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November 18, 2010

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

Re: Reporting of Proxy Votes on Executive Compensation and Other Matters [Release Nos. 34-63123; IC-29463; File Number S7-30-10]

Dear Ms. Murphy:

On behalf of various institutional investment managers which are clients of Mayer Brown LLP, we appreciate the opportunity to express the views set forth below on the U.S. Securities and Exchange Commission's (the "Commission") proposed rule and form amendments under the Securities and Exchange Act of 1934, as amended ("Exchange Act") and the Investment Company Act of 1940, as amended ("Company Act") that, if adopted, would require any institutional investment manager subject to Section 13(f) of the Exchange Act to report annually how it voted proxies relating to certain executive compensation matters ("Proposed Rule").[1] The Proposed Rule is intended to accomplish the Congressional directive set forth in Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[2] While recognizing the Congressional decision that such disclosure may potentially provide the public with a better-informed view of corporate governance matters, Section 951 should be interpreted only as broadly as necessary to effectuate the statutory goal. Certain aspects of the Proposed Rule are unnecessarily broad and the proposed compliance deadline is too short. Specific reasons and recommendations for narrowing the scope of the Proposed Rule are set forth below.

Proxy Voting Information to be Included on Amended Form N-PX

As proposed, amended Form N-PX would require almost every "institutional investment manager"[3] to report all proxy votes cast "on the approval of executive compensation and on the

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1 *See* Reporting of Proxy Votes on Executive Compensation and Other Matters, Exchange Act Release No. 63,123, 75 Fed. Reg. 66622 (Oct. 28, 2010) ("Proposing Release").

2 *See* Dodd-Frank Section 951, Public Law 111-203, 124 Stat. 1376, 1899-1900 (July 21, 2010) (codified at 15 U.S.C. 78n-1).

3 As set forth in the Proposing Release, the Commission is defining "institutional investment manager" for purposes of this rulemaking in the same way that this term is defined under the Exchange Act. See Proposing

frequency of executive compensation approval votes, as well as votes . . . on the approval of executive compensation that relates to an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer." Among other things, amended Form N-PX would require institutional investment managers otherwise subject to 13(f) reporting requirements to disclose: (1) the number of shares the institutional manager was entitled to vote or had or shared voting power over; and (2) the number of those shares that were voted. This quantitative disclosure goes beyond the scope of what is contemplated by Section 951 and would not provide meaningful information to the public. In addition, it has the potential to violate confidentiality provisions in agreements entered into with institutional clients.

Number of Shares Entitled to Vote or Voting Authority Over

Although included as a new disclosure item on the proposed amended Form N-PX, requiring the disclosure of the number of shares that an institutional investment manager is entitled to vote or had sole or shared voting authority over is not based on the text of Section 951. While it is clear that Section 951 requires some form of annual disclosure by institutional investment managers concerning voting of shareholder proxies, nothing in that provision even mentions numbers of shares voted. A simple indication of "for", "against", "abstain" or any other relevant choices would be sufficient to satisfy the statutory disclosure obligation.

In addition, the Proposing Release acknowledged that the number of shares over which a manager has voting authority will not necessarily match the number of shares reported on Form 13F, which is based on investment discretion. More specifically, the Proposing Release noted that certain clients may withhold voting discretion, particularly clients subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"),[4] indicating the Commission's understanding that the manager may have full discretion over these client accounts and may include their holdings on the manager's Form 13F, but would have no knowledge of how such clients voted their shares. As a result, filing numbers of shares on Form N-PX could result in confusing and relatively meaningless quantitative data.[5]

More importantly, the Proposing Release fails to recognize that in addition to those clients who completely withhold voting authority as in the ERISA example provided, there are also many clients who, despite giving their managers full investment discretion, direct their managers to vote in accordance with the clients' own proxy policy and guidelines. While not generally the

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Release, *supra* note 1, at 66623. Exchange Act Section 13(f)(6)(A) defines the term "institutional investment manager" to include "any person exercising investment discretion with respect to the account of any other person."

4 *See* Proposing Release *supra* note 1, at n.20 and accompanying text.

