SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS

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September 15, 2009

File Reference No. S7-13-09
Proxy Disclosure and Solicitation Enhancements
Release No. 33-9052

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

Dear Ms. Murphy:

The Society of Corporate Secretaries & Governance Professionals appreciates the opportunity to respond to the request for comments made by the Securities and Exchange Commission (the "Commission") in its proposed rule entitled "Proxy Disclosure and Solicitation Enhancements" (the "Proposed Rules").

The Society of Corporate Secretaries & Governance Professionals is a professional association, founded in 1946, with over 3,100 members who serve more than 2,500 companies. Our members are responsible for supporting the work of corporate boards of directors and their committees and the executive management of their companies on corporate governance and disclosure. Our members are generally responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements. The majority of Society members are attorneys, although our members also include accountants and other non-attorney governance professionals.

I. <u>Introduction</u>

We support the Commission's goal of providing enhanced disclosure to shareholders in the proxy statement. We note, however, that more disclosure is not necessarily better disclosure. We are also concerned that the Proposed Rules will result in an increase in both the length and complexity of proxy statements. And, as proxy statements get longer, we believe that there is a very real risk that retail investors will not read them. Therefore, we believe that the Commission should take a principles-based approach that focuses on whether the additional information that is being required would be meaningful to shareholders in determining how to vote or whether the information is merely incremental or general information. Our recommendations and comments, which are set forth below, are based on this principles-based approach. In addition, the Commission should permit companies to refer to other documents to the extent the requested information is disclosed elsewhere (e.g., Form 10-K or company website). As described below, some of the disclosure requested in the Proposed Rules is already disclosed in other publicly filed documents. In addition, in certain instances, we believe that it would be better for investors to have disclosure of some of the requested information on company websites rather than in the proxy statement itself.

II. Enhanced Compensation Disclosure

The CD&A Should Not Be Expanded to Include Employees Generally

The proposed amendments to Regulation S-K Item 402(b), Compensation Discussion and Analysis (CD&A), would require a company to discuss and analyze its broader compensation policies and overall compensation practices for employees generally, if risks arising from those compensation policies or practices "may" have a material effect on the company. For the reasons described below, we do not believe that it would be appropriate to expand the scope of the CD&A beyond the named executive officers (NEOs) to include disclosure of the company's compensation policies and practices for employees generally. Expanding the CD&A to employees generally would represent a fundamental shift: as Instruction 1 to Item 402 states, "The purpose of the Compensation Discussion and Analysis is to provide to investors material information that is necessary to an understanding of the registrant's compensation policies and decisions **regarding the named executive officers**." Instruction 2 continues "The Compensation Discussion and Analysis should be of **the information contained in the tables** and otherwise disclosed pursuant to this Item." We believe that shareholders would be ill-served by including disclosures of a registrant's overall compensation program for employees as it relates to risk management in the CD&A. Such disclosure would likely be general in nature and therefore not meaningful to investors. Such disclosures also would not necessarily relate to the NEO information contained in the Summary Compensation Tables, and as such could be confusing because the discussion would be presented out of context. The proposed inclusion of material risk disclosure in the discussion of NEO compensation instead of in a company's other risk-related disclosures would mean that shareholders would have to consult two different disclosure documents in order to obtain a full understanding of a company's risks. Moreover, this disclosure would add length and complexity to the proxy statement, which could make it more difficult for shareholders to understand a company's explanation of the policies and decisions relating to the compensation of the NEOs. We are also concerned that if the disclosures resulting from the Proposed Rules were to be focused on a specific company group or function, the requested information would likely require the disclosure of confidential information which could result in competitive harm. For example, it might be necessary for a company to disclose the specific business strategies and associated compensation levels and mix.

