

May 19, 2011

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

RE: Comments on Proposed Listing Standards for Compensation Committees  
File Number S7-13-11

Dear Ms. Murphy:

The Center On Executive Compensation is pleased to submit comments to the Securities and Exchange Commission (“Commission”) providing its perspective on the Commission’s proposed listing standards for compensation committee and outside advisor independence and augmented compensation consultant disclosure rules implementing Section 952 of the Dodd-Frank Act.<sup>1</sup> Our comments focus on the need to preserve the flexibility and company discretion to the extent possible within the SEC listing standards for the national securities exchanges.

The Center On Executive Compensation (“Center”) is a research and advocacy organization that seeks to provide a principles-based approach to executive compensation policy from the perspective of the senior human resource officers of leading companies. The Center is a division of HR Policy Association, which represents the chief human resource officers of over 325 large companies, and the Center’s more than 80 Subscribing Companies are HR Policy members that represent a broad cross-section of industries. Because senior human resource officers play a unique role in supporting the compensation committee and in working with the committee’s consultant and outside advisors, we believe our views can be particularly helpful in understanding the critical role that compensation committees play in publicly traded companies and the importance of the independence of the members of the committee.

### **I. Comment Period**

The Center recognizes that the Commission is under considerable time pressure to complete the regulations under section 952 of the Dodd-Frank Act within the statutory deadline while also promulgating other rules under the law. The Center is pleased that the Commission extended the 23-day comment period for the proposed rules regarding listing standards for compensation committees, even though the extension was granted on

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<sup>1</sup> U.S. Sec. Exch. Comm’n, Proposed Rule: Listing Standards for Compensation Committees, Release Nos. 33-9199, 34-64149, 76 Fed. Reg. 18,966 (Apr. 6, 2011) (to be codified at 17 C.F.R. §§ 229, 240).

the original comment filing date of April 29.<sup>2</sup> For membership organizations such as ours that seek to involve our Subscribers in developing our comments, it is extremely difficult to obtain meaningful input in such a short period of time. For this reason we believe it is imperative that the Commission provide at least 60 days for comment for future releases under Dodd-Frank and other regulatory initiatives.

## **II. Compensation Committee Independence**

The Center largely agrees with the SEC's approach of implementing Section 952 by allowing the stock and securities exchanges to promulgate their own independence standards based upon factors set by the Commission. The Center believes that it is appropriate for large shareholders to be considered independent and eligible to serve on compensation committees. However, we disagree that the SEC should set a look-back period in its regulations, making this consistent with audit committee standards. Our discussion of each of these items follows.

### **A. A Flexible Approach to Independence Is Preferable**

Consistent with the language of the statute, the Commission has proposed a set of factors that the securities exchanges must consider when setting their compensation committee independence listing standards rather than prescribing a set of criteria that must be incorporated.<sup>3</sup> The Center agrees with the Commission's approach and believes that it provides exchanges with the flexibility to tailor independence standards that will be appropriate for their member companies based on a set of principles set by the Commission.

The Commission's approach has worked well in the past and has allowed for variation between the exchanges with respect to the rules that determine Board and audit committee independence. For example, the New York Stock Exchange listing standards require that a majority of compensation committee members be independent and that no director may be considered independent until the Board has affirmatively determined that the director does not have a material relationship with the listed company.<sup>4</sup> Independence is based on "all relevant facts and circumstances" and the NYSE standards set out bright-line criteria for independence. By contrast, under NASDAQ listing standards, the compensation committee must consist of a majority of independent members and the Board must determine whether a director is independent, which is defined as not having a relationship that would interfere with the exercise of independent judgment in carrying out his duties regardless of whether the relationship is with the listed company.<sup>5</sup>

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<sup>2</sup> U.S. Sec. Exch. Comm'n, Proposed Rule: Listing Standards for Compensation Committees (extension of comment period), Release Nos. 33-9203, 34-64366 (Apr. 29, 2011).

<sup>3</sup> 76 Fed. Reg. at 18,969-70.

<sup>4</sup> New York Stock Exchange Listed Company Manual Section 303A.01.

<sup>5</sup> NASDAQ Rule 5605(b)(1).

The Center believes that the national securities exchanges should continue to have the ability to prescribe their own listing standards for compensation committees despite the fact that there may be some variance between the exchanges. This flexibility has allowed different approaches on independence to develop which reflect the differences in the size and types of companies that are traded on those exchanges. In sum, the Center agrees that affording the exchanges the discretion to establish their own independence criteria provided certain SEC-prescribed factors are considered is a balanced and appropriate approach.

#### B. Large Shareholders May Serve on Compensation Committees

The Commission has asked whether large shareholders should be considered “affiliates” and thus not independent, disqualifying them from serving on a compensation committee. The Center agrees with the rationale currently incorporated by the NYSE and NASDAQ that “with the exception of audit committee membership requirements, stock ownership alone will not automatically preclude a director from being considered independent under either NYSE or NASDAQ listing standards.”<sup>6</sup> With this in mind, the Center believes that under the final rules implementing section 952, the stock exchanges should have the flexibility to decide that major shareholders, even though they are considered “affiliated directors” should be allowed to serve on compensation committees.