5 Given that Form 13F itself has not been particularly useful to the Commission, it would not seem appropriate to require additional data which cannot be matched up or otherwise used to meaningfully supplement the information already required on Form 13F. *See* Office of Inspector General, SEC, Report No. 580, Review of the SEC's Section 13(f) Reporting Requirements, at vi (Sept. 27, 2010) (stating that, "despite Congressional intent that the SEC would be expected to make extensive use of the Section 13(f) information for regulatory and oversight purposes, no SEC division or office conducts any regular or systematic review of the data filed on Form 13F.").

case with respect to retail clients, institutional clients often dictate to their managers how proxies on shares held in their portfolios must be voted. Each institutional client generally presents the manager with its own written proxy voting policies and/or guidelines at the time the investment management agreement is entered into with the manager and then directs the manager both to follow the client's proxy policy and to provide the client with periodic reports on how the shares in its account were voted. In these situations, the manager's role is merely that of an agent for the client. Although the manager may effectuate the client's voting decisions by actually completing the proxy card and casting the vote, whether electronically or otherwise, the manager has no control over and does not decide how the shares will be voted.

In addition, some managers are not readily able to determine from a substantive perspective how best to vote proxies, such as index managers and those that use formulaic or quantitative investment processes where limited or no fundamental analysis is performed on investments. To the extent that such managers vote on behalf of clients at all, they either vote in accordance with their clients proxy policies or, for clients who do not have their own written policies and procedures, the managers may offer their clients an array of third party proxy voting service providers who, in turn, offer the managers' clients a variety of different proxy voting guidelines from which to choose (*e.g.*, corporate governance, social and environmental issues). Proposed Form N-PX would require such managers to report proxy voting information gleaned from the numerous and differing proxy voting standards adopted by clients or selected by clients from such third party providers. Such information is hardly meaningful and is no reflection of how the manager itself voted or would have voted had it retained voting authority.

The Proposing Release interprets the scope of the Section 951 reporting obligation to include not just those proxies which the manager voted in accordance with its own proxy policy and procedures; but also, proxies on every security the manager, "whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, had or shared the power to vote, or to direct the voting of, the security."[6] This definition of voting authority is so broad, it would require managers to disclose all votes cast for such institutional clients despite the fact that the manager had no control over the nature or content of the actual votes cast.

This result does not comport with the plain meaning of Section 951 which requires only that the institutional manager report "how *it* voted on any shareholder vote".[7] While it may be considered self-evident that a manager has the "power to vote" or "sole or shared voting authority" if a vote cast by the manager is voted in accordance with its own written proxy voting policy adopted in accordance with Rule 206(4)-6 under the Investment Advisers Act of 1940, as amended ("Advisers Act"), nothing in the text of Section 951 would indicate that a vote cast by a manager in accordance with a *client's* proxy policy or guidelines is the manager's (or "its") vote simply because the manager undertakes ministerial responsibility for the mechanical aspects of casting a client's votes. The legislative history of Section 951 indicates that, at least with respect to institutional investment managers, the only concern Congress was attempting to address was that the managers might vote the shares of other people "to the detriment perhaps of the people

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6 Proposing Release, *supra* note 1, at 66623.

7 Dodd-Frank Section 951, *supra* note 2 (emphasis added).

whose shares they were voting" and wanted to insure that when the managers voted for such persons they would "disclose to those persons how they voted."[8] Section 951 addressed this concern by allowing managers to "report at least annually how it voted" on any relevant shareholder vote unless the Commission adopts a rule requiring public disclosure. To the extent that institutional managers are already providing written reports directly to institutional clients in accordance with the clients' written proxy policies or guidelines, at least as frequently as annually, and in many cases at least quarterly or even monthly, there is no need for the Commission to require such managers to include on Form N-PX any information relating to votes that have already been reported directly to the shareholder (*i.e.*, the manager's client) in order to satisfy the intent of Section 951.

Moreover, the Proposing Release left the door open to limit the scope of managers' reporting obligations by requesting comment on whether "the reporting requirement should be based on having the power to vote."[9] The Commission has, and should exercise, its authority to "provide guidance concerning the circumstances under which a manager has sole or shared voting power."[10] Even if the Commission is wedded to requiring disclosure of the total number of shares, neither "power to vote" nor "shared voting authority" should be defined to include votes cast by the manager in accordance with the written proxy voting guidelines of a client. Such votes should be excluded from the manager's N-PX reporting obligation.

