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November 22, 2010

Securities and Exchange Commission
100 F Street NE
Washington, DC 20549
Attention: Ms. Elizabeth Murphy, Secretary

Re: File No. S7-30-10,
Release 34-63123, "Reporting of Proxy Votes on
Executive Compensation and Other Matters"

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committees") of the Section of Business Law of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission (the "Commission") regarding the proposed rule and form amendments contained in Release 34-63123, "Reporting of Proxy Votes on Executive Compensation and Other Matters" (October 18, 2010) (the "Release"). It was principally drafted by the Committee's Subcommittee on Hedge Funds and, in particular, by the members of the drafting committee identified below.

The comments in this letter represent the view of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law.

We appreciate the opportunity to comment on the proposal. Addressing the requirements of Section 14A(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), added by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, without unreasonably burdening institutional investment managers ("IIMs"), is much more complex than it might initially appear. We believe that the proposed rules and form contained in the Release can be modified to satisfy the goals of Section 14A(d) without imposing undue burdens on IIMs—and undue expenses on the ultimate beneficiaries of the funds that IIMs manage. Equally, however, we believe some such modifications are necessary.

Preliminarily, we would raise a number of questions that we believe warrant more consideration than was reflected in the Release. The Commission could address most of these questions, and minimize most of the concerns, if it limited the required disclosure, as the statute actually suggests ("Every institutional investment manager . . . shall report . . . how it voted"), to those securities that the IIM actually voted, rather than those with respect to which the IIM might be deemed to have had the authority to vote.[1]

The questions relate initially to the underlying motivation for the reports required by new Section 14A, as well as the reports required of registered investment companies under Investment Company Act Rule 30b1-4. Implicit in those disclosure requirements is the public policy that institutional holders should be diligently exercising their voting franchise and should be reporting to their beneficial owners how they exercise that franchise.

While that policy may generally be appropriate for registered investment companies as they have historically operated, we think it is inappropriate for some investment managers subject to Section 14A. Specifically, we believe that those managers that decide that their investment strategies are not affected by the outcome of proxy votes, and therefore do not devote the time or resources necessary to vote proxies on an informed basis on behalf of their clients, should not be required to report on proxies they do not vote if they conclude that not voting the proxies does not violate their fiduciary duties to the affected clients. The Commission recognized this situation in adopting Rule 206(4)-6 under the Investment Advisers Act of 1940[2] when it said:

> We do not suggest that an adviser that fails to vote every proxy would necessarily violate its fiduciary obligations. There may even be times when refraining from voting a proxy is in the client's best interest, such as when the adviser determines that the cost of voting the proxy exceeds the expected benefit to the client.

Indeed, we believe that in some cases the Commission might properly take affirmative action to *discourage* exercise of the voting franchise. In particular, it may well be that an

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[1] We understand proposed Rule 14Ad-1 and Proposed Form N-PX to require that a report be filed as to all securities that the IIM owned, with sole or shared voting power, on the record date for the securities in question, if there was a proposal submitted for shareholder vote on the matters described in Section 14A(d) of the Exchange Act, whether or not the IIM actually voted those securities. *See, e.g.*,Release at §II.E.3. That requirement, however, is not unambiguously set forth in the Proposed Rule itself, which states that an IIM to whom the Proposed Rule applies "shall file an annual report . . . containing the [IIM's] voting record . . ." One might reasonably conclude that a "proxy voting record" did not include a failure to vote.

[2] Investment Advisers Act Release No. 2106, "Proxy Voting by Investment Advisers," (Jan. 31, 2103) at text acc. n. 18.

IIM implementing a strategy that involves relatively short holding periods, or that has offsetting short positions such that casting votes would involve "empty voting,"[3] might properly determine that it is not in the interests of its clients for it to vote proxies. Typically, such IIMs do not vote shares they may happen to have owned on the voting record date, and may well have disposed of before the meeting date. We believe the cost of requiring such IIMs to report on all proxies would exceed any conceivable benefits to their clients or to investors more broadly.

Additionally, as a matter of statutory construction, we note that Section 14A(d) requires only reports of "how it [the investment manager] voted." The statute does not require a report if the IIM did not, in fact, vote. Requiring that such holders file a report does not appear to us to serve a purpose, and would involve unnecessary time and expense, to the detriment of the institution's clients and beneficiaries. The development and implementation of the technology that would be necessary to track such record date holdings also represent significant burdens without a corresponding benefit.

