SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS

November 18, 2010

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

Re: Shareholder Approval of Executive Compensation and Golden Parachute Compensation, File No. S7-31-10

Dear Ms. Murphy:

The Society of Corporate Secretaries & Governance Professionals (the "Society") appreciates the opportunity to respond to the proposed rules on Shareholder Approval of Executive Compensation and Golden Parachute Compensation, SEC Rel. No. 34-63124 (October 18, 2010) (the "Release") by the Securities and Exchange Commission (the "SEC" or the "Commission").

Founded in 1946, the Society is a professional membership association of over 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, board committees, and the executive management of their companies regarding corporate governance and disclosure. Our members are generally responsible for their companies' compliance with securities laws and regulations, corporate law, and stock exchange listing requirements.

The Society generally supports the SEC's efforts to implement the provisions of Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") relating to the advisory votes by shareholders on executive compensation (the "Say on Pay Proposal") and on the frequency of the Say on Pay Proposal (the "Frequency Proposal"), as well as golden parachute compensation arrangements. However, as explained below, we have concerns about certain parts of the proposed rules, particularly where they go beyond the requirements of the Dodd-Frank Act.

I. WE COMMEND THE STAFF FOR ITS GUIDANCE ON NOT TRIGGERING A PRELIMINARY PROXY REQUIREMENT

The Society strongly agrees with the Commission's proposed amendment to Rule 14a-6(a) to add Say on Pay Proposals and Frequency Proposals to the list of items that do not trigger the filing of a preliminary proxy statement. We agree with the Commission that because these items are required of all companies, they are similar to the other items listed in Rule 14a-6(a) that do not require a preliminary filing. In addition, requiring preliminary proxy filings by all companies because of these advisory votes would impose additional costs and unnecessary administrative burdens on both companies and the Commission.

In addition, the Society commends the Commission for providing the transition guidance in the Release stating that until the SEC takes final action to implement Section 14A, it will not object if companies do not file preliminary proxy materials if the only matters that would require such filings are these advisory votes (or other items specified in Rule 14a-6(a)). This guidance is timely and very helpful to many Society members, and it will minimize confusion on this issue as these new rules are finalized and implemented.

II. DISCLOSURE REGARDING RESPONSE TO PREVIOUS SAY ON PAY PROPOSALS SHOULD NOT BE REQUIRED

A. The Commission should not expand the disclosure required in the Compensation Discussion and Analysis because it would not provide meaningful information to investors.

The Proposal would amend Item 402(b) of Regulation S-K to require companies to address in the Compensation Discussion & Analysis ("CD&A") whether, and if so how, their compensation policies and decisions have taken into account the results of previous Say on Pay Proposals. We do not believe that this disclosure requirement would be useful to investors and are concerned that it would either (1) generate meaningless boilerplate disclosure, or (2) deem this information "material" regardless of whether or not it is.

We note that Instruction 3 to Item 402(b) states, in part, that the CD&A should "***focus on the material principles*** underlying the registrant's executive compensation policies and decisions and ***the most important factors relevant to analysis of those policies and decisions***. The Compensation Discussion and Analysis shall reflect the individual circumstances of the registrant and ***shall avoid boilerplate language"*** *(emphasis added)****.*** Shareholder support for management proposed advisory votes on executive compensation has generally been very high, suggesting that the vast majority of companies would have nothing to disclose in response to this requirement -- or worse they would feel compelled to disclose the absence of anything to disclose. We are concerned that the proposed amendments to Item 402(b) would in fact result in precisely more boilerplate for a large number of companies and therefore undermine the objectives of this Instruction.

Second, the proposed amendment is unnecessary because material information relating to compensation of executives is already mandated. Instruction 1 to Item 402(b) states "The purpose of the Compensation Discussion and Analysis is to provide to investors **material** information that is necessary to an understanding of the registrant's compensation policies and decisions regarding the named executive officers." (emphasis added). To the extent any changes in a company's compensation arrangements were material and came about as a result of a shareholder Say on Pay vote, discussions of such changes in the CD&A would likely refer to such vote.