Risk Disclosure is Already Required, Appropriately, in the MD&A

We believe that there are other existing disclosure requirements that would provide more meaningful information about the effect of the registrant's compensation policies on its risk profile and risk management. We believe that if a company has risks arising from its compensation policies or practices that may have a material effect on the company, then the company is already required to disclose those risks in its risk factor disclosures, in the management's discussion and analysis of financial condition and results of operations (MD&A), and quantitative and qualitative disclosures about market risks. Disclosures relating to overall compensation programs and policies as they relate to risk management would not be meaningful if isolated from the company's overall risk disclosure, and therefore, are more appropriately discussed in the context of the company's overall risk disclosure in the annual 10-K and quarterly 10-Q filings. If the purpose of the Proposed Rules is to encourage disclosure of the relationship of a company's overall compensation policies and practices and risk taking, we believe that a more meaningful approach would be for the Commission to remind companies of their obligation to disclose such material risks in their risk factor disclosure, MD&A or in quantitative and qualitative disclosures about market risks, rather than in expanding the existing required compensation disclosure.

The Standard for Disclosure Should be "Likely" Rather Than "May"

If, however, the Commission nevertheless elects to adopt the proposed amendment to the CD&A, we believe that the Commission should replace the words "may have a material effect" with "is likely to have a material effect" in Item 402(b)(2). The instructions to the CD&A currently provide a materiality standard for the disclosures. Thus, Instruction 1 to Item 402(b) provides that the purpose of CD&A is to "provide to investors material information that is necessary to an understanding of the registrant's compensation policies, while Instruction 2 to CD&A provides that CD&A should "focus on the material principles underlying the registrant's executive compensation policies and decisions." We are concerned that the proposed wording would expand the scope of CD&A to include discussion of items that "may" have a material effect. We believe that a "likely to have a material effect" standard would provide investors with meaningful disclosure and not speculation about items that are unlikely to occur.

III. <u>Summary Compensation Table and Director Compensation Table</u>

We Support the Reporting of Stock and Option Awards at Aggregate Grant Date Fair Value under FAS 123R

The Proposed Rules would amend the Summary Compensation Table and Director Compensation Table to require companies to report stock and option awards at their aggregate grant date fair value computed in accordance with FAS 123R. We support this change. The aggregate grant date fair value is generally used by compensation committees in determining the amount of stock and options to award, whereas the current disclosure requirement confusingly focuses on accounting considerations that may have no bearing on compensation decisions. For example, awards that vest over time are disclosed over the vesting period rather than in the year of the grant, unless the executive was retirement eligible, in which case they are reported in the year of the grant. Thus, two executives might receive the same amount of stock or option awards, but have different values reported under the current requirements because one is retirement- eligible and the other is not.

In supporting this change, we recommend the following three modifications/additions:

<u>Awards Granted for Prior Fiscal Year Performance Should be Included</u>. The Summary Compensation Table and Director Compensation Table should be further amended to enable companies to report stock and option awards granted for services with respect to the relevant

fiscal year, even if the awards were granted after fiscal year-end. It is the practice of many companies to award incentive compensation in the first three months of the fiscal year based on performance metrics met for the prior fiscal year. This information is more relevant to shareholders as it will provide the best picture of an executive's total compensation for services in a given fiscal year. Matching the awards granted to the time frame in which the performance is measured will also eliminate confusion, and we believe this approach would be consistent with the way that compensation committees view and analyze information when making compensation decisions. This approach would also be consistent with the reporting of amounts earned under non-equity incentive plans. To avoid any risk of abuse, we recommend that this approach be limited to awards granted in the first three months after the fiscal year end with respect to services performed in the applicable fiscal year or performance periods that ended during the fiscal year.

Companies Should Not Be Required to Recompute Values for Previous Years. The Proposal asks for comment on whether companies should be required to present recomputed disclosure for each preceding fiscal year to show the full grant date fair values. We do not believe that requiring recomputation is necessary or appropriate. The summary compensation table data showing the amounts for the preceding two fiscal years has already been disclosed to investors and requiring that companies now present different (recomputed) amounts for those previous years would serve only to confuse investors. Instead, companies can clearly indicate by footnote or other disclosure that the equity values shown for the most recent fiscal year are based on full grant date fair values in accordance with the new rules, and that the equity values shown for the previous fiscal years were based on amounts recognized for financial reporting purposes in accordance with the previous rules.

