Association of Corporate Counsel

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September 15, 2009

United States Securities and Exchange Commission
Attn: Ms. Elizabeth M. Murphy, Secretary
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Proposed Rule – Proxy Disclosure and Solicitation Enhancements
File No. S7-13-09

Dear Ladies and Gentlemen:

The Corporate and Securities Committee (the "Committee") of the Association of Corporate Counsel ("ACC") appreciates this opportunity to comment on the Securities and Exchange Commission's (the "Commission") Proposed Rulemaking – Proxy Disclosure and Solicitation Enhancements (the "Proposed Rules").

ACC is the world's largest bar association serving the professional needs of attorneys who practice in the legal departments of corporations, associations and other private sector organizations around the world. It has nearly 25,000 members in over 80 countries, which such members are employed by more than 10,000 organizations. As one of ACC's largest committees, the Committee consists of approximately 6,700 members at over 4,000 organizations in the United States. The Committee's membership spans organizations ranging from small public and private companies to some of the world's largest public and private corporations. ACC's membership includes attorneys from 95 of the Fortune 100 companies and over 400 of the Fortune 500 companies. The Committee submits this as a representation of the majority of its constituent members and, therefore, not necessarily those of the ACC as a whole.

Before addressing the Proposed Rules, we want to address comments made by the Commission's Chairman, Mary L. Schapiro, at the open meeting introducing the Proposed Rules, where she commented:

> You will note, I hope, that in each of these areas [addressed in the Proposed Rules] we have stressed *the concept of better or more timely disclosure – not simply additional disclosure*. I have heard from both investors and companies a shared concern that our proxy statements are in danger of becoming unreadable, because there is so much information packed into them. As commenters consider this proposal, I hope that all will focus on whether the right information is being disclosed in the right way, not just adding on to an already weighty document. To the extent any item of current disclosure is unnecessary, I really hope that commenters take the time to tell us so.[1]

[1] *Speech by SEC Chairman: Statement at SEC Open Meeting*, Chairman, Mary L Schapiro, Washington D.C., July 2009; http://www.sec.gov/news/speech/2009/spch070109mls.htm (emphasis added).

We are concerned that the majority of the modifications presented in the Proposed Rules fall into the later category - "simply additional disclosure" - and not "better . . . disclosure."

We strongly encourage the Commission to consider the comments provided by Chairman Schapiro and evaluate whether the Proposed Rules will add significant value to proxy statements and ultimately to shareholders. For the reasons provided below, the majority of the Proposed Rules would, in most cases, simply add pages to proxy statements without adding any real value to shareholders.

Enhanced Compensation Policy Disclosure

Compensation Discussion & Analysis Disclosure

We object to the Proposed Rules that would expand the Compensation Discussion & Analysis ("CD&A") portion of proxy statements beyond the named executive officers to discuss a company's broader compensation policies if these policies or practices may have a material effect on the company. The Proposed Rules would: (i) result in additional disclosures that are not meaningful to shareholders and (ii) confuse shareholders.

Most, if not all, compensation programs contain some element of risk. For example, a "pay for performance" compensation plan or policy, by its very nature, contemplates some level of risk-taking, given that employees would likely have to take some amount of risk to achieve the stated performance goals. An issuer would struggle to understand when its broader compensation polices "may have a material effect on the company," and, consequently, whether they are required to disclose information on their broader compensation policies and plans. As a result, companies would "err on the side of caution" and provide disclosures on their broad compensation programs and policies affecting all employees. These disclosures would likely be general in nature, not be meaningful to shareholders and, over time, likely become "boilerplate."

Additionally, the required disclosures under the Proposed Rules would likely confuse shareholders. Under the present rules and regulations, shareholders already have trouble evaluating most CD&As. Adding more disclosures regarding other compensation practices, polices and programs, as contemplated by the Proposed Rules, would likely only increase shareholders' confusion and discourage them from reading the CD&A. In other words, in line with Chairman Schapiro's comments, we believe that because so much information would be packed into the CD&A, it would become unreadable to the average shareholder.

