#Keith Paul Bishop
[redacted]

October 23, 2010

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

Re: File No. S7-31-10

Dear Ms. Murphy:

I am writing to comment on the proposal by Securities and Exchange Commission (the "**Commission**") to amend its rules to implement the provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") requiring a shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation.

1. <u>Background</u>.

I am an attorney in private practice in Irvine, California and an Adjunct Professor of Law at Chapman University Law School. I have also served as a member of the California Senate Commission on Corporate Governance, Shareholder Rights and Securities Transaction; Co-Chairman of the Corporations Committee of the Business Law Section of the California State Bar; and Chairman of the Business and Corporate Law Section of the Orange County (California) Bar Association. I am writing in my individual capacity and not on behalf of my law firm, the law school, any of my law firm's clients or the aforementioned groups.

2. <u>The Commission should permit greater flexibility with respect to the form of proxy</u>.

Because the Dodd-Frank Act does not require a binding shareholder vote, an issuer should be given the flexibility to us a form of proxy that it determines provides the best assessment of shareholder preferences. The Commission proposes to add a new paragraph to Rule 14a-4 to require a proxy to provide a means whereby the person solicited is "afforded an opportunity to specify by boxes a choice among one, two or three years, or abstain.[1] Thus, the Commission appears to contemplate a plurality voting rule (*i.e.*, the three alternatives are put to a vote simultaneously). Under a plurality vote (aka first-past-the-post) rule, the proxy holder casts the votes subject to the proxy in favor of one particular alternative. Although the Commission's proposal does not specifically address the issue, the Commission appears to anticipate that the alternative with the most votes would "win".[2]

Notably, the Dodd-Frank Act does not require a particular voting rule with respect to advisory votes on the frequency of shareholder voting on executive compensation. Moreover, the Commission stated in its proposal that "we do not believe that it is necessary to prescribe a standard for determining which frequency has been 'adopted' by the shareholders." Thus, the Commission should allow issuers the opportunity to design proxies that enable the use of different voting rules that may better assess shareholder preferences.

For example, some issuers may prefer to assess shareholder preferences through the use of a Borda count method.[3] A Borda count procedure would require a shareholder to rank its order of preference with respect to the frequency of shareholder advisory votes on executive compensation. The Borda count system gives greater weight to shareholder preferences than other voting rules. Consequently, it can be a useful method for an issuer to determine the frequency that is supported by a consensus of shareholders.

This is illustrated by the following example. If a corporation has 100 shares outstanding with each share entitled to one vote per share. Five shareholders hold the following number of shares and votes:

Shareholder	**Number of Shares (Votes)**
A	40
B	35
C	25

[1] The proposed rule refers to a "form of proxy *which provides for a shareholder vote*". This conflates a proxy with a ballot. A proxy is not a vote. Rather, it is a limited agency pursuant to which a stockholder authorizes another person to vote. I recommend that the Commission rewrite the rule to refer to a "form of proxy that provides instructions for a shareholder vote on the frequency of shareholder votes . . .". Also, the reference to providing authority to abstain misapprehends the function of a proxy. A shareholder can simply abstain by not executing a proxy card and not voting in person on the matter. A shareholder who executes a proxy card but does not wish to grant authority to vote should be provided with the opportunity to "withhold authority".
[2] The Commission has proposed to add a note to Rule 14a-8 that would permit an issuer to exclude, as substantially implemented, a shareholder proposal with respect to advisory vote on executive compensation provided the company has adopted a policy on the frequency of say-on-pay votes that "is consistent with the plurality of votes cast n the most recent shareholder vote required by § 240.14a-21(b) of this chapter."
[3] This method is named for French mathematician Jean-Charles Borda.

