures. Therefore, we believe that the disclosure required under Section 953(b) should be treated as furnished, but not filed. In addition, we believe that the rules implementing Section 953(b) should affirmatively state that, in providing the disclosure required by that section, companies may make reasonable estimates or assumptions in calculating the median annual total compensation for all employees. Under such an approach, companies should be required to describe any such estimates or assumptions used. Companies also should be permitted to include cautionary language as to the imprecision involved in such calculations. Finally, using its general rulemaking authority under the securities laws, the Commission should seek comment on whether it would be appropriate to further prescribe rules defining the categories of employees to be evaluated for purposes of determining median employee compensation. For example, some have argued that the disclosures will be more informative if companies are permitted to evaluate only full-time employees. Similarly, if the objective of the disclosure is to show pay disparity in the U.S., instead of showing cost-of-living disparities around the world, only U.S. employees should be covered.

Questions have arisen as to when and in what filings Section 953(b) disclosure is to be made. Because Section 953(b) requires the Commission to amend Item 402, the Commission should clarify that the disclosures called for under Section 953(b) are required only in any filing identified in Item 10(a) of Regulation S-K that otherwise is required to contain the information set forth in Item 402. As well, the Commission should clarify when information for the most recently completed fiscal year is required to first be disclosed. In this regard, we suggest that such disclosure be required no earlier than the date that a company's definitive proxy statement containing Item 402 information is first filed.

Section 954: Recovery of Erroneously Awarded Compensation

Section 954 of the Dodd-Frank Act adopts a new Section 10D that requires the Commission by rule to direct the national securities exchanges to prohibit the listing of any company that does not develop and implement a policy providing (1) for disclosure of the company's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws, and (2) that in the event of specified accounting restatements, the issuer will recover incentive-based compensation from certain executives that was based on the erroneous data in excess of what would have been paid under the restated financials.

Although the phrasing differs slightly between Section 10D(b)(1) and 10D(b)(2), we believe the references to "incentive-based compensation" should be interpreted in the same manner under both provisions. Specifically, we believe that the "incentive-based compensation" that is subject to the recovery policy required to be maintained under clause (2) is the same "incentive-based compensation that is based on financial information required to be reported under the securities laws" that is referred to in clause (1).

The Commission's existing rules adequately define what constitutes incentive-based compensation for purposes of these provisions. Thus, the policy implemented pursuant to Section 10D(b) should apply to incentive-based compensation that is reported under Item 402(d)(2)(iii) (the non-equity incentive plan awards columns of the Grants of Plan-Based Awards Table) and under Item 402(d)(2)(iv) (the equity incentive plan awards columns of the Grants of Plan-Based Awards Table).[17] Further, since the recovery policy under Section 10D(b)(2) is triggered by a financial restatement, only incentive-based compensation that is based on financial information required to be reported under the securities laws is subject to the policy that is maintained and disclosed pursuant to Section 10D. As such, the listing standard and policy provided for under Section 10D can dovetail nicely with the requirement under Section 953(a) of the Dodd-Frank Act requiring enhanced disclosure of the relationship between a company's financial performance and compensation actually paid, and we encourage the Commission to integrate these provisions instead of developing conflicting or disparate disclosure requirements.

Questions have arisen as to what is to be disclosed under Section 10D(b)(1); that is, what is the "policy of the issuer on incentive-based compensation that is based on financial information required to be reported under the securities laws" that is required to be disclosed. We believe this requirement should be read in the context of the recovery policy provided for

[17] Section 10D(b)(2) clearly states that the incentive-based compensation that is to be subject to recovery includes stock options awarded as compensation, but does not state that all forms of stock options or other types of equity compensation are to be subject to recovery. As noted above, many institutional investors and others do not consider stock options or RSUs that vest based on continued performance to be "incentive-based compensation." Moreover, the value of such equity awards is not based on financial performance, but instead is based on market price performance.

generally under Section 10D(b),[18] and that Section 10D(b)(1) should be implemented by mandating that CD&As include disclosure of the type currently addressed (but not mandated) under Item 402(b)(2)(viii),[19] to the extent that such policies relate to financial information required to be reported under the securities laws.

