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November 18, 2010

Via E-mail: rule-comments@sec.gov

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

Re: Shareholder Approval of Executive Compensation and Golden Parachute Compensation (Release No. 34-63124); File No. S7-31-10

Dear Ms. Murphy:

We are pleased to respond to Release No. 34-63124 (the "Release"), in which the Securities and Exchange Commission (the "Commission") solicited comments on its proposed rules concerning Shareholder Approval of Executive Compensation and Golden Parachute Compensation. We have set forth our comments on some of the issues raised in the Release below, in the order of their presentation in the Release.

Shareholder Advisory Votes on Compensation

A. Provision of a Form of Resolution

The Commission has noted that its proposed rules relating to shareholder approval of executive compensation ("say-on-pay votes") and the frequency of say-on-pay votes ("say-on-pay frequency votes") do not set forth any specific language or form of resolution to be voted upon by shareholders. In Request for Comment (1), the Commission asks whether it should include more specific requirements regarding the manner in which issuers present the say-on-pay vote and, if so, what specific form or language should be used. Similarly, in Request for Comment (10), the Commission asks whether it should require specific language for the say-on-pay frequency vote and, if so, what specific language or form of resolution should be used.

We believe that the Commission should provide in the final rule or in the adopting release a non-exclusive sample form of resolution that any issuer may use for the say-on-pay vote. Such a sample would simplify the drafting process for issuers and promote efficiency, while at the same time, because it is non-exclusive, allow issuers flexibility to tailor the language as appropriate for their circumstances. The non-exclusive form of resolution could read as follows:

> "RESOLVED, that the holders of the common stock of the Company approve the compensation of the Company's named executive officers, as disclosed in the Company's Proxy Statement for the ____ Annual Meeting of Shareholders pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, the Executive Compensation tables and related disclosure."

Along the same lines, we believe that the Commission should provide a non-exclusive sample form of resolution for the say-on-pay frequency vote. The non-exclusive form of resolution could read as follows:

> "RESOLVED, that the holders of the common stock of the Company indicate, by their vote on this resolution, whether the vote on executive compensation required by Rule 14a-21(a) should take place every one year, every two years or every three years."

B. <u>CD&A Disclosure as to Say-on-Pay Votes</u>

The Commission has requested comment (Request for Comment (7)) on whether an issuer should be *required* to include a discussion of whether and how it considered the results of prior say-on-pay votes in the Compensation Disclosure and Analysis ("CD&A") section under Item 402(b)(1), or whether this should be included in Item 402(b)(2) as an example of information that may be required to be disclosed in the CD&A depending on its materiality under the issuer's particular facts and circumstances. Furthermore, the Commission requested comment (Request for Comment (8)) on whether the CD&A should discuss all prior say-on-pay votes or only the most recent one.

We believe that, in order to ensure that the CD&A focuses on the material elements of the issuer's compensation program, discussion of whether and, if so, how the issuer considered prior say-on-pay votes should be required to be included in the CD&A only if it was a material element of the issuer's compensation decisions under the particular facts and circumstances. If the discussion would be immaterial, there is no need to include it in the proxy statement. We believe that mandating inclusion in the CD&A of this specific item, regardless of materiality, would be a fundamental departure from the principles-based approach that the Commission took in adopting the CD&A. The 2006 adopting release for the CD&A stated that the purpose of the CD&A disclosure "is to provide material information about the compensation objectives and policies for named executive officers without resorting to boilerplate disclosure" and that "the adopted principles-based Compensation Discussion and Analysis, utilizing a disclosure concept along with illustrative examples, strikes an appropriate balance that will effectively elicit meaningful disclosure."[1] We support this approach, and believe that it should be continued in this case by including the impact of prior say-on-pay votes as an example of potentially material disclosure in Item 402(b)(2).

If the Commission nevertheless determines that discussion of prior say-on-pay votes *must* be included in the CD&A (regardless of materiality) we believe, in response to Request for Comment (8), that, in order to reduce extraneous discussion, the issuer should be required to discuss only the most recent vote, not all prior votes.

C. Initial Public Offering Exemption

The Commission has requested comment (Request for Comment (11)) on whether disclosure by a new issuer, in its IPO registration statement, of how frequently it will hold its say-on-pay vote should be sufficient to exempt it from further say-on-pay and frequency votes until the year disclosed.

We believe that such an exemption should be made available because purchasers of the new issuer's shares will be aware of its vote frequency policy when purchasing the shares. In addition, as a new public company, it may take some time for the issuer to fully develop its public company compensation policies and for shareholders to have an opportunity to assess the effectiveness of these policies. Thus, it may well be premature to require the issuer to conduct a say-on-pay vote in that first year.[2]

D. Treatment of Unmarked Proxy Cards

The Commission has requested comment (Request for Comment (16)) as to any technical issues arising from the proposed proxy card changes in Rule 14a-4 for the say-on-pay frequency vote.

