SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS

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May 26, 2011

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

Re: Listing Standards for Compensation Committees, File No. S7-13-11

Dear Ms. Murphy:

The Society of Corporate Secretaries & Governance Professionals (the "Society") appreciates the opportunity to respond to the Proposing Releases for Implementing Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), "Listing Standards for Compensation Committees", SEC Rel. Nos. 33-9199 and 34-64149 issued on March 30, 2011 (the "Proposed Rules") by the Securities and Exchange Commission (the "SEC" or the "Commission").

Founded in 1946, the Society is a professional membership association of more than 3,100 attorneys, accountants, and other governance professionals who serve approximately 2,000 companies of most every size and industry. Society members are responsible for supporting the work of corporate boards of directors and their committees and the executive management of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements.

I. Independence of Compensation Committee Members

Pursuant to new Section 10C of the Securities Exchange Act of 1934, enacted by Section 952 of the Dodd-Frank Act, the SEC has proposed Rule 10C-1 directing the national securities exchanges (the "exchanges") to adopt listing standards requiring each member of an issuer's compensation committee (or other board committee performing equivalent functions) to be "independent." The Proposed Rules do not define "independence," but direct the exchanges to adopt such a definition after taking into account relevant factors, including (i) sources of compensation of a board member and (ii) whether a board member is affiliated with the issuer.

<u>The Commission Need Not Prescribe Additional Minimum Independence Standards</u>

The Commission has requested comment regarding whether it should propose additional mandatory factors for consideration. The Society supports the Commission's proposed approach permitting each exchange to establish its own independence criteria, and believes that it is not

necessary for the Commission to propose additional mandatory factors for the exchanges to consider in establishing a definition of "independence." We believe that the exchanges possess the appropriate experience and expertise to establish the definition of independence for the purposes of compensation committee membership, based on the factors required in the Dodd-Frank Act and any other considerations they deem relevant. The major exchanges currently prescribe independence requirements for board members and audit committee members, and the Society believes that the exchanges have the ability to prescribe the independence requirements for compensation committee members. The Society believes that exchanges will be able to appropriately take into consideration the function that the compensation committee performs when determining the relevant independence criteria that should be applicable to that committee. The Society is planning to meet with representatives of the NYSE and NASDAQ, and other exchanges, as appropriate, to review and discuss considerations related to the determination of independence for compensation committees.

Directors Affiliated With Large Shareholders Should be Permitted to Serve on Compensation Committees

While the Society supports and agrees with the SEC's approach to the determination of independence for compensation committees, the Society believes that directors affiliated with significant investors are appropriate to serve as independent members of an issuer's compensation committee absent any other barrier to qualification and should not be categorically precluded from serving on compensation committees. We believe that for the purposes of overseeing executive compensation, the interests of the shareholders represented by these directors are aligned with other shareholders and, accordingly, such directors should not be excluded from the definition of independence because they are affiliated with a major shareholder or shareholders of the issuer. In the experience of many of our members, such directors are a valuable asset to the compensation committee as a result of their typically substantial financial commitment, experience and expertise. We encourage the Commission to clarify in its final rules implementing Section 10C that, when determining independence for compensation committee members, affiliation with the issuer by reason of equity ownership in the entity does not result in per se disqualification.

The Commission Should Consider Reducing the Number of Definitions of Independence Applicable to a Compensation Committee

Members of a compensation committee currently must satisfy a multitude of different (and inconsistent) definitions of "independence."[1] In addition to the definition of the relevant exchange, they must qualify as "non-employee directors" under Rule 16b-3(b)(3)(i), and as "outside" directors under Internal Revenue Code Section 162(m). (We note that issuers must also take into consideration definitions of independence utilized by the proxy advisory firms). We believe the Commission should take this opportunity to consider conforming the Rule 16b-3 definition with the common elements of the definitions implemented by the relevant exchanges.

[1] See Exhibits 1 and 2 to Chapter 16 "Director Independence Requirements" in A Practical Guide to SEC Proxy and Compensation Rules, Fifth Edition, (Aspen Publishers, 2011).

