



September 15, 2009

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

**Re: File Number S7-13-09**

Dear Ms. Murphy:

The National Association of Corporate Directors is the nation's leading membership organization for independent directors. On behalf of our 10,000 members, we appreciate the request for comment on your proposed rule, **Proxy Disclosure and Solicitation Enhancements**. Because the proposal, if enacted, will have a significant impact on our members, we feel compelled to comment on a number of items therein.

**A Enhanced Compensation Disclosure:**

Since its founding in 1977, NACD has spoken out on the need for greater transparency surrounding board decisions. Transparency is one of NACD's *Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies* (October 2008). NACD agrees that greater disclosure of compensation matters is a sound governance objective. We provided guidance for enhanced disclosure in our *Report of the NACD Blue Ribbon Commission on Executive Compensation* (2003/2007). Furthermore, our forthcoming *Report of the NACD Blue Ribbon Commission on Risk Governance* recognizes the link between compensation and risk, as follows:

“Executive compensation is a good example of how the aggregation of risks may play out across an enterprise. Long the target of shareholder attention, executive compensation has a significant impact on corporate risk. Improper compensation structures and short-term incentives have created massive problems for companies. To help minimize this risk, compensation committees may find it helpful to consider corporate strategy and appropriate time horizons for long-term and sustainable business success. Compensation committees may also seek assistance of external advisors/experts for information on proper metrics to incent managers.”

NACD has traditionally advocated enhanced disclosures of compensation and other matters on a *voluntary* basis. In general, we do not support an increase in *mandatory* disclosure in proxy statements or other filings. Filings are growing in number, size, and

complexity; adding more mandatory disclosures may not be the best course. **NACD supports improved disclosure on the board's role in risk oversight, including compensation matters as they relate to risk, on a limited basis, as described below.**

### *Compensation and Performance*

NACD has formally established that to oversee executive compensation properly, boards need better metrics to judge performance, stronger oversight of human capital development, and greater independence of the compensation committee. In addition, NACD has noted consistently that each board should approach the task of compensation oversight by adopting a compensation philosophy and a set of principles to guide its actions. We also believe, as we stated in the *Report of the NACD Blue Ribbon Commission on Executive Compensation*, cited above, that a thorough and appropriate compensation philosophy should reflect a link to performance and to the principles of independence, fairness, long-term shareholder value, and, most importantly, transparency. Compensation committees and boards can set clear performance objectives and measure performance against those objectives. These performance objectives should be based on multiple quantitative and qualitative factors, as opposed to stock price alone. We have further stated that boards should encourage communications with shareholders on the subject of compensation.

However, we firmly believe that companies must be free to choose their own methods and metrics for compensating and rewarding their management for achieving optimal performance. Those compensation programs should include the relationship to risk in the most optimal way the board and management can define. While strategy and risk are important topics for the compensation discussion, we question the value of disclosing the substance of these discussions as part of compensation disclosure and analysis (CD&A) in the proxy statement. Risk and strategy are complex subjects, and to do them justice, any meaningful disclosure may have to be voluminous, adding text to an already lengthy proxy. Moreover, such a requirement could lead to legalistic disclosures that would be meaningless to investors. **For these reasons, NACD disagrees with the SEC's proposal to expand the scope of the CD&A to require disclosure concerning a company's overall compensation program as it relates to risk management and or risk-taking incentives.**

### *Analyzing Risk and Compensation*

The SEC proposal would mandate what is basically a risk-related analysis of compensation. This analysis would, by definition, have to be specific to each company and would likely involve competitively sensitive information. Further, such disclosures, in many cases, would go beyond the scope of even a sophisticated investor to properly comprehend—requiring an understanding of the business, compensation, and multiple other input factors. In addition, the linkage between risk measurements and a set of compensation objectives would be subject to a great deal of interpretation and hypotheses. The risk-related information is also likely to be outdated by the time it is filed and not useful for prospective analysis.

