SIFMA

Securities Industry and
Financial Markets Association

September 15, 2009

Via: Electronic Delivery

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

Re: Proposed Rules Regarding Proxy Disclosure and Solicitation Enhancements (File No. S7-13-09)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] is submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments on the Commission's proposed amendments to the rules regarding executive compensation proxy statement disclosure to be promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), set forth in Release Nos. 33-9052; 34-60280 (the "Proposal"). We appreciate the opportunity to comment on certain of the matters discussed in the Proposal.

I. Equity Award Disclosure

We heartily endorse the Commission's proposed amendment to Item 402(c)(2)(v) and (vi) and Item 402(k)(2)(iii) and (iv) of Regulation S-K regarding the manner of disclosure of stock and option awards in the Summary Compensation Table and Director Compensation Table (the "Tables"), respectively. We believe that reporting stock and option awards based on aggregate grant date fair value (as determined under Financial Accounting Standards Board (FASB) Statement of Financial Accounting Standards No. 123 (revised 2004) *Share-Based Payment* ("FAS 123R")) would provide investors with a clearer and more accurate understanding of total annual compensation for a company's named executive officers ("NEOs") and directors for all of the reasons cited by the Commission in the Proposal. We would also like to address certain of the Commission's more specific requests for comment regarding equity award disclosure.

[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

A. Year of Grant v. Year of Service

The Proposal contemplates that the Tables would report for a given fiscal year the aggregate grant date fair value of equity awards granted during such fiscal year. The Commission requested comment as to whether the Tables should instead report for a given fiscal year the aggregate grant date fair value of equity awards granted for services rendered in such fiscal year, even if the actual grant occurred after fiscal year end. We believe that the proposed rule should be changed to reflect this approach (and, if applicable, the Grant of Plan-Based Awards Table should be conformed) for the following reasons.

The Commission requires the dollar value of bonuses earned by an NEO in a given fiscal year to be reported in the Summary Compensation Table for such fiscal year, recognizing that such bonuses may not have been paid (or even finally calculated, *see* Instruction 1 to Item 402(c)(2)(iii) and (iv)) prior to the end of such fiscal year. Similarly, many companies compensate their NEOs for the NEOs' and the company's performance in a given fiscal year with equity awards granted after the end of such fiscal year. As with bonuses, decisions in respect of such equity awards are typically made in light of the company's financial results and the NEOs' performance evaluations for such fiscal year, both of which may not be finalized until after fiscal year end. Often these awards are made when final bonuses are awarded, with part to be paid in cash and part to be paid in the form of an equity award. We do not believe that there is any policy reason for differentiating the timing of reporting compensation earned in a given fiscal year depending upon whether it is made in the form of cash or an equity award.

Moreover, if the Commission is seeking to eliminate "alternative" Summary Compensation Tables in the Compensation Disclosure & Analysis section of company proxy statements ("CD&A"), this change should be adopted. If the proposed rule remains as currently drafted, many companies may still feel the need for an "alternative" Summary Compensation Table in order to disclose (and explain) what they believe is the true total amount determined to be paid by the compensation committee and earned by an NEO in a given fiscal year – total compensation calculated by including equity awards earned, not granted, in such fiscal year. We believe that the Commission's goal of enhancing and clarifying investors' understanding of the role of equity awards in total annual compensation would be diminished by the switch to aggregate grant date fair value without this additional change.

In order to allay concerns that a company could manipulate the timing of equity awards in order to distort the determination of NEOs for a given fiscal year if this approach were adopted, we suggest that this approach apply solely to awards that are not only granted with respect to services performed in the given fiscal year but are also granted within 2 ½ months after the end of such fiscal year. This 2 ½ month rule echoes Federal tax rules which permit a company to deduct bonuses earned in a given fiscal year in that year even if paid in the immediately following fiscal year so long as such payment occurs within the first 2 ½ months of such fiscal year. This rule would ensure that the grant of the award is reasonably proximate to the fiscal year in which it is earned and also provide sufficient time for the finalization of financial statements and performance evaluations.