II. Retention of Compensation Committee Advisers

The SEC's proposed Rule 10C-1 prescribes certain factors that a compensation committee must take into account when selecting a compensation consultant, legal counsel or other adviser, in addition to any other factors that the exchanges may require.

The Commission Need Not Prescribe Additional Required Factors Nor Establish Bright Line Thresholds

The Society agrees that the factors set forth in Section 10C(b) of the Dodd Frank Act are generally comprehensive and that the Commission need not establish materiality or bright line numerical thresholds to determine whether, or when, any factors should be considered by a compensation committee. We support the Proposed Rules as written because we believe that compensation committees should have the flexibility to retain compensation advisers that best meet their needs. We believe compensation committees are well positioned to analyze qualifications of potential advisors and make proper decisions for engaging their advisers, without the necessity of any additional specific requirements imposed by either the Commission or the exchanges.

The Commission Should Not Require Disclosure of the Selection Process

Further, we do not believe that the Commission should amend Regulation S-K to require listed companies to describe the compensation committee's process for selecting compensation advisers. We do not believe such information would be useful to investors because such a disclosure would likely be similar for all issuers, i.e., that the compensation committee considered the required factors. We believe that factors considered by the compensation committee are within the purview of a director's ability to make decisions under the business judgment rule, and we believe such individual factors are not so material to investors as to require separate disclosure. Disclosure of factors that are not material to investors would only add to the length of the proxy statement without providing meaningful information.

III. Disclosure Regarding Compensation Consultants

The Commission is required by Section 10C(c)(2) to require that an issuer disclose whether its compensation committee has retained or obtained the advice of a compensation consultant and whether such engagement has raised any conflict of interest. In that regard, you have asked whether additional clarification should be provided regarding the phrase "obtained the advice" and whether the exception for consulting with regard to broad-based plans and providing benchmark data in the first full sentence of current Regulation S-K Item 407(e)(3)(iii) should be retained.

The Commission Should Clarify That "Advice" is Obtained Only When a Compensation Committee Obtains a Recommendation Regarding the Amount or Form of Compensation for Named Executive Officers

Under Section 10C(c)(2)(A), if a committee has not "retained" a compensation consultant, the disclosure requirements (and the conflicts analysis) are nonetheless triggered if the committee (or

management) has obtained the "advice" of a compensation consultant. We believe that it is important to clarify what is meant by "advice." "Advice" should be defined as a recommendation regarding the amount or form of compensation of the named executive officers that is provided to the committee; advice therefore does not include the provision of services with respect to broad-based plans nor the provision of non-customized data described in the current exemption. Unless the information provided to the compensation committee contains specific recommendations regarding compensation of named executive officers, we believe that advice has not been obtained.

The Existing Exemption in Item 407(e)(3)(iii) Should be Retained

In its 2009 rule changes, the SEC concluded that non-customized benchmarking data does "not raise the potential conflicts of interest that the rule is intended to address."[2] Accordingly, an exemption for providing non-customized benchmarking data and consulting with regard to certain broad-based plans was included in the lead-in paragraph of Item 407(e)(3)(iii). The Proposed Rules would eliminate this exemption and, in the process, treat non-customized data as though it were "advice" for purposes of Section 10C(c)(2) even though the consultant does not provide advice as to these matters.

Prior to 2009, many companies retained large, well-known consulting firms as their compensation committee consultants for several purposes. Not surprisingly, given the breadth of these firms' services, these same consultants were often also used by companies' management for other matters. When the Commission adopted rule changes in December 2009, citing potential conflict of interest concerns, the SEC required additional disclosure regarding the fees paid to these firms. As a result, many compensation committees began to engage, smaller, boutique consulting firms that do not provide any services to management to advise them on executive compensation.

However, the smaller consultants now retained by many compensation committees do not have the capacity to provide non-customized benchmarking data that is provided by the larger consulting firms. Therefore, non-customized benchmarking data often is collected by certain of the larger firms as a supplement to, or to form the basis of the advice provided by, the compensation committee's consultant. The firm that provides the non-customized benchmark data is not engaged by the compensation committee directly; instead the data is generally provided either by:

- The company's management pursuant to its own engagement with a large consultant, or
- The boutique consulting firm pursuant to its own engagement with a large consultant.