Finally, as noted in the Release, this proposed new disclosure is not required by the Dodd-Frank Act. Even more noteworthy, disclosure of a company's response to any other advisory non-binding vote (e.g., shareholder proposals under Rule 14a-8) is not required to be discussed the next year's proxy statement. The Release does not suggest any reason to treat the advisory vote on Say on Pay any differently than other non-binding votes.

B. If the Commission does expand the required CD&A disclosure, it should be included in Item 402(b)(2) and only be required with regard to the company's most recent Say on Pay Proposal.

In the event that the SEC decides to require Item 402(b) disclosure of the consideration of the results of the Say on Pay Proposal, the Society recommends that the new disclosure be addressed in Item 402(b)(2) as a non-exclusive example of information that should be addressed, depending upon materiality under the individual facts and circumstances, and not in Item 402(b)(1) as a mandatory principles-based topic. As noted above, we believe this approach would eliminate the potential for boilerplate disclosure.

We also note that in the event that the Say on Pay Proposal receives less than majority support, it is likely that an issuer would need to address this result in the following year's discussion of its compensation policies.

Alternatively, if the SEC includes the new requirement in the final rules as a required disclosure under Item 402(b)(1), we believe it should only be required if the Say on Pay Proposal does not receive majority support at the time it was most recently submitted to a shareholder vote.

Finally, any requirement for CD&A disclosure of the company's consideration of previous votes on the Say on Pay Proposals should relate only to the time such proposal was most recently submitted to shareholders. Requiring disclosure about the company's consideration of earlier shareholder advisory votes would only increase the <u>length</u> and <u>density</u> of the CD&A, making it more difficult for shareholders' review. We do not believe that a lengthy and potentially confusing discussion of the results of prior advisory votes is warranted, and in any event such disclosure may no longer be relevant. If the results of earlier shareholder advisory votes are material to the decisions made by the company's compensation committee, disclosure would already be required under the existing rules.

III. ITEM 24 OF SCHEDULE 14A WOULD PROVIDE NO MEANINGFUL DISCLOSURE TO INVESTORS

Proposed Item 24 of Schedule 14A would require companies to disclose that they are providing the Say on Pay Proposal and the Frequency Proposal because they are required to do so under Section 14A of the Securities Exchange Act and to briefly explain the general effect of the votes. We do not believe that this type of disclosure would provide additional meaningful information to investors (*e.g.*, "We are providing for a shareholder vote on this item because we are required to do so."). Instead, the Society believes that this requirement will merely result in boilerplate disclosure.

Companies make numerous disclosures and routinely hold shareholder votes as required by applicable rules without having to state that those disclosures or votes are mandatory. We do not see any need to require companies to include such statements with regard to the Say on Pay Proposal or the Frequency Proposal.

The Society believes that the types of disclosure contemplated by proposed Item 24 would tend to result in the addition of boilerplate language to the proxy statement that would not contain meaningful information to investors. While a similar type of disclosure is currently required of companies that have received public funds through the TARP program, proposed Item 24 would apply broadly to **all** companies regardless of their status. Finally, the current proxy disclosure rules (Item 21) already provide for disclosure on the vote required for approval of each item of business at the shareholders' meeting. Companies have the discretion to use that item to describe the non-binding nature of the Say on Pay Proposal and the Frequency Proposal.

For the reasons stated above, the Commission should not include new Item 24 in the final rules. Instead, companies should have flexibility in disclosing the nature and effect of these advisory votes on executive compensation.

IV. COMPANIES SHOULD BE ALLOWED TO PROPOSE THE FREQUENCY VOTE IN A THREE CHOICE FORMAT

The Society is concerned that for many companies the four choice approach proposed with regard to the vote on the Frequency Proposal – i.e., shareholders would be offered a choice of four boxes -- 1 year, 2 years, 3 years and abstain, may be a problem for some of the participants in the proxy voting system. There have been varying and sometimes conflicting reports about whether all proxy service providers will be able to reprogram their systems in time to enable the four choice selection for the upcoming proxy season that begins in about two months. Even if all service providers can accommodate the four choice approach, conversion to a four box proxy card will be time consuming and costly, and the increased costs will ultimately be borne by the company and its shareholders.

