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Via e-mail to: rule-comments@sec.gov

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

Reference: S7-31-10 November 17, 2010

Dear Ms. Murphy,

Thank you for the opportunity to provide comments on the SEC's proposed rules for shareholder approvals of executive compensation and of golden parachute compensation. My comments focus on the binding nature of the frequency vote, as well as on the appropriateness of exemptions for certain types of issuers and of exclusions of certain shareholder proposals.

Q25: Nature of the vote on the frequency of votes on executive compensation

The statutory language of section 14A EA, its genesis in the legislative process and statements made in the legislative process pose the question, whether the shareholder vote on the frequency of advisory shareholder votes was intended to be binding or non-binding (i.e. advisory) for the issuer.

There are several arguments in favor of the interpretation that congress intended the frequency vote to be binding.

Statutory language of section 14A(a)(2) EA

The statutory language in section 14A(a)(2) contains several elements that suggest that the frequency vote was intended to be binding. Firstly, it mentions a shareholder vote to *determine* whether votes *will* occur every 1, 2 or 3 years. The language in section 14A(a)(1) and in 14A(b)(2) mentions votes to *approve* compensation or agreements that were already decided by the directors of the company. A decision can be approved *after* it has already been made and after the company is already legally bound by this decision. In other words, an *approval* can also be non-binding. However, the meaning of the verb *determine* points to a binding action that leads to a decision or outcome. In addition, if the vote on the frequency was intended to be advisory, the statutory text would not have used the verb *will* to mention that the vote is to determine whether votes *will* occur every, 1, 2 or three years, but would have used the verb *should* to indicate that the vote was just the advice of the shareholders or the recommendation by the shareholders on the frequency.

Legislative history of section 14A(a)(2) EA

Both, the original house version and the original senate version of section 14A included a *mandatory annual* advisory shareholder vote on executive compensation. The shareholder vote on the frequency of advisory shareholder votes on executive compensation was an amendment by Senator Crapo (R-Idaho) from the Senate Committee on Banking, Housing an Urban Affairs during the conference. Neither the written conference documents nor the verbal statements that were made during the conference mention that the frequency vote was intended to be non-binding.

Senator Crapo describes his amendment to "allow the shareholders to make that decision rather than having federal law mandate it".[1] In addition, Chairman Dodd does not mention that this vote on the frequency is non-binding or advisory during his report of the amendment to the house conferees.[2] There was no further public debate by the house conferees before they accepted this amendment nor was there any further public debate on this amendment by the full conference committee before its vote on the conference report.

The house counter offer that accepts the senate addition of a vote on the frequency of the advisory shareholder vote on executive compensation describes it as "to require that 1st such shareholder vote also include vote allowing shareholders to *decide* whether future such votes should occur every 1, 2 ob 3 years" (emphasis added). In contrast the house amendment to add back a vote on golden parachutes that was included in the house version, but not in the senate version explicitly mentions that this shareholder vote is non-binding. It seems odd that the non-binding nature of the golden parachute vote is mentioned, but that a supposedly non-binding nature of the frequency vote is not mentioned in this document.[3] In Addition, a change from a *mandatory annual* advisory shareholder vote on executive compensation to a purely *advisory* shareholder vote, whether the advisory vote on executive compensation should be held *every one, two or three years*, would have elicited some debate if it had been interpreted as a major change rather than a mere technical issue.

[1] refer to the debate of the senate conferees on the senate conferee amendment to add a vote on the frequency of the shareholder vote at 1:52:30 of the webcast at http://financialserv.edgeboss.net/wmedia/financialserv/conference061610.wvx

[2] refer to the Report by Chairman Dodd to the house conferees at 00:39 of the webcast at http://financialserv.edgeboss.net/wmedia/financialserv/conference061710.wvx

[3] refer to item 7 and item 1 of the House Counter Offer on Senate Title IX Subtitle E Executive Compensation at http://financialservices.house.gov/FinancialSvcsDemMedia/file/key_issues/Financial_Regulatory_Reform/Conference_on_HR_4137/Title_IX_Subtitle_E_Exec_Comp/Title_IX_House_Counter_Offer_Summar_ExeComp_6_22_2010.pdf

Legislative history and statutory language of section 14A(c) EA

In both the original house version and the original senate version the shareholder vote on executive compensation had its own rule of construction rather than a general rule of construction that referred to several shareholder votes on executive compensation and on golden parachutes. It is possible that the creation of a general rule of construction by the conference committee that refers to all votes erroneously overlooked that the final version subsection (a) now includes an additional vote on the frequency of the advisory shareholder vote on executive compensation.

This view is supported by the fact that the rule of construction in subsection (c) refers to the shareholder *vote* referred to in subsection (a) and (b) rather than to the shareholder votes. However, subsection (a) includes not just one *vote*, but two shareholder votes (one vote on executive compensation and a second vote on the frequency of the vote on executive compensation).

In conclusion, the language of section 14A(a)(2), the legislative history and the language of section 14A(c) support the interpretation that the shareholder vote on the frequency of advisory shareholder votes on executive compensation was intended to be binding.