Retaining the exemption contained in Regulation S-K Item 407(e)(3)(iii) is consistent with the purposes of Securities Exchange Act Section 10C(c)(2), which is to require disclosure, in a

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[2] Item 407(e) of Regulation S-K; Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009) [74 FR 68334, 68348] (the "2009 Release").

competitively neutral fashion, regarding compensation consultants and any conflicts of interest they may have.[3] It does not make sense to require conflicts/independence assessments and proxy disclosure with regard to a firm that only provides non-customized benchmark data because such a provider does not give any analytical input, discretionary judgment or advice. In 2009, the SEC itself noted that non-customized benchmarking data is not deemed to be "executive compensation consulting services."[4] Consistent with the reasoning set forth in the 2009 Release, merely providing non-customized benchmark data should not be considered "advice" for purposes of Section 10C(c)(2), and therefore should remain outside the scope of the rules. The Dodd-Frank Act does not mandate that the Commission require disclosure of services that do not involve advice; accordingly, we believe the elimination of the exemption goes beyond that which is mandated by the Dodd-Frank Act.

The Commission notes its sensitivity to the costs and benefits imposed by the Proposed Rules.[5] The SEC has not cited any evidence that there have been any issues with the current exemption contained in Item 407(e)(3)(iii), that any investor desires the removal of the exemption, or that there are any potential benefits associated with removing the exemption. Therefore, we believe that the exemption should be retained in the final rules.

A Definition of "Advice" Should be Added to Item 407(e)(3)(iii)

One possibility for retaining the exemption in the final Item would be to add a definition of "advice" as an instruction to Item 407(e)(3)(iii). If such an instruction were included, the recitations of what does not constitute "advice" could be dropped from subparagraphs A and B. Alternatively, given the meaning of the word "advice," the exemption relating to broad-based plans and non-customized benchmark data could be left in the lead-in paragraph of Item 407(e)(3)(iii) (which would indirectly establish that such information is not "advice").

IV. The Final Rules Should Clarify that They Apply Only to Executive Compensation

We believe the Commission's final rules should reflect that the new disclosure requirements apply only to the compensation committee and its consultant when determining compensation for named executive officers and not to any committee of the Board determining director compensation. The SEC rules (Regulation S-K, Item 407(e)(3)(iii)), as currently in effect, as well as the Commission's currently Proposed Rules clearly apply to compensation committees and their consultants. However, certain provisions in Item 407(e)(3)(iii) also reference director compensation. We note the intended scope of the proposed changes is limited to a "committee of the board that oversees *executive compensation*."[6] However, juxtaposition of current Item 407(e)(3) with the proposed revisions has created uncertainty at many companies because

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[3] Listing Standards for Compensation Committees, Release Nos. 33-9199; 34-64149 (Mar. 30 2011) [76 FR 18966, at 18980] (the "Release").

[4] 2009 Release at 68347.

[5] Release at 18984.

[6] Release at 18968 (emphasis added).

director compensation is not handled by the compensation committee at those companies -- instead, it is in the purview of the governance committee.

Even though the introductory sentence of Regulation S-K, Item 407(e)(3) requires disclosure of the company's "processes and procedures for the consideration and determination of executive *and director compensation*" (emphasis added), the proposed amendments to Item 407(e)(3)(iii) eliminate the mention of director compensation in clause (iii), and, instead just reference the committee. The confusion stems from the fact that the Item, as proposed to be modified, still retains the current language in Item 407(e)(3)(iii)(A) and (B) that requires disclosure about fees paid to compensation committee consultants for "determining or recommending the amount or form of executive *and director compensation*." The result is that it is unclear whether the Item, if amended as proposed, will also apply to disclosures regarding director compensation and to a company's governance committee if that committee is responsible for director compensation and engages a consultant to assist the committee.

For all these reasons, the new disclosure requirements should apply only to the compensation committee and its consultant when determining compensation for named executive officers and not to any committee of the Board in regard to director compensation.

V. Conclusion

The Society appreciates the opportunity to comment on the Proposed Rules. If you have any questions, please feel free to contact the undersigned.

Respectfully submitted,

/s/ Neila B. Radin
Chair, Securities Law Committee
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