The SEC’s proposed rules provide that independence must be determined by several relevant factors, such as the director’s sources of compensation and whether a director is affiliated with an issuer. Although the term, “affiliate” is not defined in the proposed rules, the SEC’s rules for audit committees under the Sarbanes-Oxley Act define affiliate as “a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.”<sup>7</sup> In the proposed rule, the SEC notes that large shareholders may be deemed to be an affiliate of a company by virtue of the percentage of their shareholdings.<sup>8</sup> However, in describing the independence requirements, the SEC noted that some commentators have indicated that unlike in the audit committee context, such directors are motivated to carefully evaluate executive compensation and exercise independent judgment.<sup>9</sup> The commentators argued that these individuals have similar views on compensation to most shareholders; therefore, their role on the compensation committee would not create a conflict of interest.

The Center agrees that the stock exchanges should be able to permit large shareholders or their representatives to serve on a compensation committee. If an individual is properly elected to serve on the Board, then provided they meet the other independence criteria, their stockholdings should not keep them off the compensation committee. Generally, equity ownership is a positive sign for unaffiliated board members

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<sup>6</sup> 76 Fed. Reg. at 18,970.

<sup>7</sup> Exchange Act Rule 10A-3(e)(1)(i).

<sup>8</sup> 76 Fed. Reg. at 18,970.

<sup>9</sup> *Id.*

and is a marker of good corporate governance as it aligns the director's interests with those of the company, management and shareholders.<sup>10</sup> The same should hold true for large stakeholders. For this reason, the Center believes that stock ownership alone should not automatically disqualify an individual from meeting the independence requirements for compensation committee members.

### C. Look-back Period for Compensation Committee Members Unnecessary

The SEC has asked whether it should require potential directors to have been independent from a company for three to five years (a look back period) before serving on the compensation committee. The Center believes that this is an unnecessary requirement as the NYSE and NASDAQ have already included a three-year look back period in their criteria for whether an individual is an independent director.<sup>11</sup> Since the Commission's rules provide a set of criteria for consideration by the exchanges, and the exchanges already mandate a look back period for independent directors, a mandated look-back period is unnecessary and the Center opposes any effort to include one.

## III. Independence of Compensation Committee Advisors

Section 952(b) of the Dodd-Frank Act gives compensation committees the authority, in their sole discretion, to retain or obtain the advice of a compensation consultant, legal counsel or other advisor. Dodd-Frank does not also require that advisors be independent; it simply requires the company to disclose whether a compensation consultant was used, whether the work of a compensation consultant has raised any conflicts of interest, and, if so, the nature of such conflict and how the conflict of interest is being addressed. Dodd-Frank further mandated that the SEC identify "competitively neutral" factors that affect the independence of a compensation consultant, legal counsel or other advisor.<sup>12</sup>

While the SEC has afforded compensation committees the opportunity to decide whether a compensation consultant, counsel or other advisor is an appropriate advisor, the Center wants to ensure that the intent of Dodd-Frank remains intact: compensation committees are not required to hire independent advisors, they must simply consider the enumerated factors regarding the independence of their advisors and make the appropriate disclosures. We believe that the compensation committee is in the best position to determine whether a particular advisor would be an appropriate advisor following a review of all factors and subject to appropriate disclosure.

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<sup>10</sup> See, e.g., Sanjai Bhagat & Brian Bolton, *Director Ownership, Governance and Performance* (Apr. 2011) (attached to comment letter), available at <http://www.sec.gov/comments/s7-13-11/s71311-13.pdf> ("We find that the dollar value of director stock ownership is positively related to operating performance both -re-2202 and post-2002.").

<sup>11</sup> New York Stock Exchange Listed Company Manual Section 303A.02(b); NASDAQ Rule 4200(a)(15).

<sup>12</sup> 76 Fed. Reg. at 18,972.

A. Disclosure of Selection Process for Outside Advisors Is Unnecessary

The SEC asks in the proposed rule whether companies should be required to describe the compensation committee's process for selecting outside advisors. The Center believes that if the protocol described in the listing standards is followed, it would be unnecessary to have additional disclosures regarding the process for selecting outside advisors as this process already serves as a conflicts check for both the committee and the consultant. Accordingly, if the SEC's protocol is adhered to, it follows that independence will not be an issue in the relationship between the consultant or compensation committee. If the SEC requires that the Board disclose its process, the Center requests that the requirement consist of a simple affirmative statement confirming that the independence criteria have been considered in selecting an advisor, rather than describing the entire process, which only adds to the length of proxy statements.