Accordingly, we suggest a blanket exemption from reporting for holdings with respect to which the IIM did not, in fact, vote. If the Commission deemed necessary, such an exemption could be conditioned on the IIM's ability to represent that the reason for not voting (or for abstaining) was that it determined that voting was not in the economic interests of the IIM's clients. We note that such an exemption would be consistent with the indication in footnote 20 of the Release and its accompanying text to the effect that an advisor to an ERISA plan would not have shared voting power on matters as to which it was not permitted to vote.[4]

Similarly, we note that there is new thinking about the right way to view index funds in the context of shareholder voting.[5] Without expressing a particular view as to the merits of that proposal, we suggest that sufficient flexibility be incorporated in the rule or rules implementing Section 14A(d) to avoid the necessity of specific reporting by an institution that adopts any formulaic voting procedure, which has been disclosed to the IIM's clients. If an IIM casts votes in accordance with a known and disclosed formula, in our view the marginal, if any, benefit to investors of disclosure of the results of the

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[3] *See, e.g.*, Henry T. C. Hu and Bernard Black, "The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership." *U.S.C. Law Review* (May 2006).

[4] We note that the Section 14A(d) reporting obligation pertains only to votes pursuant to subsections (a) and (b).of Section 14A, which relate to matters for which the proxy solicitation rules of the Commission apply. In order to avoid confusion in the context of the rules adopted pursuant to Section 14A(d), we believe it would be helpful for the Commission to state clearly in any final rule or adopting release that the report of voting does not apply to votes by foreign private issuers that are exempt from the Commission's proxy solicitation rules pursuant to Rule 3a12-3 under the Exchange Act.

[5] See P. Lyons, "Rock the Vote: A New Approach to Proxy Voting by Index Funds," 8 *The Deal* No 21 (Nov. 1-14, 2010)

application of the formula would not warrant the time and expense incurred in making the disclosure.

We also are concerned that applying the "shared voting power" concept in this context is unnecessary and difficult. While the Commission notes in footnote 18 of the Release that the concept is intended to be substantially similar to the beneficial ownership standard of Rule13d-3(e) under the Exchange Act, the latter standard has often been difficult to apply. Schedule 13D permits such difficulties to be handled by clear definition within the form. Form N-PX, by contrast, does not readily permit such explanatory disclosure.

To reduce such uncertainties, and consistent with the statute, we recommend the Commission require IIMs who are filing Form N-PX as a result of being subject to Section 14A(d), to file reports only with respect to securities that have been included in Form 13F reports during the period covered by the Form N-PX. This is, of course, separate from and in addition to our recommendation that reporting be required only as to securities that are actually voted.

Another general comment we would make is that the Release and the Proposed Rule and Form do not address the issue of stock loans. For general reporting purposes under Section 13 of the Exchange Act, stock loans are properly disregarded. A lender of securities under a stock loan invariably has the ability to recall the securities, and therefore has the ability to obtain voting power promptly. The investing public is entitled to be aware of this information.

With respect to reports as to how shares were voted on specific matters, however, as required by Section 14A(d) and proposed rule 14Ad-1, the same considerations do not apply. Under any circumstances, an IIM is entitled to determine (explicitly or implicitly) that the value of lending securities exceeds the value of voting on proposals. If the IIM makes that determination, and does not recall securities that have been loaned prior to the record date, then (absent special circumstances or an agreement to the contrary) the IIM did not have the right to vote on the record date. Given the purposes of the Section 14A report as we understand them, we believe that securities that have been loaned out should, consistent with the actual fact, be treated as securities with respect to which the holder did not have the right to vote on the record date.[6]

In this connection, however, it is not in all instances clear that an IIM will even know whether securities in its clients' portfolios are on loan. If securities are held with a prime broker that has authority to lend or re-hypothecate the securities, it is not

[6] It may well be appropriate, however, to require some disclosure if a Section 14A report is otherwise being filed with respect to securities of the issuer, to eliminate the risk that a reader, comparing a prior Form 13F with the 14A disclosure, might inaccurately conclude that the institution had disposed of all or a portion of the issuer's securities.

necessarily clear whether the prime broker will have specifically identified (or will have had the ability to specifically identify) the securities that it had on loan on behalf of a particular IIM client as the applicable record date. The prime broker might, for example, have an available pool of 800,000 shares of an issuer that it holds for a number of IIMs and from which it has loaned 500,000 shares without specifically identifying which beneficial owners' securities were loaned. As a result, the rule and form as proposed might easily lead to duplicative or incorrect reports regarding the same portfolio securities.