Moreover, there are alternatives that would not require conversion to the four choice format and therefore would not result in similar cost increases for reprogramming. For this reason, the Society recommends that the SEC allow companies flexibility to choose the format that best fits their particular situation. The following is an example of an alternative that may be more practical for some companies and service providers.

> *Do you have a preference as to the frequency of the advisory vote on executive compensation?*
>
> *Yes ____ No ____ Abstain ___*
>
> *If you voted yes above, how frequently do you want an advisory vote on executive compensation?*
> *[Management recommends _________]*

Every year ____ *Every 2 years* ___ *Every 3 years* ___

Under this formulation, vote tabulators can use the three option format that is currently used and with which shareholders are familiar. We understand that this type of cascading voting is not optimal but many of our members have used even more complicated cascading votes in merger proxies without confusion or other significant problems. The significant benefit of this approach is that service providers will not have to reprogram their existing systems.

V. ADVISORY VOTES ON ANY PART OF THE ITEM 402 DISCLOSURES SHOULD BE EXCLUDED

The Commission should amend Rule 14a-8, as proposed, but should include language in the new Note expressly stating that shareholder proposals asking for advisory votes on any part of the disclosures required under Item 402 would be excludable. We make this point because while the phrasing of the proposed Note to paragraph (i)(10) is clear that a proposal to approve *all of* the compensation of executives as disclosed pursuant to Item 402 may be excluded if the frequency proviso is met, we are nonetheless concerned that the proposed phrasing might be construed so as not to permit the exclusion, as substantially implemented, of a shareholder proposal that would provide an advisory vote to approve *only a portion of* the compensation of executives as disclosed pursuant to Item 402. Thus, if Rule 14a-8(i)(10) were limited to shareholder proposals relating to companies' executive compensation disclosures in their entirety, a proposal seeking a separate vote on a component of the disclosure – for example, the compensation decisions relating to the CEO, or with respect to just the Summary Compensation Table, or limited to the CD&A – might not be excludable as substantially implemented even though the subject matter would be included as part of the required advisory vote on executive compensation.

As a result, companies and shareholders could be subjected to unnecessary and duplicative votes, which would frustrate the purpose of amending Rule 14a-8. The Society agrees that it is both necessary and appropriate to prescribe a standard for excluding shareholder proposals under Rule 14a-8(i)(10) on the basis of "substantial implementation" of the Say on Pay Proposal and the Frequency Proposal. SEC rules implementing Dodd-Frank should provide a basis for excluding shareholder proposals that cover those same subjects; otherwise, requiring management to include such proposals in the proxy would be unnecessary and the Frequency Proposal would be meaningless.

We believe the plurality standard, as stated in the proviso in the proposed Note to paragraph (i)(10) to Rule 14a-8, is an appropriate basis for excluding shareholder proposals on executive compensation and frequency as substantially implemented. That standard properly reflects the fact that because there are three choices of frequency, a plurality vote, and not a majority vote, may often result. Any higher standard, such as one based on the majority of votes cast, would unduly limit the availability of Rule 14a-8(i)(10).

We further believe that, as proposed, Rule 14a-8 should permit companies that meet the plurality standard to exclude any shareholder proposal that provides or seeks another frequency vote. Rule 14a-8 would thereby enable companies to prevent duplicative votes relating to the frequency with which shareholders are asked to vote on executive compensation as disclosed.

To clarify its scope, the Society recommends that the Note to paragraph (i)(10) of Rule 14a-8, as adopted, allow the exclusion of shareholder proposals based on the most recent Frequency Vote, regardless of whether such vote was required by Rule 14A-21(b). In other words, the Note as proposed appears to unintentionally exclude from its scope Frequency Proposals that were conducted on a more frequent basis than mandated by the new rules.