Number of Shares Voted

The Proposing Release also proposes to amend Form N-PX to require disclosure of the number of shares voted by the manager. According to the Proposing Release, the number of shares voted is needed because, without it, there would be no indication of the "magnitude" of votes cast by the manager in situations where an institutional manager voted in multiple ways on behalf of multiple clients (*e.g.*, for, against or abstain).[11] Comment was requested on whether the Commission should "amend Form N-PX, as proposed, to require disclosure of the number of shares the reporting person was entitled to vote or had voting power over, the number of shares voted, and the number of shares voted in each manner?"[12]

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[8] Unofficial Transcript of the House-Senate Conference Committee on H.R. 4173, 111th Cong., 2d Sess., day 3 (CQ Congressional Transcripts, June 16, 2010) (June 16, 2010) (Statement of Representative Frank); available at http://www.cq.com/doc/congressionaltranscripts-3687812?print=true. Representative Frank stated as follows:

> "[W]here people are voting other people's shares on the question of compensation, they should say how they are voting, because the fear is that they would be coerced into voting with CEO[s] at whatever level of salary and golden parachute and bonus was there to the detriment perhaps of the people whose shares they were voting. So we felt one way to deal with that was not to tell them how to vote, but simply to acquire [sic] those who were voting the shares of other people, to disclose to those people how they voted."

[9] Proposing Release, *supra* note 1, at 66624.

[10] *Id*.

[11] *See id.* at 66628.

[12] *Id*. at 66630.

Form N-PX should not be amended in this way because requiring disclosure of the number of actual shares voted goes well beyond the statutory reporting obligation and will not provide meaningful information. Moreover, the Commission's objective can be attained in less onerous ways.

As discussed above, Section 951 contains no language requiring any numerical or quantitative data to be reported. Moreover, the existing public disclosure required by registered investment companies ("funds") on Form N-PX, which was readily available to Congress at the time Section 951 was under consideration,[13] does not require any numerical data as to how many shares a fund was entitled to vote or how many shares were actually voted. Thus, there is no reason to assume that Congress intended for the Commission to go further with respect to institutional managers than it had already gone with respect to funds.

With respect to whether reporting the number of shares voted provides meaningful information, the Proposing Release provided no rationale for including number of shares voted in situations where all shares are cast in the same way. Thus, if the manager has voted all shares in a single way under its own policy and procedures, it should be sufficient to state that all shares were voted in whatever way is applicable rather than disclosing the number of shares voted.

The Proposing Release suggests that where votes are cast in multiple ways, an indication of magnitude of shares voted in each way may be necessary. To the extent that the Commission feels strongly that some indication of "magnitude" is required, there are other less burdensome ways to achieve that result. For example, a manager could report how a *majority* (or plurality) of the shares the manager was entitled to vote was actually voted. Since institutional managers often cast votes in multiple ways, this approach permits clear and succinct disclosure regarding the disposition of a manager's votes cast for the majority (or plurality) of shares it manages. This approach supports the Commission's desire to describe the magnitude of the different votes, but eliminates the need for managers required to file Form N-PX to calculate and interpret the raw data on votes that will be provided by most proxy voting systems or third party service providers in order to complete Form N-PX. Alternatively, managers could report the percentage of total votes cast for each position; although this would be slightly more burdensome in that it would require additional calculations, it would serve the Commission's goals in determining the magnitude of the votes cast for each position without inundating the Commission and the public with additional raw data not intended by Section 951 and of questionable usefulness.

The Proposing Release also overlooked the fact that institutional clients almost invariably select their own custodians and often participate in securities lending programs that are completely independent from the manager. Even if a manager has voting power and would, therefore, be required to disclose certain securities as part of the total number of shares over which the manager has voting authority, the manager would not able to vote any securities which are out on

[13] Indeed, the legislative history indicates that Congress was aware of the mutual fund reporting obligation. *See* Unofficial Transcript of the House-Senate Conference Committee on H.R. 4173, *supra* note 8, in which Representative Frank stated, "earlier the government had required mutual funds at least for the SEC to disclose how they voted, when they were voting other people's shares."

loan under an agreement entered into solely between the client and its custodian at the time a vote is due. While institutional clients and their managers may understand this distinction, it is not generally understood by the public.[14] As a result, reporting the number of shares actually voted could create unexplained discrepancies between the number of shares required to be disclosed as authorized for voting and the number of shares actually voted whenever clients' securities are on loan pursuant to any client-directed securities lending arrangements during a voting period. These discrepancies could create confusion and uncertainty about why a manager did not vote all of the shares over which they had voting authority if disclosure of numbers of shares voted is required.