This difficulty could also be avoided, of course, if the Commission were to limit the disclosure requirement —consistent with the statute at issue—to securities that the IIM did in fact vote[7]. At the very least, we believe that the Commission should specifically address the stock loan issue in the Rule as adopted, and should discuss and clarify that issue in the related adopting release.[8]

As a technical matter, we note that proposed Form N-PX unnecessarily requires both ticker (Item 1(b)) and CUSIP numbers (Item 1(c)), creating unnecessary burden. Certain securities listed on more than one exchange have multiple ticker symbols.[9] We would require ticker symbols only if CUSIP numbers are not available.

The burden inherent in the reporting system could be reduced if the Commission devised a means for coding issuer proposals submitted to stockholders, so that IIMs filing reports could reference the same codes in indicating their votes. This would avoid potentially inconsistent reporting and eliminate an IIM's need to characterize an issuer's proposals (Item 1(e)) and whether votes were for or against a recommendation (Item 1(j)).

We turn now to the specific matters on which comment was requested.

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[7] We understand that in certain instances, the voting instruction form an IIM may receive from a DTC participant may refer to a number of shares that does not take into account shares loaned by the participant. We do not believe the IIM should have liability if its reports pursuant to Section 14A(d) are based upon the number of shares it believes in good faith it has voted, regardless of whether or how the DTC participant may actually have voted such shares.

[8] The same observation, of course, could be made with respect to the reports currently required under Rule 30b1-4.

[9] Even if the proposed rule were revised to refer to the ticker symbol on the principal securities exchange on which the securities trade, we believe the disclosure of the ticker symbol would be burdensome, because IIMs would then be required to obtain and compare trading volume information for a given period (assuming the period were to be specified in any final rule). If CUSIP numbers are not available, however, to avoid the foregoing issue, we would suggest that the Commission permit an IIM to disclose only one ticker symbol for the security on any U.S. securities exchange on which the security trades.

1. The use of voting power as the basis for determining which Section 14A Votes would be reported.

> • Should the reporting requirement be based on having the power to vote with respect to Section 14A Votes or should we use some other basis, such as investment discretion? Should we, as proposed, base the requirement to file on a manager having either sole or shared voting power?

> We believe that, consistent with the statute, basing the filing requirement on voting is the only appropriate measure. However, as noted above, in a retrospective report of voting, we believe it appropriate to recognize the situation as it existed as of the record date, not on a theoretical construct of how it might have existed. That is, for example, if the shares were loaned out on the record date, the institution did not have *in fact* the power to vote them, and should not be charged with reporting how it voted them. In this connection, again, it is important to deal with the question whether it is practically possible in certain circumstances for an IIM to determine whether its securities were out on loan to others.

> Disclosure of how an IIM voted—required only if the IIM did vote—would eliminate concern with this issue.
> .

> • Should we provide guidance concerning the circumstances under which a manager has sole or shared voting power? For example, would it be helpful for the Commission to provide guidance regarding the application of the Form N-PX "sole or shared voting power" standard as it would apply to ERISA plans? Commenters who believe that guidance would be helpful are asked to specify the nature of the guidance that would be helpful.

> Again, we believe that reporting votes as they were cast obviates much of the concern with this issue. If the institution voted the shares without consultation, "shared" power becomes meaningless. Similarly, if the institution might have "shared" power, but the votes were cast by another without consultation, the institution's role is meaningless. The inquiry should be whether the institution did influence the vote. The Rule should not require an institution that might have shared power in some theoretical sense to report a vote that was cast by another if it did not actually influence that vote. Where different institutions share power and consult prior to the vote, some indication to that effect would be appropriate.

2. Securities with respect to which institutional managers would be required to file proxy voting records.

• Should we, as proposed, require institutional investment managers to report Section 14A Votes with respect to "any security?" Should we, instead, limit in any way the securities with respect to which Section 14A Votes are required to be reported? For example, should we require Section 14A Votes to be reported only with respect to securities that a manager has previously reported or been required to report on Form 13F?

While the statute is unclear, we think the preferred interpretation is that reporting only be required for positions that are reportable on Form 13F. If a position need not be reported on Form 13F—generally because it is not of sufficient size to warrant reporting—we would expect the same factors to militate against requiring the IIM to file a report of its voting. We would apply the Form 13F standard to the date as of which the Section 14A report is being filed—i.e., if the position would have been required to be reported on a Form 13F filed as of the same date, then (but only then) would the voting record be required to be reported. We note in this connection that if reporting were required only as to votes actually cast, investors would still be able generally to determine the votes in which the IIM did not participate.