The Center urges the SEC to be mindful of the cumulative effect of its disclosure requirements on the length of proxy statements. Based on Center research into the average length of proxy statements and compensation disclosures, in 2010, the average proxy statement was 101 pages, with 32 pages devoted to compensation disclosures. This is an increase from an average of 26 pages devoted to compensation disclosures in 2008. These averages will surely increase with the addition of say on pay this year and as other Dodd-Frank Act mandates become effective.

**IV. Compensation Committee Consultant-Related Disclosures**

Consistent with section 952, the proposed rule requires that a company disclose in its proxy statement whether the Board's compensation committee retained or obtained the advice of a compensation consultant.<sup>13</sup> This is an expanded approach from the current rules where disclosure is required if the compensation consultant had a role in "determining or recommending the amount or form of executive and director compensation."<sup>14</sup>

A. Elimination of Survey and Broad-Based Plan Exemptions

The proposed regulations eliminate the exemption for the provision of advice on broad-based plans that do not discriminate in favor of executive officers or directors and for consultants providing non-customized benchmark surveys. This means that disclosure about a compensation consultant is required even if the consultant's role is limited to consulting on a broad-based plan or providing non-customized benchmark compensation information, such as a survey. The Center believes that these exemptions should be continued.

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<sup>13</sup> 76 Fed. Reg. at 18,971.

<sup>14</sup> 76 Fed. Reg. at 18,979.

With respect to non-customized survey data or survey data that is customized by the company, but not by the consultant providing the data, the Center believes the provision of this information does not impact the advice provided by the same consultant or a different consultant with the same consulting company. Instead, the data is used by the compensation committee to determine whether its company's practices are an outlier or are in line with their peer group. Surveys represent just one factor that a compensation committee considers in determining appropriate compensation for its company. Moreover, in light of the focus on independence, in recent years, many boutique compensation consulting firms have been created that do not have the capacity to develop their own survey data. These consultants often rely on survey information provided by larger consulting firms that conduct similar studies annually. The surveys do not name specific companies, the underlying data is not attributable to any one company and the survey information is presented in the aggregate. The potential for a meaningful conflict of interest with this type of information is negligible at best.

Accordingly, it is unclear how disclosure of survey information would operate. For example, could a consultant's use of survey information from a particular consulting group jeopardize his or her independence? Would a company need to disclose any other work that the consulting group provides to the company, even though the data would not be impacted by such work? The Center requests that the SEC clarify what constitutes advice in the phrase, "retained or obtained the advice of a compensation consultant." Does advice only include information that is customized for use by the compensation committee alone or would it be broadly applicable to any information used to shape a committee's decisions in developing compensation, benefit programs or policies that are common at other companies. We believe that continuing this exemption is consistent with ensuring the independence of the members of the compensation committee. By contrast, elimination of this exemption may have a chilling effect on the use of valuable survey information that allows compensation committees to fully research the landscape of popular practices at other companies and within their peer group as they set compensation. Although we do not believe that the SEC intended to limit a compensation committee's access to valuable information, eliminating this exemption may have that effect.

With respect to advice provided to companies on broad-based plans, the Center believes that such consulting need not be disclosed because executives and directors are treated the same as all other employees.

#### B. Dodd-Frank Rules, Regulation S-K, and Director Compensation

The proposed regulations contain references to director compensation, but section 952(b) of the Dodd-Frank Act covers only compensation consultants, legal counsel and other outside advisors making recommendations to compensation committees. The Center would like the SEC to clarify that these listing rules apply to compensation committees and their consultants only. It is important to note that director compensation is generally not handled by a Board's compensation committee; it tends to fall within the

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responsibility of a company's governance committee. The proposed rules confuse the roles of the compensation and governance committees.

Specifically, the introductory sentence in Regulation S-K, Item 407(e)(3) requires disclosure of the company's processes and procedures for the consideration and determination of executive and director compensation. Proposed amendments to Item 407(e)(3)(iii) eliminate the mention of director compensation and instead reference only the compensation committee. The SEC proposal, however, still retains the language from Regulation S-K that requires disclosure of fees paid to committee consultants for "determining or recommending the amount or form of executive and director compensation."<sup>15</sup> The Center requests that the SEC revise their rules to eliminate references to director compensation so that current regulations are consistent with the statute. Otherwise, the SEC will invite confusion as to whether existing rules or proposed rules potentially apply to a company's governance committee if that committee handles director compensation and engages a consultant to assist the committee.

## V. Conclusion

The Center on Executive Compensation appreciates this opportunity to provide comments on the proposed listing standards for compensation committees. If you have any questions about these comments, please contact me at [tbartl@execcomp.org](mailto:tbartl@execcomp.org).

Sincerely,



Timothy J. Bartl

Senior Vice President and General Counsel

cc: Securities and Exchange Commission:  
Hon. Mary L. Schapiro, Chairman  
Hon. Kathleen L. Casey, Commissioner  
Hon. Elisse B. Walter, Commissioner  
Hon. Luis A. Aguilar, Commissioner  
Hon. Troy A. Parades, Commissioner

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<sup>15</sup> 76 Fed. Reg. at 18,979.