In addition, the note should also state that a company may exclude, as substantially implemented, any shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executive officers as disclosed pursuant to Item 402 of Regulation S-K "**or any part of such disclosure**," if the company has adopted a policy on the frequency of advisory votes on executive compensation as described in the Note.

This recommended wording would make clear that companies meeting the plurality vote standard may exclude shareholder proposals that provide or seek a vote *on all or any part of* the compensation of executives that has been disclosed. It would not permit the exclusion of a proposal that falls outside the scope of the Say on Pay Proposal such as a shareholder proposal seeking a shareholder vote on changes in compensation policies or on future compensation.

VI. FREQUENCY VOTES ARE ADVISORY AND NEW DISCLOSURE AS TO A COMPANY'S RESPONSE SHOULD NOT BE REQUIRED

The Society believes that the Commission should not amend Form 10-K and Form 10-Q, as proposed, to require that companies disclose their decisions on the frequency of future Say on Pay Proposals in their Forms 10-Q for the quarter in which the annual meeting takes place (or in the Form 10-K if the annual meeting takes place in the fourth quarter).

First, this would be an unprecedented and significant departure from the traditional manner in which disclosure in response to other non-binding shareholder votes is handled. Under Section 951 of the Dodd-Frank Act, the Frequency Proposal is explicitly non-binding. For many years companies have asked their shareholders to cast non-binding votes on shareholder proposals under Rule 14a-8. Companies have had the discretion to determine the timing and substance of any disclosure about their responses to such advisory votes. The Release cites no reason why a new disclosure obligation should be imposed on companies in periodic reports with regard to this new advisory vote. We assume that the obligation is proposed to give potential proponents notice of the company's position with respect to the Frequency Proposal in an effort to reduce the likelihood of conflicting shareholder proposals (that will be excludable under Rule 14a-8, as proposed to be amended). However, we see no reason why the Frequency Proposal – unlike any other advisory vote – should trigger a mandatory disclosure requirement at all. We also note that no other Annual Meeting agenda items are required to be disclosed so far in advance, and we do not see any reason why the Frequency vote should be treated any differently.

Second, the Society is also very concerned that requiring companies to make and disclose their decisions on the Frequency Proposal in the short time frame would deprive boards and their committees of the ability to carefully consider the vote, available alternatives, and the best interests of their companies. As a practical matter, the proposed rules would require that, within a period of time as short as three or four weeks, management, the board and/or one or more board committees would have to (i) review the voting results, (ii) assess their significance, (iii) discuss the available alternatives internally and, as appropriate, with external advisors and investors, (iv) reach a decision, and (v) meet to act on the decision. In addition, time would be needed to draft the disclosure once the board and/or its committees reach their decisions and act on them.[1] The short time frame also seems to assume that the shareholders will express a clear preference on the Frequency Proposal, thereby giving the board a "mandate" as to the requested timing for future Say on Pay Proposals. However, it is quite possible that the Frequency Proposal will lead to inconclusive results, which may necessitate more extensive deliberations.

As created by Section 951 of the Dodd-Frank Act, Section 14A of the Securities Exchange Act states that the non-binding Frequency Proposal "may not be construed [] as overruling a decision by such company or board of Directors" or creating or changing fiduciary duties by the company or board.[2] This language does not support imposing a significant burden on the company or board – i.e., an obligation to make a decision within a specified (and perhaps, unduly short) period of time and to publicly disclose that decision in the company's next quarterly or annual report filed with the SEC. We submit that the best approach is the one that companies currently follow with regard to all advisory shareholder votes – i.e., they use their discretion to decide the timing of, and disclosure method for, any company decisions made in response to a non-binding shareholder vote. It is our view that on Frequency Proposal votes, a company would likely disclose its response no later than in the following year's proxy statement.

In summary, the requirement that companies disclose their decisions about their anticipated responses to the Frequency Vote in the next periodic report is inconsistent with the fact that no other advisory votes are required to be disclosed, and in any event, such requirement would be unduly burdensome to companies, their Boards, and management.