Calculation of Grant date Fair Value in accordance with FAS 123R. We recommend that in its final rule release, the SEC include a clarification regarding equity valuation as discussed below, that we believe is necessary because previous guidance issued by the staff of the Division of Corporation Finance appears to be inconsistent with the Proposed Rules. The SEC's current proposal would require companies to include in the Summary Compensation Table and Director Compensation Table the "aggregate grant date fair value computed in accordance with FAS 123R". Calculating this value for performance-based equity awards (e.g, performance share units) is more complicated than for other equity grants. Performance-based awards often have a "target" level, as well as a "threshold" level (lower than target) and a "maximum" level (higher than target). For such awards, FAS 123R requires that the company consider which is the "most probable" scenario.

For example, if the company determines that the "maximum" level is not the most probable outcome, then the company would not use the maximum amount to determine the grant date fair value under FAS 123R. Instead, if the company determined that at the time of grant, the "target" level was the most probable outcome, then the company would use the target level to determine the initial fair market value (i.e., the value at the time of grant).

Our concern arises because the Division of Corporation Finance suggested in guidance issued earlier this year that under FAS 123R a company would be required to use the "maximum" level for purposes of determining the initial grant date fair value under FAS 123R, without regard to whether the maximum level was determined by the company to be the most probable. Specifically, the "Compliance & Disclosure Interpretations: Regulation S-K" (C&DI) contain the following question and answer:

"Question 120.05 (Grants of Plan-Based Awards Table)

Question: An incentive performance plan will pay out at different levels depending upon the actual performance results over the relevant performance period. Is the grant date fair value reportable in column (l) of the table determined based on threshold, target or maximum performance?

Answer: The grant date fair value reportable in column (l) is determined based on maximum performance, so that investors can see the maximum grant date fair value numbers that were authorized in granting the award. [May 29, 2009]"

This guidance directly conflicts with FAS 123R, which requires that if a company determines that target performance (not maximum performance) is most probable, then the company must use target performance to determine the initial grant date fair value. We acknowledge that this guidance was given in the context of the Grants of Plan-Based Awards Table. However, under the Proposed Rules, the full grant date fair value of awards would be required to be disclosed in the Summary Compensation Table rather than the Grant of Plan-Based Awards Table. Therefore, we are concerned that the guidance will be considered relevant when companies are determining the initial grant date fair value for purposes of reporting equity awards in the Summary Compensation Table and Director Compensation Table. This is significant because these amounts would now be included in the "Total" compensation columns. If companies are required to value performance-based equity awards at "maximum," this will mislead investors about the intention of the compensation committees when the awards were approved.

In sum, we request that if the Commission adopts this proposal, it include a clarification in the narrative discussion acknowledging that for performance-based equity grants, the grant date fair value computed in accordance with FAS 123R should take into consideration, among other things, the probability that certain performance levels will be achieved. Alternatively, or in addition, the Commission could direct the staff of the Division of Corporation Finance to remove this specific C&DI.

IV. Enhanced Director and Nominee Disclosure

We Support Additional Disclosure of Board Memberships and Legal Proceedings

We support the proposed amendment of Item 401 of Regulation S-K to expand the disclosure requirements regarding the past directorships held by directors and nominees and the time frame for disclosure of legal proceedings involving directors, nominees and executive officers. We also support expanded disclosure regarding a director's or nominee's experience, qualifications and education beyond the brief biographical information that is currently required.

Disclosure of "Attributes and Skills" is Not Meaningful as They are Intangible Qualities

However, we believe that it is not appropriate to require disclosure of “attributes and skills” as it would be very difficult to describe in a meaningful way the intangible qualities that many good directors possess. **It goes without saying that the best directors are those with good critical thinking skills, the ability and willingness to ask questions, and the courage to challenge management when necessary.** In addition, many directors possess the same attributes, which could result in companies providing the same disclosure for multiple directors, which would not be meaningful. Further, a well-assembled board consists of a diverse collection of individuals who have a variety of complementary skills, and focusing on an individual director’s attributes and skills fails to take this into account.