Q2: Exemption of smaller reporting companies from compensation vote

I do not think that adding an advisory shareholder vote on executive compensation to the list of other matters on a proxy will create much of an extra burden for smaller reporting companies. As a consequence, I do not think that smaller reporting companies should be exempt from the requirement. Holding an annual meeting of shareholders and sending proxy statements to shareholders is more like a fixed cost that does not increase much incrementally just because one more item is disclosed on the proxy and one more item is voted upon at the annual general meeting. The shareholder rather than the company may spend more time and potentially more money on studying the existing executive compensation disclosures and on deciding how to vote. But it is up to the shareholder, whether he or she wants to vote at all or to abstain, how much to spend on reviewing disclosures on executive compensation or whether to outsource some of the review and preparation work to a proxy advisor.

Q11: Exemption of new issuers from frequency vote

New issuers should not be permitted to make the decision on the frequency of advisory shareholder votes on executive compensation, to disclose it in its prospectus and to be exempt from the frequency vote until the year disclosed. Going public often means that the previous shareholders that made or recommended the decision on the frequency of advisory votes on executive compensation sell their shares to new shareholders that have originally not been able to participate in the frequency vote that is disclosed in the prospectus. Creating such an exemption would simply help incumbent management to have fewer advisory shareholder votes on its compensation in the first years after going public. An exemption would deprive the new shareholders of some of their say-on-pay for up to three years.

Q15: Choices offered in the frequency vote

I believe that a free shareholder choice between having an advisory vote every one, two or three years or to abstain from this vote on the frequency is sufficiently clear. Allowing issuers to restrict this choice by allowing the board to propose one or several frequencies and only allowing shareholders to vote for or against the frequency that is proposed by the board would conflict with the statutory language of section 14A(a)(2) EA and the intent from its legislative history.

Q17: Voting standard to determine substantial implementation of a proposal

If the SEC wants to prevent shareholders to repropose a subject for a vote between more than two frequency choices that has already been voted upon and that has already been substantially implemented by the issuer, than it will need a voting standard to determine the will of shareholders on which of the choices should be implemented. Abstentions on the vote to choose the frequency of the advisory shareholder votes on executive compensation should be disregarded. However, simply selecting the frequency that has received most of the non-abstaining votes (i.e. a plurality of the votes) does not seem to adequately capture the preferences of the shareholders. Imagine a situation where a third of the votes less two votes are for a frequency of three years, a third of the votes plus one vote is for a frequency of two years and a third of the votes plus one vote is for a frequency of one year. Although only an absolute minority of the non-abstaining votes (one third of the votes plus two votes) is for three years compared to the remaining two thirds of the votes less two votes that are for less than three years, a plurality standard would result in a frequency of three years to be selected as the "will" of the shareholders. As an alternative I propose the following voting standard:

Step 1: Do not count the abstaining votes
Step 2: Eliminate the frequency that has received the lowest number of the remaining votes. In the unlikely event that several frequencies have received the same number of lowest votes, the frequency with the highest number of years is eliminated as a tie-breaker rule since the legislative history suggests that an annual vote was the original preference in both the house and the senate version.
Step 3: Choose the frequency among the remaining two frequencies that has received more votes than the other frequency. In the unlikely event that both remaining frequencies have the same number of votes, the lower number of years is selected as a tie-breaker rule since the legislative history suggests that an annual vote was the original preference in both the house and the senate version.

I do not believe that the voting standard should vary if the company has multiple classes of voting stock. Votes from all classes of voting stock for the same frequency choice should be aggregated.

Q18: Exclusion of say-on-pay votes with a substantially similar scope

The provision on advisory shareholder votes should be interpreted as the minimum standard for giving shareholders a say on compensation that ultimately may affect their profits. If the company of the state or foreign country in which the issuer is incorporated or under whose laws it is organized permits more extensive shareholder rights relating to the compensation of directors, officers or employees, then the SEC should not prevent shareholders from exercising those rights. Examples of possible more extensive rights include more frequent shareholder votes, binding shareholder votes, votes on the compensation of executive officers other than named executive officers, votes on the compensation of directors or votes on the compensation of or compensation system for other employees. The SEC should be mindful that although SEC rules exempt foreign private issuers from the proxy rules, not all issuers that are incorporated or organized under the laws of a foreign country are considered foreign private issuers by SEC rules.

In addition, the fact a majority of shareholders voted for a particular frequency at a prior general meeting of shareholders does not mean that the shareholders are still the same and that their respective will is still the same so that the issuer and the shareholders need not be bothered to answer the same question again. Existing shareholders may have sold their shares to new shareholders who have a different opinion. Shareholders may have been happy with having an advisory shareholder vote on executive compensation less frequently than every year, but may subsequently change their mind and want another advisory vote on executive compensation sooner because an issuer does not adjust executive compensation that has not been approved by shareholders in the previous vote in a way that shareholders perceive to reflect their will. On the other hand shareholders may also change their mind and want less frequent votes after they have seen that directors have been responsive to their wishes concerning executive compensation.

Q19: Exclusion of proposals for a different frequency of say-on-pay votes

I do not believe that shareholder proposals for a frequency of advisory shareholder votes on executive compensation that differ from substantially implemented frequencies that were previously proposed by shareholders should be excluded from the proxy. This belief is based on the reason that both the composition of shareholders and their will can change over time as circumstances change.

Q21: No exclusions after subsequent material changes to compensation programs

The exclusion should not be available if the issuer has after materially changed its compensation program subsequent to the most recent say-on-pay vote or the most recent frequency-vote.

I appreciate the opportunity to comment on these matters and hope that my comments are useful in the rulemaking process.

Respectfully submitted,

Georg Merkl