Confidential Treatment for Form N-PX

As discussed above, the proposed amendments to Form N-PX, if adopted as proposed, would force managers to disclose information not only about votes cast over which the manager had full or shared voting discretion, but also information about votes cast by the manager in accordance with the written proxy voting policies of its clients, including policies provided by third party service providers and adopted by the client, not by the manager. While these votes are not necessarily cast in accordance with any position the manager espouses or would have taken under its own voting policy, if the manager is required to disclose the number of shares over which it has voting authority and the number of shares actually voted, this disclosure would appear, whether accurately or not, to reflect the voting position of the manager.

Depending upon the circumstances, such disclosure could also be identifiable to a single client or group of related clients which directed the manager to vote in a particular manner. Such client or group of clients may have in place a confidentiality agreement with the manager under which information about the portfolio and actions related to the portfolio are not to be publicly disclosed. Clients who have not delegated proxy voting decision-making to their managers have a right to assume that such votes are confidential. Nothing in Dodd-Frank expressly overrides this expectation of client confidentiality and it would not make sense to interpret Section 951 as

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[14] As evidenced by a statement during the conference committee on Dodd-Frank in which Senator Schumer advised his Congressional colleagues that securities on loan may still be voted by the person who owns the securities, even members of Congress may not understand this distinction. *See* Webcast Video Archive of a Meeting of the House-Senate Conference Committee on H.R. 4173, 111th Cong., 2d Sess., day 4 (June 17, 2010) (time index 42:57) (Statement of Senator Schumer), available at http://financialserv.edgeboss.net/wmedia/financialserv/conference061710.wvx. In fact, securities out on loan cannot be voted by the lender unless the lender has an arrangement under which it can recall the securities.

Investment companies registered under the Company Act which participate in securities lending arrangements are generally required to enter into some form of an agreement with the borrower under which they are able to recall securities out on loan in order to vote proxies. *See, e.g*., Salomon Brothers, SEC No-Action Letter (May 4, 1975); and Morgan Guaranty Trust Company of New York, SEC No-Action Letter (April 17, 1996). This recall obligation is not applicable to managers of institutional separate accounts and, on a fully disclosed basis, institutional separate account clients are aware that their securities lending activities may inhibit their institutional manager's ability to vote proxies. In practice, institutions generally negotiate their own securities lending agreements with borrowers, the arrangements are usually a *fait accompli* long before the institutional investment manager even begins to manage the portfolio and the agreements are not subject to renegotiation by or at the behest of the manager.

requiring the investment manager to make disclosure of information that a client would otherwise have a right to treat as confidential unless the statute expressly required it, which is not apparent on the face of the statute.

In establishing proxy voting requirements under the Advisers Act, the Commission took cognizance of these confidentiality issues.[15] Yet, under the Proposed Rule, all of the disclosure requirements set forth in amended Form N-PX would apply without regard to the potential existence of such contractual provisions or the manager's obligations.

The Proposing Release states that a manager may be permitted to request confidential treatment for the amended Form N-PX. However, there is no indication that this expectation of client confidentiality would be an acceptable rationale for granting such treatment. Under the terms of the Proposing Release, requests for confidential treatment of Form N-PX would be subject to the same conditions and limitations as confidential treatment of the manager's Form 13F and would be granted "only in narrowly circumscribed circumstances where an institutional investment manager has filed a confidential treatment request for information reported on Form 13F that is pending or has been granted and where confidential treatment of information filed on Form N–PX would be appropriate in order to protect information that is the subject of the Form 13F confidential treatment request."[16]