The question then becomes twofold: 1) Are companies providing investors with the information they need to assess risk? 2) Are they explaining their compensation packages and philosophy in relation to risk? **NACD supports the idea that compensation information is an important feature of the risk discussion. Companies should be encouraged to provide this information in the most appropriate format, including narrative explanation.**

### **B Enhanced Director and Nominee Disclosure:**

NACD has a long history of advocating for a proactive approach to board composition. To serve on a board and to stay on a board, candidates must be qualified, and their qualifications must fit the strategic needs of a company. Since our founding, NACD has promoted the highest possible professional standards for board and director conduct, practice, and performance, and provided opportunities for directors to develop their effectiveness as board members. At the same time, we recognize the need to provide shareholders with additional information about directors' backgrounds and experience. We believe that such disclosures can include experience beyond the boardroom that is relevant to the company. The SEC might also consider having the candidates make disclosures about what continuing education they have received over the past year. **Whether freshman or long-serving director, we believe that experience and education should be reported so that those shareholders making judgments on a director candidate's capability to serve are adequately informed.**

We note that existing SEC rules already require that all registered companies make disclosures in their proxy statements about the nominating committee, if one exists (and, if there is no nominating committee, to explain the reasons for not having one). Specifically, they are required to disclose their process for identifying and evaluating director candidates including the minimum qualifications for a committee-recommended nominee and any qualities and skills that the nominating committee believes are necessary or desirable for board members to possess.

This proposal builds on existing rules by requiring greater disclosure of candidates' qualifications, including duration of past board service, as well as specific experience, attributes, and skills that qualify a director candidate for board service. **NACD supports this proposal, with modifications relating to experience and education, as described above.**

### **C New Disclosure about Company Leadership Structure and the Board's Role in the Risk Management Process:**

We believe the separation of the roles of independent chairman and the chief executive officer or the appointment of a lead director are models that every board should carefully consider for corporate governance. We made this point in the *Report of the NACD Blue Ribbon Commission on Board Leadership*, published in 2004. The board must separate the tasks of running the business of the board (chair) and running the business of the

corporation (CEO), if both are to be performed effectively. When the CEO and chair role are separate, this distinction is obvious. When the roles are combined, the role of a lead director (chosen by the other independent directors) ensures the proper functioning of the board. There is no one-size-fits-all solution. Each board should decide for itself what works best. **NACD supports the principle of an independent board leader.**

Additionally, the proposed rule seeks disclosure about the board's involvement in the risk management process, whether at the board level or at the committee level. Specifically, the disclosure would address who monitors risk management (the full board and/or one or more standing committees) and how the board monitors risk.

As in the case of board leadership, when it comes to risk oversight, there is no single "right" approach. Rather, there are general guidelines. As a general rule, the full board should have the primary responsibility for risk oversight, with the board's standing committees supporting the board by addressing the risks inherent in their respective areas of oversight. This is underscored by the fact that a single committee may lack the time, resources, and expertise to oversee the full range of risks facing a company and/or may duplicate such duties with audit, finance, credit, and other committees. Moreover, the critical link between strategy and risk points to the need for the full board, rather than one committee, to have responsibility for risk.

The board's role in the oversight of risk begins with assessing the appropriate strategy for the company, and agreeing to the risk appetite that is inherent in the strategy. The full board has two basic responsibilities:

- To ensure that management has implemented an appropriate system to manage these risks; i.e., identify, assess, mitigate, monitor, and communicate about these risks.
- To ensure the board's committee expertise, structure, and oversight processes enable effective oversight of these risks.

NACD supports the proposal to disclose the board's involvement in the oversight of the risk management process, whether at the board level or at the committee level, and supports the disclosure of how boards monitor risk through this oversight process.

#### **D New Disclosure Regarding Compensation Consultants:**

While recognizing that no single model for executive pay will fit every business organization, NACD believes that there is an identifiable set of best practices that compensation committees and boards of directors can apply. Our fundamental point is that every company should have a transparent compensation system based on a core set of clearly established principles, not on ad hoc considerations.

Among these best practices is the use of an independent compensation advisor when an advisor is needed. Compensation committees and boards of directors should consider

engaging an independent compensation consultant, as needed, to assist in the development of both a compensation philosophy and specific pay packages. The consultant should be *hired by and report directly to the committee* (or the board, if there is no committee), and should not be retained by the company in any other capacity with the exception that, in special cases, a consultant may be asked to opine on an employee compensation matter that is relevant to the overall compensation plan. Such involvement in nonexecutive compensation matters should be ancillary to the consultant's focus on executive compensation—supporting it rather than overtaking it. That is, in no cases should the hourly fees or time commitment involved in such duties rise to a material level relative to the consultant's executive compensation consulting assignment.