The Commission's rules should clarify what the 3-year period in Section 10D(b)(2) runs from (for example, does the 3-year period run backwards from the date of an Item 4.02 Form 8-K filing). In addition, the Commission's rules and the listing rules implementing Section 10D should take into account that companies generally will not be able to apply the recovery policy to awards and arrangements established or granted before the company implemented the listing standard and to awards granted to an employee before the employee became an executive officer. In this regard, we understand that the enforceability of recoupment policies is uncertain under the laws of various states that prohibit forfeitures of wages paid, and that there is substantial doubt as to whether a company policy implemented pursuant to a listing standard can pre-empt state laws. Even in jurisdictions where general enforceability concerns do not exist, companies may be unable to apply recovery policies retroactively to compensation arrangements that have already been granted or earned, or to compensation provided pursuant to pre-existing employment agreements. As well, many companies' existing recoupment policies take into account whether the amounts to be recovered are significant in comparison to the costs of seeking recovery (for example, if a former executive does not willingly return previously paid compensation, it may be necessary to file suit and seek to enforce any judgment; if the executive is not resident in the U.S., the costs of pursuing a recovery could be even greater). Thus, the Commission's and exchanges' rules should accommodate such cost/benefit determinations by a company, provided that this aspect of the policy is disclosed pursuant to Section 10D(b)(1).

Section 955: Disclosure Regarding Employee and Director Hedging

Section 955 of the Dodd-Frank Act provides that the Commission shall adopt rules requiring companies to disclose their policies on whether employees or directors are permitted to hedge equity securities. We assume that this provision is intended to address only equity securities of the issuer and encourage the Commission to clarify that point in its rulemaking. We also believe it would be appropriate for the Commission to clarify that this Section does not require companies to adopt policies, but only to describe policies that companies have in place.

---

18 In other words, the policy described in the lead-in language under Section 10D(b) should not only provide for the recovery of incentive-based compensation as described in Section 10D(b)(2) but also should provide for public disclosure of the company's recovery policy.

19 Item 402(b)(2)(viii) states that CD&A may be required to discuss:

(viii) Registrant policies and decisions regarding the adjustment or recovery of awards or payments if the relevant registrant performance measures upon which they are based are restated or otherwise adjusted in a manner that would reduce the size of an award or payment;

Foreign Private Issuers

We believe the rules the Commission proposes pursuant to Sections 951 thought 955 should exclude foreign private issuers from their scope, to the extent consistent with the Dodd-Frank Act. We make this suggestion for a number of reasons:

1. Pursuant to Rule 3a12-3 under the Exchange Act, foreign private issuers are not subject to the proxy or information statement requirements of Section 14 of the Exchange Act. To impose Say on Pay, Say on Frequency or Say on Golden Parachute obligations on such issuers may be burdensome to such companies and may create investor confusion, especially in jurisdictions which already require such votes based on what may be different standards.

2. Foreign private issuers are not subject to the compensation disclosure standards that are applicable to domestic U.S. public companies. The imposition of detailed compensation disclosure requirements on such issuers may be inconsistent with the rules applicable to compensation disclosure in the foreign private issuer's home country (or pursuant to foreign securities exchange listing requirements) and may be extremely burdensome on such issuers.

3. Although we note that Section 952 of the Dodd-Frank Act exempts from the scope of the compensation committee independence provision "a foreign private issuer that provides annual disclosures to shareholders of the reasons that the foreign private issuer does not have an independent compensation committee", it is possible that a foreign private issuer may have an independent compensation committee consistent with the independence the guidelines adopted in a foreign jurisdiction. We suggest that any Commission rulemaking clarify that the exemption from the compensation committee independence requirement applies to a foreign private issuer that discloses the reasons that it does not have an independent compensation committee as provided for in Section 10(C)(a) of the Exchange Act, even though it may have a compensation committee deemed independent under its home country or principal securities exchange rules.