Nevertheless, if the Commission determines to adopt the Proposed Rules, the phrase "may have a material effect" should be replaced with "will likely have a material effect." This small change may provide companies a clearer test to help determine when they must disclose information on their broader compensation policies.

Summary Compensation Table

We support the Proposed Rules that would revise the Summary Compensation Table and Director Compensation Table disclosure of stock awards and option awards

to require disclosure of the aggregate grant date fair value of awards computed in accordance with FAS 123R. Additionally, we believe that the Summary Compensation Table and Director Compensation Table disclosures should be further amended to enable companies to report stock and option awards granted for services performed during the year at issue, even if the awards were granted after the applicable fiscal year. This would give shareholders a better picture of a named executive officer's total compensation for that particular fiscal year and would conform the disclosure to how most boards and compensation committees view each executive's compensation when setting and approving compensation.

In connection with transition reporting, a company should be allowed to determine, in its discretion, whether to re-calculate the compensation for previous years in the Summary Compensation Table and Director Compensation Tables or provide additional disclosures that would allow its shareholders to make a "year-to-year" comparison of the named executive officers' or directors' compensation.

Enhanced Director and Nominee Disclosures

Director and Nominee Qualifications

We object to the Proposed Rules that would require disclosures describing the specific experience, qualifications or skills that qualify a particular director or nominee to serve as a director and committee member. The proposed disclosures would not add value to a company's proxy statement; rather they would simply add length. Most companies, under the Commission's rules and regulations or applicable securities exchange rules, already disclose the attributes, qualities or characteristics their boards search for in directors and director candidates.[2] Accordingly, similar information is already available to shareholders.

Moreover, disclosures of "person-by-person" qualifications would not add significant value to proxy statements, and, in fact, will be misleading to shareholders. Like a football team (or any other team), a board of directors is made up a number of different members with different skills, backgrounds and experiences to complement each other and work together. Focusing on one director's particular qualifications and skills without discussing how these qualifications and skills complement all of the other directors' skills and qualifications (which would add a significant amount of length to proxy statements) would do a disservice to that particular director and would be misleading to shareholders. Also, we feel that it would be very difficult to adequately describe the intangible qualities (*e.g.*, critical thinking, industry knowledge, diverse business experience, etc.) that many directors possess and make them quality directors. Disclosures should not be focused on an individual's qualifications, experiences and skills. Rather, discussion should focus on whether the board, as a group, has the appropriate qualifications, experiences and skills to perform its job and duties.

For similar reasons, we do not believe a company should be required to disclose, on a "person-by-person" basis the experience, qualifications or skills that qualify a particular board member to be on a certain committee. It is a very common practice for boards to have their members rotate between committees to allow them to gain a better understanding of the company as a whole. For this reason, many companies do not

[2] *See* Rule 407(C)(2)(ii) and New York Stock Exchange Listed Company Manual, Rule 303A.09.

recruit directors to serve on a particular committee[3]. Again, the focus should not be on the individual directors, but rather the committee as a whole.

Nevertheless, if the Commission implements the Proposed Rules on Director and Nominee Qualifications, the proposed disclosures should only be required when the director is first nominated as a board member and the first year a director serves as a member of a committee.

Biographical Information

We support the Proposed Rules that would require enhanced director and nominee biographical information. However, we do object to having these Proposed Rules be effective for the 2010 proxy season. Many companies have already started preparing for the 2010 proxy season, and will shortly start issuing director questionnaires in order to prepare their proxy statements. Accordingly, many of these questionnaires will be distributed to directors prior to the Proposed Rules being final. If the Proposed Rules are made final after the questionnaires are distributed to directors, these companies will either not be able to recover the new biographical data under the Proposed Rules, or will have to expend significant time, money and resources to recover such biographical information for the 2010 proxy season.