B. Performance-Based Equity Awards

The Commission requested comment as to whether companies would be discouraged from tying equity awards to performance conditions if the full grant date fair value without regard to the likelihood of achieving the performance objectives of such awards were required to be reported in the Summary Compensation Table. We believe that this approach would in fact prove to be a disincentive for companies to grant performance-based equity awards, as it will, in most cases, significantly overstate compensation (because performance conditions that would generally reduce the value of the compensation (conditionally) awarded would be ignored) or result in companies refraining from imposing difficult performance conditions.

In order to avoid the unintended consequences of such a disincentive, we suggest that performance-based equity awards be disclosed in the same way as performance-based non-equity awards with the amount actually earned under the award reflected in the Summary Compensation Table in the fiscal year in which the relevant performance goals are satisfied. Given the purpose of the Summary Compensation Table to disclose the amount of compensation earned by an executive with respect to a given fiscal year based on performance of both the company and the executive in such fiscal year, we believe that our suggested approach would best reflect the compensatory intentions of the company's use of performance-based equity awards.

However, if the Commission adopts the regulation as currently proposed, we strongly recommend that the grant date fair value reportable in the Summary Compensation Table for performance-based awards be based on target performance and not maximum performance (as the Division of Corporation Finance currently indicates should be the case in the Grants of Plan-Based Awards Table (*see* Compliance and Disclosure Interpretation 120.05)).

C. Transition Reporting

We support the Commission's proposed approach to transition reporting. We believe that disclosure of prior fiscal year compensation of each NEO in the 2009 Summary Compensation Table reflecting aggregate grant date fair value amounts in the Stock Awards and Option Awards columns (with a recomputed amount in the Total Compensation column) would provide investors with a clear apples-to-apples comparison of the year-over-year changes in the annual compensation of the NEOs. However, we also strongly agree with the Commission that the identity of NEOs for any preceding fiscal year should not be affected as a result of recomputed Total Compensation amounts.

II. Compensation Consultant Disclosure

We would like to address certain of the Commission's more specific requests for comment in regard to the Commission's proposed expanded disclosure rule relating to compensation consultants' potential conflicts of interest. Such rule would require, with respect to a compensation consultant who plays a role in determining or recommending the amount or form of executive or director compensation (other than a role limited solely to consulting on broad-based, nondiscriminatory plans) and in the event such consultant or any of its affiliates also provide other services to the company or any of its affiliates, disclosure of the nature and extent of such other services and of the aggregate fees paid for the executive compensation services and for all other services.

A. Disclosure Threshold

We believe that the foregoing disclosure should be required only in the event that the aggregate amount of fees for non-executive compensation related services exceeds an established threshold. Such approach would enhance the Commission's goal of providing necessary information in a concise and meaningful manner by eliminating disclosure of immaterial and insignificant relationships and focusing investors on material potential conflicts of interest.

For such a threshold, we recommend that the Commission look to the business relationship threshold currently used with respect to the determination of director independence under Item 407(a) – the listing standards of the company's applicable national securities exchange or inter-dealer quotation systems listing standards (in the case of a listed company) or specified listing standards (in the case of a non-listed company). We note, however, that the business relationships threshold varies among listing standards, e.g., NYSE's greater of 2% of consolidated gross revenues or $1 million and NASDAQ's greater of 5% of consolidated gross revenues or $200,000. If the Commission wanted one consistent bright line threshold of aggregate fees paid for compensation consultant non-executive compensation related services applicable to all companies, we would recommend a 5% of consolidated gross revenues test (i.e., the bright line disclosure rule for business relationships between a company and a director affiliated entity under former Item 404(b) and under NASDAQ's current rule).

B. Executive Compensation Consulting Services

We believe that the Commission should clarify the scope of the compensation consultants that are considered to play a role in determining or recommending the amount or form of executive or director compensation. We believe the proposed disclosure should be triggered only in respect of consultants that are materially involved in setting pay or overall compensation structures for NEOs and have direct contact with the compensation committee. Such clarification would prevent the unnecessary inclusion of, for example, consultants who merely provide industry-wide or broadly-distributed benchmarking surveys that might be utilized by a compensation committee and consultants who render minor services with respect to various aspects of executive compensation (such as medical benefits). Failure to clarify the Commission's rule to limit it to those consultants whose role with the compensation committee merits greater examination of other services provided by them and their affiliates will result in a confusing list of multiple consultants playing minor roles and meaningless disclosure of services that do not give rise to potential conflicts of interest, diffusing the focus on the company's principal compensation consultant(s).