We believe that the Commission should clarify that, with respect to the say-on-pay frequency vote, issuers still have the right under the second sentence of Rule

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[1] *Executive Compensation and Related Person Disclosure*, Release Nos. 33-8732A, 34-54302A, IC-27444A (Aug. 29, 2006), 71 Fed. Reg. 53,158 (Sept. 8, 2006).

[2] *See NYSE Listed Company Manual* Section 303A (providing companies listing in conjunction with an IPO a transition period to phase-in independent director and compensation committee requirements).

14a-4(b)(1) to retain discretionary authority with respect to matters as to which a choice is not specified by the security holder, provided that the proxy card states in boldface type how such shares are intended to be voted. Proposed Rule 14a-4(b)(3) (unlike existing Rule 14a-4(b)(2), relating to director elections) does not address the treatment of unmarked proxy cards. The Commission does not propose to amend the second sentence of Rule 14a-4(b)(1), which provides that as a general matter the issuer may retain the ability to vote unmarked cards in line with the issuer's recommendations, and we believe this general language should, and would, apply to say-on-pay frequency votes. Our concern is that the addition of language excepting the say-on-pay frequency vote from the first sentence of Rule 14a-4(b)(1) could create some doubt in this regard, particularly given the specific reference in existing Rule 14a-4(b)(2). We believe the Commission should either add clarifying language to Rule 14a-4(b)(3) or confirm in the adopting release that the general rule applies to say-on-pay frequency votes. That would place the frequency vote in line with other proxy statement items providing a default choice if the security holder submits an unmarked card. We believe it is commonly understood and expected among shareholders, brokers and issuers that proxy cards returned signed but unmarked will be voted in line with the issuer's recommendations, as indicated on the proxy card. In fact, the standard form broker letter provided in the NYSE rules expressly states this expectation.[3] We believe that changing the treatment of unmarked cards on one particular vote would frustrate the intent of shareholders who return unmarked cards, and will lead to confusion and inconsistent application among market participants.

E. Shareholder Proposals

The Commission has requested comment (Request for Comment (19)) on whether there are other circumstances when shareholder proposals relating to the frequency of say-on-pay votes should be considered substantially implemented and subject to exclusion under Rule 14a-8(i)(10).

We believe that shareholder proposals on the frequency of say-on-pay votes should be subject to exclusion if management decides to conduct the say-on-pay vote more often than the frequency that received the support of a plurality of shareholders. Without such an exclusion, an issuer would essentially be penalized for providing shareholders with more frequent say-on-pay votes. Accordingly, we would suggest that, in the instruction to Rule 14a-8(i)(10), the words "is consistent with" should be replaced with "provides for an equal or greater frequency as that indicated by".

[3] *See NYSE Listed Company Manual* Section 905.00 (" It is understood that, if you sign without otherwise marking the form, this will be construed as an instruction to vote the shares as recommended by the management on all matters to be considered at the meeting.").

F. Issuer's Disclosure of Frequency of Shareholder Vote

The Commission has requested comment (Request for Comment (23)) on whether it is sufficient that an issuer disclose its decision on how frequently it will conduct the say-on-pay vote in the Form 10-Q or Form 10-K following the say-on-pay frequency vote, or if the issuer should be required to disclose its decision on Form 8-K within four business days of the frequency vote.

We believe that, in order to allow issuers and their boards time to give the matter appropriate consideration, it is preferable to allow the issuer to wait until it files its next Form 10-Q or 10-K to disclose its decision on how often it will conduct the say-on-pay vote, as proposed. Requiring issuers to reach a decision within four business days of the say-on-pay frequency vote could lead to rushed decisions made without proper consideration, and may require, for example, special board meetings that would raise logistical and cost concerns without commensurate benefits to shareholders.

Disclosure and Shareholder Advisory Vote on Golden Parachute Compensation in Business Combinations

A. Incorporation by Reference of Item 402(t) Narrative Disclosure

Proposed Item 402(t) would set forth the required tabular and narrative disclosure with respect to golden parachute arrangements in connection with business combinations. Under the proposal, the narrative disclosure must address any material conditions or obligations applicable to the receipt of payment, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, their duration, and provisions regarding waiver or breach, the specific circumstances that would trigger payment, and other matters. It will often be the case that the details of the arrangement will have been included in a prior annual proxy statement (*e.g.*, in the Item 402(j) or Item 402(t) disclosure). We believe that issuers should be permitted to satisfy this requirement in the proxy materials for the business combination by incorporating narrative information by reference from an earlier annual proxy statement filed with the Commission. This would assist issuers in keeping the disclosure in the business combination proxy materials relatively direct and easy to understand, and avoiding repetition of detailed plan provisions in multiple filings.

B. Share Price for Item 402(t) Disclosure

The Commission has requested comment (Request for Comment (39)) on the share price that should be used in calculating the Item 402(t) disclosure. As proposed, the tabular quantification of dollar amounts based on issuer stock price in a merger or similar transaction would be calculated based on the closing price per share on the last practicable date.