Additionally, we believe that the Commission, in its final rule, should provide that companies are permitted to reference their websites in order to disclose such biographical information; provided they disclose director biographical information on their websites

Disclosure about Company Leadership Structure

In general, we do not object to disclosures about how the company's leadership is structured. However, we are concerned that by requiring companies to disclose whether and why they have chosen to combine or separate the principal executive officer and board chair positions, the Commission is implying that one form of leadership structure is preferable to another. While we commend the Commission for stating in the proposing release, "[i]n proposing this requirement, we note that different leadership structures may be suitable for different companies depending on factors such as the size of a company, the nature of a company's business, or internal control considerations, among other things," we have already seen certain stakeholders referring to this type of requirement as "comply or explain." Thus, we fear that certain stakeholders will use this requirement to promote one form of leadership structure over another.

Voting Results on Form 8-K

In general, we do not object to the Proposed Rules that would require shareholder voting results to be reported on a Form 8-K. We do, however, feel that it may difficult for some companies, especially smaller companies, to comply with the four business day filing requirement for such Form 8-K. We suggest that a company have ten business days after the shareholder vote to file its Form 8-K. In addition, if the voting results are too close for a final determination within the provided filing deadline (whether

[3] The exception to this general rule is the Audit Committee.

it be four or ten business days), we suggest that the Proposed Rules allow companies to report such results four business days after such results become final.

Disclosures Regarding Compensation Consultants

In general, we do not object to the Proposed Rules that would require disclosures on the fees paid to compensation consultants and their affiliates if they also provide other services to the company. However, we feel that a threshold should be used for required disclosures of the "other services" provided by the compensation consultant. For example, if the compensation consultant provides "other services" to the company but the fees received by the compensation consultant or its affiliate for these other services does not exceed $120,000,[4] then no disclosure would be necessary.

Proxy Solicitation Process

The Committee objects to the Proposed Rules that would allow a shareholder to be exempt from complying with proxy solicitation rules when such shareholder provides other shareholders with a blank, un-marked copy of management's proxy card and request the shareholder to return the proxy card directly to management. We feel strongly that a person who provides a shareholder with an unmarked copy of management's proxy in connection with a "just vote no" campaign is providing a form of revocation and should not be entitled to the exemption provided under Rule 14a-2(b). This position is consistent with the holding in *MONY Group, Inc. v. Highfields Capital Mgmt. L.P.*, 368 F.3d 138 (2d Circuit, May 13, 2004) as well as the Division of Corporation Finance's interpretation of Rule 14a-2(b).[5] Moreover, it is imperative that shareholders who receive an un-marked copy of management's proxy card, also receive the information required under the proxy rules, including, without limitation, the economic interests of the person providing a copy of the management's proxy card and, most importantly, the effect of executing a subsequent proxy card. To allow otherwise would, among other things, be contrary to the Commission's stated goal of providing shareholder's complete information.[6]

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[4] *See* Regulation S-K, Item 404(c).

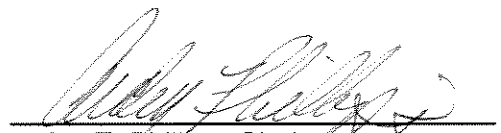
[5] The Staff acknowledged that providing a shareholder with a blank copy of management's proxy card could have the effect of a revocation of an earlier dated proxy submitted by the same shareholder.

[6] *See*, 74 Fed. Reg. 35088 (proposed July 17, 2009) ("We believe that these proposals, if adopted, would provide greater certainty to soliciting parties, help shareholders receive timely and *complete information* and facilitate shareholder voting.") (emphasis added).

We appreciate the opportunity to comment on the Proposed Rules and are available to provide you with further information if you would find it helpful.

Respectfully submitted,

Corporate and Securities Committee
Association of Corporate Counsel

By: 
Arden T. Phillips, Chairman

cc: The Honorable Mary L. Schapiro
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The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy Paredes
Meredith Cross, Director, Division of Corporation Finance
David M. Becker, General Counsel and Senior Policy Adviser to the Commission
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