If shareholders A, B and C prefer a one-year, three-year and two-year interval, respectively, then shareholder A's preference would "win" under the plurality voting rule contemplated by the Commission's proposed rule. A significant consequence of the plurality voting rule proposed by the Commission is that the preference supported by the *largest minority* will often prevail. In other words, the Commission's voting rule would tend to disregard the preference with the *greatest overall support.* If, however, the shareholders were permitted to rank their preferences and a Borda count rule is used, the result could be different as illustrated by the example below:

Preference	**Shareholder A (40 votes)**	**Shareholder B (35 votes)**	**Shareholder C (25 votes)**
1st	One-Year	Three-Year	Two-Year
2nd	Three-Year	Two-Year	Three-Year
3rd	Two-Year	One-Year	One-Year

The Borda count scores for the three alternatives are as follows:[4]

Frequency	**Points**
One-Year	180
Two-Year	185
Three-Year	235

Thus, the use of a Borda count method allows an issuer to determine the true consensus choice of the shareholders rather than the will of the largest minority.

Other issuers may desire to implement "approval voting" in which shareholders are permitted to vote for each alternative as opposed to only one alternative as contemplated by the Commission's proposed rule. The alternative that receives the most votes "wins". Thus, approval voting relies on plurality voting to determine the outcome. In fact, the Commission's current proxy rules mandate approval voting in the election of directors because Rule 14a-4(b)(2) because that rule in effect requires that a shareholder be able to instruct the proxy holder to vote for each nominee.[5]

---

[4] Under the Borda count method, each alternative is assigned a number of points equal to 3 times the number of votes for a first place ranking, 2 times the number of votes for a second place ranking and 1 times the number of votes for a third place ranking. Thus, the number of points assigned to the one-year alternative in this example is (40*3) + 35 + 25 = 180.

[5] A proxy holder may also withhold authority. Withholding authority would result in an abstention if the proxy holder is counted as present at the meeting. If state law gives effect to a vote against a nominee, then this alternative must also be provide on the proxy. Instruction #2 to Rule 14a-4.

Issuers may find several advantages in an approval voting system. Among other things, an approval voting system provides the following benefits:

- It is easy to implement;
- It provides shareholders with more voting options;
- It determines the preference with the greatest overall support to be determined.

For example, if shareholder A prefers a frequency of one or two years, shareholder B prefers a frequency of two or three years, and shareholder C prefers a frequency of two years, the votes for each frequency would be as follows:

Preference	**Votes**
One-Year	40
Two-Year	60
Three-Year	25

Thus, the use of an approval voting system would allow an issuer to determine the frequency with the broadest overall support rather than the first choice of the largest minority.

3. Proposed text.

In light of the foregoing, I recommend that the Commission revise proposed Rule 14a-4(b)(3) as follows:

> A form of proxy ~~which~~ that provides instructions for a shareholder vote on the frequency of shareholder votes to approve the compensation of executives required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1(a)(2)) shall provide means whereby the person solicited is afforded a~~n~~ ~~opportunity~~ a reasonable means to ~~specify~~ provide instructions concerning that person's preference or preferences. Reasonable means include, but are not limited to, the following:
>
> (i) a box opposite each alternative that may be marked to provide or withhold authority to vote for that alternative with an instruction that the person solicited may provide authority with respect to one or more alternatives.
>
> (ii) by a box~~es~~ opposite each alternative that may be marked to provide authority and a box that may be marked to withhold authority to vote on any alternative with an instruction that the person solicited may provide authority to vote with respect to one alternative only. ~~a choice among 1, 2 or 3 years, or abstain~~.

> <u>(iii) by a box opposite the following each of the following preference rankings: 1, 2, 3 years; 1, 3, 2 years; 2, 1, 3 years; 2, 3, 1 years; 3, 1, 2 years; and 3, 2, 1 years that may be marked to provide authority to vote with respect to one alternative only.</u>

In conclusion, Congress did not impose a voting rule when it mandated shareholder advisory votes and neither should the Commission. Issuers should be allowed the flexibility to adopt voting rules that best assess shareholder preferences.

Very Truly Yours,

/s/ Keith Paul Bishop