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[1] As an example, if a company has its annual meeting on June 28, 2010, the Proposal would require that a final decision be made by the company and disclosed in the Form 10-Q that the company files no later than August 9, 2010,, which is only six few weeks after the meeting.

[2] Securities Exchange Act, Section 14A(c)(1) (2) and (3).

VII. SPECIFIC RESOLUTION LANGUAGE FOR SAY ON PAY AND FREQUENCY PROPOSALS

A. The Commission should include non-exclusive examples of acceptable "separate resolution" language for the Say on Pay Proposal.

The Release requests input on whether more specific requirements should be included in the new rules regarding the manner in which companies should present the Say on Pay Proposal and the Frequency Proposal. The Release expressly asks if the SEC should designate the specific language to be used and/or require companies to frame these two advisory votes in the form of a resolution (and, if so, what specific language or form of resolution should be used).

To date, management Say on Pay Proposals have generally included a specific resolution within the discussion of the proposal, though the specific wording of the resolutions has varied. Examples of these include the following:

> *RESOLVED that the shareholders approve the compensation of the company's named executive officers disclosed in the Compensation Discussion and Analysis, the compensation tables and the related narrative disclosures included in this proxy statement.*
>
> *OR*
>
> *RESOLVED, that the shareholders approve the compensation of the company's named executive officers as disclosed in this proxy statement [pursuant to Item 402 of Regulation S-K].*

While the Society believes that the Commission should not mandate any specific language for the separate resolution in the Say on Pay Proposal, it might be helpful if the final release includes **non-exclusive** examples of resolution language that complies with the rules, such as the resolutions above.

B. The Commission should include non-exclusive examples of acceptable "separate resolution" language for the Frequency Proposal or clarify in the final rule that this proposal itself satisfies the "separate resolution" requirement.

In contrast to the Say on Pay Proposal, the Frequency Proposal required by proposed Rule 14a-21(b) does not easily lend itself to formulation as a resolution because shareholders are being asked to select one of three possible frequencies. Therefore, we suggest that the Commission either (i) clarify in the final rules that the "separate resolution" requirement is satisfied by companies including the Frequency Proposal in their proxy statements without the need for any additional specific resolution in that proposal or (ii) provide non-exclusive examples of "separate resolution" language in the final rule release that would meet the rule's requirements with regard to the Frequency Proposal.

VIII. THE PROPOSED SCOPE OF THE GOLDEN PARACHUTE DISCLOSURE SHOULD BE LIMITED

A. The Commission should clarify the golden parachute provisions to require disclosure only of arrangements triggered by the transaction being voted upon by the shareholders.

The Dodd-Frank Act requires that any person making a solicitation for shareholder approval of a merger or similar transaction must disclose and seek shareholder approval of golden parachute arrangements of such person that are based on or related to the transaction. While we believe that the SEC's proposed rule intends to follow the Congressional intent on this issue, the text of the proposed rule itself seems ambiguous and suggests that disclosure is required of <u>any</u> golden parachute arrangement, regardless of whether the arrangement is triggered or otherwise related to the transaction that is the subject of the solicitation. This is inconsistent with the discussion in the Release, which states that "Item 402(t) would require disclosure of all golden parachute compensation ***relating to the merger*** among the target and acquiring companies and the named executive officers of each in order to cover the full scope of golden parachute compensation ***applicable to the transaction***" (emphasis added).[3] However, the proposed rule text creates confusion that should be clarified by the SEC in the final rule text.

Specifically, we suggest the <u>**following changes in bold below**</u> to the text of the proposed rule:

> <u>Item 402(t)(1)(ii)</u>
>
> Any proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§240.14a-101) pursuant to Note A of Schedule 14A, with respect to each named executive officer of the acquiring company and the target company, provide the information specified in paragraphs (t)(2) and (3) of this section regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the acquiring company or target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to ~~**an**~~ <u>**the**</u> acquisition, merger, consolidation, sale or other disposition of all or substantially all assets of the company <u>**that, in each case, is the subject of such proxy or consent solicitation**</u>.

B. Disclosure of golden parachute arrangements of an acquirer's named executive officers should be required only if the acquirer's shareholders are voting on the transaction at issue.