• Should we prescribe any threshold position size below which a manager would not be required to report its Section 14A Votes? For example, consistent with Form 13F, should a manager be permitted to omit Section 14A Votes from Form N-PX reports with respect to securities where it held fewer than 10,000 shares (or less than $200,000 principal amount in case of convertible debt securities) and less than $200,000 aggregate fair market value? If we adopt a reporting threshold that is different from the Form 13F reporting threshold, or adopt no threshold, will this make the information required to be reported on Form N-PX more difficult to track or impose any other burdens?

Our response to the previous question answers this question as well.

3. Proposed time of reporting

- Should we, as proposed, require institutional investment managers to report their Section 14A Votes annually on Form N-PX not later than August 31, for the most recent twelve-month period ended June 30? Should we instead require reporting as of some other period end date (e.g., May 31 or December 31), or with a shorter or longer lag period after the end of the reporting period (e.g., 1 month, 3 months, or 6 months)? Should we require reporting to occur more frequently than annually (e.g., monthly, quarterly, or semi-annually)? If we require reporting on a schedule other than that proposed, should we also change the schedule on which funds report so that institutional investment managers and funds would report on the same schedule?

Annual reporting satisfies the statutory requirement ("at least annually") and seems to us sufficient from the perspective of shareholders of either the institution or the portfolio company. The August 31/June 30 dates seem appropriately calibrated to reduce the burden on reporting institutions while providing reasonably timely information.

- We are proposing that an institutional investment manager would not be required to file a Form N-PX report for the twelve-month period ending June 30 of the calendar year in which the manager's initial filing on Form 13F is due. Is this transition rule appropriate for managers entering the Form 13F and Form N-PX filing requirements, or is some other rule more appropriate? For example, should we require an institutional investment manager to report Section 14A Votes for the period commencing January 1 (rather than July 1) of the calendar year in which the manager's initial filing on Form 13F is due? Or should we require an institutional investment manager to report Section 14A Votes for the period commencing on the first day of the month immediately following the date on which it meets the $100 million threshold? That is, if a manager meets the $100 million threshold on the last trading day of August 2013, should the manager be required to report Section 14A Votes commencing September 1, 2013, rather than July 1, 2014, as proposed? If we require institutional investment managers to report Section 14A Votes for periods earlier than proposed, what, if any, implementation issues would this raise for managers?

The implementation schedule for new 13F filers seems a reasonable accommodation to their needs. We endorse this aspect of the rule as proposed.

- Should we, as proposed, not require an institutional investment manager to file a Form N-PX report with respect to any shareholder vote at a meeting that occurs after September 30 of the calendar year in which the manager's final filing on Form 13F is due? Should we, instead, require an institutional investment manager to report Section 14A Votes cast at meetings that occur during some period after September 30 of the calendar year in which the manager's final filing on Form 13F is due? If so, what should that period be?

We view the Section 14A statutory mandate as expiring at the same time as the expiration of an institution's obligation to file Form 13F. However, requiring a filing regarding meetings occurring up to September 30 of the year in which the manager's final filing on Form 13F is due does not seem an unreasonable burden.

4. Duplicative reporting.

- Should we, as proposed, permit a single institutional investment manager to report Section 14A Votes in cases where multiple institutional investment

> managers share voting power? Should we, as proposed, permit an institutional investment manager to satisfy its reporting obligations by reference to the Form N-PX report of a fund that includes the manager's Section 14A Votes? Is there any reason not to permit joint reporting, e.g., would it confuse users of Form N-PX or make Form N-PX harder to use? Are there other ways to address potentially duplicative reporting that are consistent with Section 14A(d) of the Exchange Act and that we should consider? Should we prohibit an institutional investment manager from reporting Section 14A Votes that are also reported by another manager or a fund? Would it confuse users of Form N-PX if, as permitted, joint reporting of Section 14A Votes is optional?

> Where managers share voting power, we agree with the Commission's suggestion that duplicative filings serve no useful purpose, so long as there is a means available for interested investors through which they can trace the institutions that voted, and ascertain how those institutions voted. The rule as proposed satisfies this need in our judgment.

In summary, the concept of requiring proxy votes to be reported may appear simple, but applying that concept to the real world of IIMs is extremely complex. We question whether the benefits to the public of proxy vote reporting where no vote was actually cast justify the time and resources that will be needed to comply with a overly broad proxy vote mandate. The statute does not require such a broad mandate. We strongly urge the Commission to create a rule that is straightforward, easy to apply, and no more extensive than the statutory requirement.

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The Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet and discuss these matters with the Commission and its Staff and to respond to any questions.

Very truly yours,

/s/ Jeffrey W. Rubin
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