We Do Not Support Disclosure That Would “Pigeon-Hole” a Director or Committee Member

Moreover, we note that board composition is an art rather than a science, and companies typically look at directors as a group with complementary skills at any given time. Thus we do not support any disclosure that would “pigeon hole” a particular director or indicate that he or she fits a certain “slot”. For the same reason, we also do not believe that it is appropriate to require disclosure of specific experience, qualifications or skills that qualify a person to serve as a member of a particular committee. Other than having a least one member of the board with “financial expertise” satisfying the requirements for the audit committee, companies generally do not select—and should not be encouraged by disclosure rules to select—individuals to serve on the board based on what committee they will serve on. In fact, many companies will rotate directors among several committee positions during their tenure on the board.

Last, we believe that companies should be required to disclose the requested information in their proxy statements only when the director is first nominated. Given our concerns stated at the outset about more disclosure not necessarily being better, requiring disclosure of the nominee’s background once will help to keep the length of the proxy more manageable.

V. New Disclosures about Company Leadership Structure and the Board’s Role in the Risk Management Process

We Support Additional Disclosure of a Company’s Leadership Structure

The Proposed Rules would add a new disclosure requirement to Item 407 of Regulation S-K and a corresponding amendment to Item 7 of Schedule 14A that would require disclosure of the company’s leadership structure and why the company believes it is the best structure for it at the time of the filing. We support these proposed amendments to Item 407 and we acknowledge the Commission’s comment that they are not intended to influence a company’s decision regarding its board leadership structure. We strongly believe that each company must determine for itself whether it is appropriate to separate the Chairman and Chief Executive Officer roles and whether or not to have a lead or presiding director. We note that while some proxy advisory firms view the separation of these roles as optimal, we are aware of no empirical evidence demonstrating that companies with a particular structure consistently have better performance than companies with other structures.

We Support Additional Disclosure with respect to the Board's Role in Risk Management

The Commission also proposes to require additional disclosure in proxy and information statements about the board's (or board committee's) role in the company's risk management process. We read this to mean the board's role in risk management **oversight**, as is noted in the questions posed for comment. We do not oppose this proposal, and we note that companies that received TARP funds are currently required to disclose information about their risk management process. Finally, we believe that the Commission should provide in its final rule that if the required disclosure is included in another document (such as the MD&A of the Form 10-K), the company may include a reference to that document rather than repeating the information in its proxy statement.

VI. New Disclosure Regarding Compensation Consultants

Disclosure of Fees Should Only Be Required for Consultants Advising on Executive Compensation

The proposed additions to Regulation S-K Item 407(e)(3)(iii) would require disclosure of fees paid to compensation consultants when they play any role in determining or recommending the amount or form of executive and director compensation, if they also provide any other services to the company. It would also require disclosure regarding the nature and extent of all additional services such consultant provides. The proposing release (at page 40) expresses a concern that the provision of additional services by a compensation consultant "may create the appearance, or risk, of a conflict of interest that may call into question the objectivity of the consultant's executive pay recommendations." While we acknowledge this concern, we believe that these disclosure requirements should only apply to compensation consultants directly engaged by the compensation committee to provide advice on executive compensation. Under our approach, a company would not be required to include any disclosure regarding consultants who only provide data or information about compensation programs in particular industries, or for companies of a specific size, etc., as these consultants would not be providing advice or recommendations regarding executive compensation. Similarly, where a compensation consultant is retained by management and does not provide advice to the compensation committee, we do not believe that the concerns expressed in the proposing release would call for disclosure of additional services provided by, and fees paid to, such consultant. We also believe that it would be appropriate for the Commission to establish a disclosure threshold based on the amount of the fees for the non-executive compensation related services, such as $120,000 per year, which is analogous to the disclosure threshold under Regulation S-K Item 404 for related person transactions.