The Society believes that it is not appropriate to require disclosure of golden parachute arrangements of an acquiring company's named executive officers ("NEOs") that are triggered by a transaction when the acquirer's shareholders are not required to vote on the

[3] Release, page 39. This concept is repeated throughout the Release (see pages 45, 47 and 89).

transaction. By requiring disclosure of an acquirer's golden parachute arrangements when the only shareholders voting on the transaction are those of the target company, the SEC is proposing that companies include more disclosure than is required by the Dodd-Frank Act.

The disclosure concerning the acquirer's parachutes would be irrelevant and potentially confusing. The disclosure required under the Dodd-Frank Act is designed to provide relevant information so that target company shareholders can make an informed decision on the required advisory vote (or an informed decision on, among other things, whether to tender their shares in a tender offer). The Release seems to acknowledge the possibility or likelihood of confusion by proposing language to clarify which tabular data relate to the target company NEOs and which relate to the acquiring company's NEOs.

In short, in a merger solicitation, voting shareholders should only be presented with the data necessary to cast an informed vote on the golden parachute arrangements of their company's NEOs that are triggered by the transaction at issue (or any arrangement that the target has with the acquirer's NEOs as required by the Dodd-Frank Act). Requiring more disclosure would likely confuse shareholders about the scope of their advisory vote and would add lengthy and complex disclosures to documents that are already cumbersome.

IX. SMALLER REPORTING COMPANIES SHOULD BE EXEMPT FROM SECTION 14A

The Society believes that smaller reporting companies that comply with the scaled disclosure rules under Item 402 could be more likely to receive an unfavorable shareholder vote on the Say on Pay Proposal and Frequency Proposal as a result of their reduced level of required compensation disclosure.

Notwithstanding the instruction to new Rule 14a-21 that specifies that this rule does not change the scaled disclosure requirements for smaller reporting companies and that such companies would not be required to provide a CD&A in order to comply with Rule 14a-21, we believe that smaller reporting companies would nonetheless feel compelled to include CD&A to provide additional disclosure so as to reduce the potential for an unfavorable shareholder vote. Smaller reporting companies never have the opportunity to review the voting recommendation reports of proxy advisory firms in advance. Often, these companies do not have access to these reports even after they are issued and thus lack the knowledge of any errors and the opportunity to request that advisory firms make clarifications or corrections of erroneous facts or analysis.

Item 402(o) of Regulation S-K requires smaller reporting companies to provide a narrative disclosure of any material factors necessary to an understanding of the information disclosed in the Summary Compensation Table. As Item 402(o) was not intended to provide the perspective of the company's board of directors on compensation objectives and policies (as is the intended purpose of the CD&A), we believe that smaller reporting companies that provide information consistent with their existing disclosure requirements would not provide sufficient information for shareholders to understand compensation objectives and policies in a way to vote favorably on the Say on Pay Proposal and Frequency Proposal.

The Staff noted in adopting executive compensation disclosure requirements applicable to smaller reporting companies that the Commission has recognized that the executive compensation arrangements of these issuers typically are less complex than those of other public companies.[4] However, the unintended effect of subjecting smaller reporting companies to Rule 14a-21 would be to eliminate the most meaningful relief of the scaled disclosure requirements adopted in the 2006 Executive Compensation Release. Further, placing smaller reporting companies in the position of being compelled to include CD&A (or CD&A-type disclosure) to communicate the rationales for their compensation policies so as to reduce the potential for unfavorable votes on the Say on Pay Proposal and Frequency Proposal would be unduly burdensome to smaller reporting companies.

Summary

For all of the foregoing reasons, we respectfully request that the SEC modify the proposed rules as explained above. We appreciate the opportunity to comment on this important proposal and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

/S/ NEILA B. RADIN

By: Neila B. Radin
Chair, Securities Law Committee

The Society of Corporate Secretaries & Governance Professionals

cc:
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[4] See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158] (hereinafter, the "2006 Executive Compensation Release") at Section II.D.1.