We believe that, where the merger or similar agreement provides a specific stock price for the transaction, the soliciting party should be permitted to use that anticipated deal price rather than the price as of the most recent practicable date, since this is likely to give shareholders a more accurate measure of the compensation an executive would actually receive if the transaction were to be consummated. Similarly, we believe that the soliciting party should be permitted to provide the Item 402(t) information reflecting consummation of the transaction on the expected consummation date, rather than the most recent practicable date as proposed. This would allow the Item 402(t) disclosure to approximate more closely what will actually occur, particularly if there are expiration dates, vesting dates, lapse of holding periods or other timing-based factors that would change the impact of the transaction on the executive. Because of the wide range of potential business combination structures and compensation arrangements, we believe the soliciting party should have flexibility as to whether to use the latest practicable date and price or the expected closing date and price, based on which is more appropriate under the circumstances. Of course, the disclosure would need to clearly set out the assumptions used.

C. Disclosure of De Minimis Perquisites and Generally Available Benefits

The Commission has requested comment (Request for Comment (34)) on whether the proposed Item 402(t) will elicit disclosure "in a clear and simple form". We believe that it would be appropriate for Item 402(t) to include the same qualifications as are currently included with respect to Item 402(j) with respect to de minimis perquisites and other personal benefits and with respect to non-discriminatory, generally available arrangements.[4]

With the qualifications implemented for Item 402(j) after substantial public comment, the Commission achieved the correct "balance between investors' need for disclosure of total compensation and the burden on a company to track every benefit, no matter how small."[5] We believe the same balance supports clear and concise disclosure. If the Commission does not adopt similar qualifications for Item 402(t), disclosure would be required for the first time with respect to multiple arrangements that have previously and noncontroversially been deemed immaterial. In our view, the

4 *See* Instructions 2 and 5 to Item 402(j).

5 *Executive Compensation and Related Person Disclosure*, *supra* note 1, 71 Fed. Reg. at 53,176.

disclosure of such information would unnecessarily dilute and detract from the focus of the proposed rule.[6]

D. Effect of Certain Golden Parachute Changes

The Commission has requested comment (Request for Comment (49)) on whether certain changes to golden parachute arrangements that take effect after fiscal year-end, such as naming an additional executive officer, or granting additional awards in the ordinary course and subject to the same acceleration clauses already voted upon, should require a separate vote in connection with a business combination. The Commission also asked whether other types of changes should not require a separate vote.

Section 14A(b)(2) evidences a clear Congressional intent to encourage issuers to provide information regarding golden parachute arrangements as part of the annual say-on-pay vote. If the types of changes that require a separate vote are routine and frequent, issuers will have little incentive to include voluntary golden parachute disclosure in their annual proxy statements. Accordingly, we believe the Commission should seek to distinguish between the types of routine changes that occur almost inevitably following the end of a fiscal year and the types of substantive changes with respect to which shareholders would expect to have a second opportunity to provide a vote.

We believe that the examples provided in Request for Comment (49) (the addition of an additional executive officer or granting additional awards subject to the same acceleration clauses previously voted upon) should be exempt from a new shareholder vote in connection with a merger because those are not substantive changes, but merely continued application of the same core arrangements that were already voted upon by shareholders. Re-introducing the matter for a new shareholder vote would not be necessary. More broadly, we believe that awards issued after fiscal year-end (and thus not included in the Item 402(t) disclosure included in the annual proxy statement) should not be subject to a vote at the time of the merger if they are issued pursuant to a shareholder-approved equity compensation plan because shareholders have already approved the plan under which the award was issued, including the extent of any discretion that the issuer or its board has to define the terms of the awards. In addition, to the extent an executive officer's severance entitlement is based upon a multiple of salary and annual bonus (as is common), we believe that changes in the person's severance

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[6] We note that the general exemptive authority of Section 36 of the Securities Exchange Act of 1934 provides appropriate authority for the Commission to extend the existing qualifications to proposed Item 402(t).

entitlement as a result of ordinary course changes in their salary or annual bonus should not be subject to a vote at the time of the merger.

At a minimum, post-year-end awards that are described in the CD&A included in the latest annual proxy statement should not be subject to a new vote, because the CD&A is part of the Item 402 disclosure that is subject to the annual say-on-pay vote. In our experience, it is common for year-end awards to be granted shortly after the end of the relevant fiscal year, when companies have information on the full-year performance of an employee, the employee's business unit and/or the company broadly. These post-year-end awards are typically described in the CD&A[7] and should be exempt from a separate vote in the merger proxy because shareholders have already approved the arrangements.

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We appreciate this opportunity to comment on the Release, and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to Marc Trevino at (212) 558-4239 or Glen Schleyer at (212) 558-7284.

Very truly yours,

SULLIVAN & CROMWELL LLP

[7] *See Proxy Disclosure Enhancements*, Rel. Nos. 33-9089, 34-61175, IC-29092 (Dec. 16, 2009), 74 Fed. Reg. 68,334 (Dec. 23, 2009) ("Companies should continue to analyze in CD&A their decisions to grant post-fiscal year end equity awards where those decisions could affect a fair understanding of named executive officers' compensation for the last fiscal year, and consider including supplemental tabular disclosure where it facilitates understanding the CD&A.").