VII. Reporting Voting Results on Form 8-K

Disclosure of Voting Results Should be Allowed on Websites

The Proposed Rules would transfer the requirement to disclose the vote results of any matter submitted to shareholders from Form 10-Q and Form 10-K to Form 8-K, in order to make them more timely. We generally support such a change; however, we believe that companies should be permitted to post their voting results on their website within the required time period in lieu of filing a Form 8-K. This is consistent with the SEC's stated goal "to encourage the continued development of company Web sites as a significant vehicle for dissemination to investors of important company information."[1] We note that the Proposed Rules would carve out an exception for contested director elections and we believe this should apply to any proposal where the outcome has not been definitively determined within four business days of the meeting. Accordingly, under our recommendation, a company would be required to furnish (either on its website or Form 8-K) preliminary results on contested elections and proposals that are "too close to call" within four business days of the meeting and final results within four business days after the results become final.

Assuming companies are permitted to furnish preliminary results for contested elections and on proposals that are "too close to call" (as we recommend), then an amendment to General Instruction I.A.3(b) of Form S-3 to add an exception to the S-3 eligibility requirements for reporting voting results would not be necessary.

VIII. Proxy Solicitation Process

Rule 14a-2(b) provides an exemption from the proxy rules for any solicitation by any person who does not, at any time during such solicitation, seek the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization.

The Rule 14a-2(b) Exemption Should Be Maintained and Third Parties Must Publicly File Solicitation Materials

The proposed amendment to Rule 14a-2(b) provides that a person who supplies a shareholder with a blank, unmarked copy of a management proxy card and requests the shareholder to return the proxy card directly to management does not, by doing so, lose the exemption from the proxy rules under Rule 14a-2(b) for solicitations. Rather than adopting the proposed amendment, we urge the Commission to retain the existing requirements pursuant to which third parties that wish to engage in soliciting activities, including the distribution of copies of the company's proxy card, must publicly file their soliciting materials. We are concerned that allowing third parties to engage in soliciting activities and send a form of revocation without providing the shareholders with the information required under the federal securities laws will deprive those shareholders of information they need in deciding whether to revoke their proxy, including information about the identity and economic interests of the person providing the proxy and information about the effect of executing such subsequent proxy.

The Commission's proposed amendment is inconsistent with the Second Circuit's decision in MONY Group, Inc. v. Highfields Capital Mgmt. L.P., 368 F.3d 138 (2d Cir. 2004). In MONY, the Second Circuit recognized that providing a blank copy of management's proxy was a potentially abusive practice and held that in the case of a proxy vote to authorize a proposed merger under Delaware law, a duplicate of management's proxy card, when included in a

[1] SEC Release No. 34-58288, "Commission Guidance on the Use of Company Web Sites" August 7, 2008, 73 Fed. Reg. 45,862, *available at* http://www.sec.gov/rules/interp/2007/34-58288fr.pdf.

mailing opposing a proposed merger, was a form of revocation under the rule. We agree with the Second Circuit and we believe that it is disingenuous to suggest that a person is not furnishing a form of revocation when that person provides a shareholder with a unmarked copy of management's proxy in connection with a "just vote no" campaign, knowing that the execution of the blank proxy will revoke a prior proxy. In fact, the Second Circuit in <u>MONY</u> noted that the only "goal in sending out the duplicate proxy cards must be to encourage shareholders who have already voted for the merger to revoke their votes." We also note that the Commission's April 1993 interpretation of Rule 14a-2(b) acknowledged that providing a shareholder with a blank management's proxy card could have the effect of a revocation of an earlier dated proxy submitted by the same shareholder.

In addition, we also believe that Rule 14a-6(g) should be expanded to require <u>all</u> persons that rely on Rule 14a-2(b)(1), not just those who beneficially own more than $5 million in market value of securities of the class that is the subject of the solicitation, to furnish a Notice of Exempt Solicitation to the Commission pursuant to Rule 14a-103. This would give the Commission an opportunity to comment on the soliciting materials and give the public information regarding the identity and economic interest of the people involved in a "just vote no" campaign, as well as provide notice to the company that a solicitation is taking place.