   Although many, if not most, foreign private issuers that do not have independent compensation committees satisfying the disclosure requirements of Section 10C(a) will likely comply with the disclosure provided for in that section, it is possible that some companies, for certain reasons may not. We believe it would be appropriate for the Commission to provide, in any rulemaking, certain accommodations for foreign private issuer compensation committees in a manner consistent with the accommodations provided to foreign private issuers are subject to the audit committee requirements pursuant to Rule 10A-3 under the Exchange Act. For example, we suggest that a compensation committee member that sits on the board of directors of a listed issuer and an affiliate of the listed issuer is exempt from the independence requirements if the member, except for being a director on each such board of directors, otherwise meets the independence requirements for each such entity, and that an employee of a foreign private issuer is exempt from the independence requirements if the employee is elected or named to the board of directors or compensation committee by the foreign private issuer pursuant to the foreign private issuer's governing law or documents, an employee collective bargaining agreement, or similar agreement or other home country legal or listing requirements. We also suggest an exemption if a member of the compensation committee of a foreign private issuer has only non-voting observer status on such committee. These comments are not intended to be comprehensive, or to be in any manner inconsistent with the other provisions of this letter. Instead, we believe the Commission, in connection with any rulemaking, should seek to elicit comments as to the appropriate means by which the objectives of Section 10C(a) can be achieved within the context of the specific issues which may be encountered by foreign private issuers.

4. Further, we encourage the Commission to consider the merits of excluding foreign private issuers from the provisions of new Section 12C(b) relating to compensation consultants. It does not appear to us that foreign private issuers that may be exempt from the requirement of independent compensation committees pursuant to Section 12C(a) are also entitled to a statutory exemption under Section 12C(b). We believe that the adoption of prescriptive rules relating to compensation consultants and advisers to foreign private issuers would be extremely intrusive in the context of foreign company governance standards and fundamental principles of international comity.. We believe the Commission should be very cautious in proceeding to affect dramatically the governance structures of foreign entities.

5. These same considerations are, we believe, applicable to claw-back provisions. Home countries would generally have a greater interest than the U.S. in determining whether companies should have recourse against their executives with respect to bonuses or other compensation which is determined on the basis of financial statements that are later required to be restated. Among other things, Section 954 of the Dodd-Frank Act provides that national securities exchanges must include in their listing standards provisions stating that companies "will recover" from any current or former executive officer certain compensation that may have been erroneously awarded. It is unclear to us, given the different legal standards that may be applicable to agreements between companies and executive officers outside the U.S., whether such a prescriptive requirement is feasible.

We are cognizant of the benefits deriving to U.S. investors by having foreign issuers offering securities in the U.S. public markets and being subject to regulation under the U.S. securities laws. Although we do not believe that each additional requirement imposed on foreign private issuers leads inexorably to the departure of foreign issuers from the U.S. markets or the determination by foreign issuers not to offer securities or list in the U.S., we are very concerned that an extension of the Section 951-955 requirements to foreign issuers, which does not take into account the burdens these provisions will impose on foreign issuers, will have this very effect. Foreign issuers seeking to list (or remain) in the U.S., in the absence of exemptive relief, will need to consider the impact of these rules on their existing governance and reporting structures, and whether the marginal benefit derived from having a U.S. market justifies the changes that may need to be made. The Commission has in the past appropriately determined that, especially in the proxy solicitation and governance areas and in matters relating to executive compensation, there are substantial reasons for exempting foreign private issuers from the full scope of U.S. requirements. We believe that, for many of the same reasons, the Commission should consider the impact of these provisions on foreign private issuers and their presence in our markets prior to the imposing the burdens of Sections 951 through 955 upon such issuers.

Conclusion

We have prepared the foregoing comments in anticipation of Commission rulemaking in the hope that these comments will be helpful to the Staff of the Commission in formulating its rulemaking proposals. Once again, the Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with the Commission and its staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin

Jeffrey W. Rubin
Chair, Committee on Federal Regulation of Securities

Drafting Committee:

Ronald O. Mueller
J. Sue Morgan
Gloria W. Nusbacher
Michael Andresino
Mark Borges
Howard Dicker
Alan Kailer

Cc:

Mary L. Schapiro, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Meredith Cross, Director, Division of Corporation Finance
Tom Kim, Chief Counsel, Division of Corporation Finance