C. Compensation Consultant Ownership Interests

We believe that disclosure of ownership interests by an individual consultant in his or her firm or any other affiliated company that provides non-executive compensation related services to a company is irrelevant to the question of potential conflicts of interest. Many consultants own stock in their publicly traded consulting firms and indeed are subject to stock ownership commitments at such firms. We believe that the only possibly pertinent information with respect to potential conflicts of interest is the payment of material fees by a company to a consulting firm for non-executive compensation related services as discussed above.

III. Other Requests for Comment

We would like to address certain of the Commission's other requests for comment as follows.

The compensation disclosure currently required with respect to each NEO is extensive and adding additional executive officers would add numerous pages of increasingly detailed disclosure. In addition, tracking all of the information necessary for satisfying the disclosure requirements for a larger group would require additional company resources being devoted to tasks not furthering the business of the company. Moreover, most executive officers of a company are compensated under the same plans and programs. Any disclosure regarding these plans and the decision-making processes undertaken in regard to them will inform investors with respect to all executive officers. We do not understand how disclosure of the actual amounts paid to executive officers who are per se not among the highest paid in the company could possibly be either material or useful to an investor.[2] In sum, we believe that the marginal benefit of this additional information to an investor would be negligible and would serve only to distract from disclosure regarding the compensation of the company's key executives.

We do not believe that disclosure of internal pay ratios should be specifically required. In its CD&A, a company is required to discuss and analyze the material factors underlying compensation policies and decisions reflected in the data presented in the tables found in its proxy statement. If internal pay equity is a material factor in respect of NEO compensation determinations, then the company will disclose it in the CD&A. If it is not, we do not see the relevance of, or reason for, any standalone disclosure of internal pay equity, such as the ratio of total compensation of an NEO to that of an average non-executive employee of the company.

We do not support the idea that the CD&A should be part of the Compensation Committee Report. For all of the reasons the Commission initially made its determination regarding the status of each of the CD&A and the Report, we believe these disclosure requirements should not be changed. We believe that the CD&A should be company disclosure filed with the Commission, given the importance assigned to it. Making the compensation committee responsible for the CD&A in such circumstance would be akin to making the audit committee responsible for a company's financial statements. We see no compelling reason for a change in the responsibilities of the company and the directors with respect to disclosure under the Securities Act rules solely in the area of executive compensation. Such a change in these rules would have to be premised upon the perception that CD&A disclosure is currently ineffective in achieving its purpose, which premise is both unsupported and, we believe, unfounded.

Lastly, we would like to express a general concern regarding the strain that the recently proposed enhancement of the compensation and corporate governance disclosure could have on already bloated proxy statements. More disclosure is not the answer to every problem, perceived or real. We worry that relevance will be sacrificed for volume if this disclosure creep continues.

We thank you for the opportunity to submit this comment letter. We would be happy to discuss with you any of the comments described above or any other matters you feel would be helpful in your review of the

[2] Although proposed, the requirement to disclose even the aggregate compensation of executive officers as a group was dropped in the 1992 amendments to executive compensation disclosure, reflecting broad commenter support for abandoning this requirement, presumably due to the lack of materiality to investors of the information elicited (Release Nos. 33-6962; 34-31327 (October 16, 1992)). We cannot find any reason that the considerations that led to this decision are any less valid now than they were then.

Proposal and the comments you receive. Please do not hesitate to contact the undersigned at 202-962-7329 or via email at evarley@sifma.org if you would like to discuss these matters further.

Sincerely,

Liz Varley
Managing Director
SIFMA

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Luis A. Aguilar, Commissioner
The Honorable Kathleen L. Casey, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Elisse B. Walter, Commissioner
Ms. Meredith B. Cross, Director, Division of Corporation Finance
Mr. David M. Becker, General Counsel and Senior Policy Director