If a compensation committee does not follow this best practice and uses the same compensation consultant as management, this arrangement should be approved by the board and disclosed to shareholders. **Therefore, NACD supports the disclosure of all additional services provided by the compensation consultant to the company or its affiliates during the last fiscal year, along with an explanation of why these services were sought. However, NACD does not support disclosure of aggregate fees paid for executive pay consulting vs. all additional services.** The purpose of such a disclosure would be to ensure that the consultant is not overly dependent on income unrelated to executive pay, thus potentially tainting the consultant's objectivity. That same purpose could be met by requiring the disclosure of a simple percentage for those consultants who may be private and do not desire to reveal actual income figures.

To be effective, the consultant should be afforded full access to management, in-house counsel, the human resources staff, and any compensation consultant hired by management. To avoid “dueling consultants,” any consultant hired by management should not be engaged in assignments involving CEO or senior executive pay. **NACD does not believe boards need to disclose whether management recommended or screened the engagement of the compensation consultant. NACD does agree that, when the board (or a compensation committee) approves additional services, they should disclose the nature of these services.** This would help shareholders better assess the role of compensation consultants and potential conflicts of interest.

#### **E Reporting of Voting Results on Form 8-K:**

We agree in principle that more timely disclosure of the voting result of an annual or special meeting would benefit investors and we are not opposed to the requirement to report the results on Form 8-K, rather than in the 10-Q or 10-K. **However, NACD opposes the requirement that the results be filed in four business days.** Under the current vote-tabulation rules, it would be very difficult to meet the four-day reporting requirement. Problems that stem from share lending and other practices can significantly delay the time that votes can be reasonably tabulated. Such problems include “over voting,” when brokers send out voting instructions to both long and short investors of the same securities, without reconciling these positions before mailing out voting instruction forms. The four-day requirement would add burdensome costs to small companies who would be required to use more outside facilitators and increased technology to adhere to

the deadline. We do not have a precise recommendation on time frame, but would encourage you to consider the proposals of proxy voting experts recommending longer periods.

We are also opposed to the idea of requiring the reporting of preliminary voting results when the outcome is not final. Because the outcome of any vote can change in the final tabulation, this information could be misleading to shareholders and others.

### **G Transition:**

NACD holds the position that the proposed timeframe for implementation of these proposed rules (the beginning of the 2010 proxy season) would not be long enough to prepare for changes to reporting requirements and other rules. Given the other proposals that are currently on the table, including the SEC's proposal on Facilitating Shareholder Director Nominations (known as "proxy access") and potential legislation that would require companies to provide shareholders with an advisory vote on pay, companies are already processing and preparing for significant changes to the proxy process. **The proposed time frame, once the final rules are published, would not allow for enough time for companies to reasonably digest the information, prepare the additional disclosures, and adhere to other changes in the rules.**

### **H Other Requests for Comment:**

This section of the SEC proposed rule contains a number of open-ended questions of significant importance and many of them invite a wide range of responses that would have a significant impact on registered companies and our director members.

NACD believes that each item in this section is significant enough to warrant full consideration and should not be lumped into an "Other" category at the end of this already complex proposal. For example, the question of whether the SEC should consider proposing to eliminate the instruction that provides that performance targets can be excluded based on the potential adverse competitive effect on the company of their disclosure is a central issue that deserves full consideration and debate within the corporate and investment community. Our concern is that such an important issue, and many others like it in Section H, will not get the proper attention they deserve and changes may be considered as an afterthought. **Therefore, NACD believes that there should be a separate undertaking by the SEC to review all the current requirements in the proxy statement, item by item, so they all get proper consideration.**

We hope that these comments are helpful to you as you continue your efforts to improve disclosures pertaining to the corporate governance of the nation's publicly traded companies.

Sincerely,

A handwritten signature in black ink that reads "Barbara Franklin". The signature is written in a cursive style with a long horizontal line extending to the right.

Barbara Hackman Franklin  
Chair, NACD

A handwritten signature in black ink that reads "Ken Daly". The signature is written in a cursive style with a long horizontal line extending to the right.

Ken Daly  
President and CEO, NACD