These circumstances were explained in an interpretive position issued by the Chief Counsel of the Commission's Division of Investment Management.[17] According to this interpretation, Congress only specified two categories of information that the Commission should, upon request, exempt from disclosure on reports filed under Section 13(f): "(1) information that would identify securities held by the account of a natural person or certain estates or trusts; and (2) information that would reveal an investment manager's program of acquisition or disposition that is ongoing both at the end of a reporting period *and* at the time that the investment manager's Form 13F is filed."[18]

Clearly, the first category it is not written broadly enough to cover all of the private institutional client accounts, including foundations, endowments and other charitable institutional accounts, which may have confidentiality agreements with their managers. With respect to the second category, it is not clear that the disclosures required by Form N-PX would necessarily implicate

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[15] In adopting Advisers Act Rule 206(4)-6, the SEC declined to require public disclosure of votes on non-Fund clients' securities because "public disclosure of proxy votes by some advisers would reveal client holdings and thus client confidences. We have determined, therefore, not to require advisers to disclose their votes publicly." Proxy Voting by Investment Advisers, Advisers Act Release No. 2106, 68 Fed. Reg. 6585, 6588 (Jan. 31, 2003).

[16] *See* Proposing Release, *supra* note 1, at 66630.

[17] *See* Letter from Douglas Scheidt, Associate Director and Chief Counsel, Division of Investment Management to Section 13(f) Confidential Treatment Filers, at 2 (June 17, 1998) available at http://www.sec.gov/divisions/investment/guidance/13fpt2.htm.

[18] *Id.* The Chief Counsel also included two other categories of securities information subject to confidential treatment, open risk arbitrage positions and investment strategies using block positioning, which are still insufficient to satisfy the concerns created by the proposed amendments to Form N-PX.

the manager's investment strategy even though they may compromise a manager's confidentiality agreement with an institutional client. As such, the rationale for confidentiality under Section 13(f) is insufficient to address the confidentiality concerns raised by the potential disclosure of a client's voting record.

The Proposing Release requested comment on "[i]n what, if any, circumstances would it be appropriate for the Commission to grant confidential treatment to information filed on Form N-PX by institutional investment managers? Should Form N-PX or rules of the Commission identify certain circumstances in which confidential treatment may be appropriate?"[19] In addition to excluding from reporting on Form N-PX any votes on any securities over which the manager should *not* be deemed to have "voting power" as discussed above, to the extent that any remaining required disclosure set forth on Form N-PX would implicate a manager's obligations to maintain confidentiality over certain portfolio information under its client contracts, the standards for requesting and obtaining confidential treatment should be expanded to permit managers to comply with these contractual obligations.

Extension of Proposed Compliance Date

Comment was also requested on whether "the proposed compliance dates provide adequate lead time for institutional investment managers that would be required to file Form N-PX for the first time" and suggested as an alternative that such managers should not be required to file their first report until not later than August 31, 2012.[20] We heartily endorse this alternative compliance date. Given the rapid-fire passage of numerous financial regulations, financial services institutions are struggling to incorporate a multitude of recently adopted rules. Despite the limited scope of disclosure contemplated by the Proposed Rule, the compliance date is unrealistic. While funds have been providing this proxy voting information for some time, other 13(f) filers that do not manage proprietary funds currently do not have systems in place to capture the vast types of information required by Form N-PX if adopted as proposed.

To the extent that the Commission chooses to go forward with the Proposed Rule as proposed, data on the number of shares voted and other numerous proposed items will have to be obtained from multiple internal applications as well from any third-party proxy voting firms that may vote on behalf of a manager's clients. In addition, gathering all of the detailed proxy voting information required by amended Form N-PX from an operational perspective is excessively burdensome for those 13(f) filers with multiple asset management and brokerage divisions, and such firms need adequate time to develop systems to consolidate such information from numerous business units. Due to the burdens which would be created by amended Form N-PX and the recent unprecedented adoption of numerous and complex regulations that are in various stages of implementation, our clients request that the Commission consider extending the compliance date for at least one year.

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[19] *See* Proposing Release, *supra* note 1, at 66630.

[20] *See id.*, at 66631.

Should you have any questions about this submission, please do not hesitate to contact the undersigned at 202-263-3263, at Mayer Brown LLP.

Respectfully submitted by,

Elizabeth M. Knoblock
Partner