Rule 14a-4(d) Should Not Allow Soliciting Persons to "Round Out" a Short Slate with Management Nominees

The proposed amendments to Rule 14a-4(d) would codify an existing no-action position (*Application of Rule 14a-4(d)(4) to Solicitation for Proposed Minority Slates of Carl Icahn and Eastbourne Capital L.L.C.)* that a soliciting person can round out its short slate with nominees named in a non-management proxy statement in the same manner as already permitted by the rule for a soliciting person to round out its short slate with nominees named in management's proxy statement. As we believe that different shareholder groups may form stealth 13(d) groups, we agree with the Commission's requirements that soliciting persons intending to "round out" their short slate with a company's or another persons' nominees be permitted to do so only so long as such soliciting person: (1) does not form a group with the other persons as determined under Section 13(d)(3) and in Regulation 13D-G; (2) is not a participant in the other persons' solicitation; and (3) includes a representation in its proxy statement that it has not agreed and will not agree to act, directly or indirectly, as a group or otherwise engage in any activities that would be deemed to cause the formation of a group as determined under Section 13(d)(3) and in Regulation 13D-G. However, for the reasons set forth in the Society's letter to the Commission regarding Facilitating Shareholder Director Nominations, the Commission should not permit a shareholder to "round out" its short-slate with directors nominated pursuant to proposed Rule 14a-11 (if adopted) or pursuant to a proxy access by-law provision.

IX. <u>Other Requests for Comment</u>

Finally, the Commission states that it is exploring other ways in which it could improve proxy disclosures, and proposes some possible reforms at the end of the Release (the "Possible Reforms"). While we support the Commission's efforts to improve disclosure, we do not believe that it should pursue the Possible Reforms at this time for the following reason: as we have noted above, proxy statements are becoming longer and more complex each year, and we are concerned that the time will come that they will be so complex that shareholders will stop reading them. We believe that these concerns will be exacerbated to the extent that the Commission's rule proposals result in additional required information that provides only incremental changes to the overall disclosure.

Thus, we believe that the Commission, in exploring ways to improve proxy disclosure, should take a principles-based approach that focuses on whether the additional information that is being considered would be meaningful to shareholders in determining how to vote or whether the information is merely incremental or general information. In this regard, we believe that the Commission should ensure that the proxy statement should not become an amalgam of discrete disclosures in response to "issues du jour".

We note the following examples of such additional disclosure and our views on such disclosure:

- Requiring the Compensation Committee Report to be "filed" would not be meaningful for shareholders in deciding whether to vote for directors, as the company's certifying officers already have liability for the contents of the CD&A;

- Expanding the CD&A to cover all executive officers (not just the named executive officers) would not be meaningful for shareholders because shareholders have been, and will continue to be able to, evaluate directors based in part on the compensation policies and practices in place for the NEOs, and the proposed expansion of the CD&A would only increase the compensation disclosure without providing much in the way of additional meaningful disclosure regarding the compensation committee's policies and procedures;

- Requiring disclosure of performance targets regardless of the potential competitive effect on a company may result in adverse consequences to a company that would outweigh any meaningful information such disclosure would provide shareholders in deciding whether to vote for directors;

- Requiring disclosure regarding whether a member of the compensation committee has expertise in compensation matters could have the unintended consequence of creating an implication that any directors on the committee that lacked such "expertise" were not qualified to serve. As described above, directors have broad knowledge and experience and use that to make judgments on a variety of issues affecting a company, including its compensation practices. Therefore, a member of a compensation committee that lacks such "expertise" may nevertheless add a tremendous amount of value to compensation decisions; and

- Requiring disclosure of whether the amounts of executive compensation reflect any considerations of internal pay equity would not be meaningful for shareholders in deciding whether to vote for directors as this disclosure is just one small element of the compensation analysis. Companies and their compensation committees are already required to address the material elements of their compensation program and the material factors underlying their compensation policies and decisions, which may include internal pay equity.

We appreciate the opportunity to comment on these important proposals and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

The Society of Corporate Secretaries & Governance Professionals

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