

# MERCER



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September 15, 2009

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

**Re: File No. S7-13-09  
Proxy Disclosure and Solicitation Enhancements  
(Release No. 33-9052; 34-60280; IC-28817)**

Dear Ms. Murphy;

Mercer is submitting comments on the Proposed Rule on Proxy Disclosure and Solicitation Enhancements, published in the Federal Register on July 17, 2009. In this letter, we comment on the proposed amendment to Item 407(e)(3) dealing with expanded disclosures related to compensation consultants. Mercer is submitting comments on other aspects of the Proposed Rule under separate cover.

Mercer is a global company providing human resources and related financial advice, products, and services, including compensation consulting services, to corporations, boards of directors, and board compensation committees concerning the compensation of executives and directors. Mercer provides executive compensation consulting services to companies around the globe, including U.S. publicly-traded companies. We have extensive experience designing and implementing executive and director remuneration programs. As a result, we understand how compensation committees function and we have assisted countless companies in improving their executive compensation disclosure under the current reporting requirements.

Mercer is a wholly-owned subsidiary of Marsh & McLennan Companies, Inc. (MMC). Mercer operates with a separate management structure, and its financial results are reported as a separate line of business within MMC. In addition to Mercer, MMC is the parent company of a number of the world's leading risk experts and specialty consultants, including Marsh, a insurance broker and risk advisor; Guy Carpenter, a risk and reinsurance specialist; Oliver Wyman, a management consultancy; and Kroll, a risk consulting firm. With approximately 53,000 employees worldwide and annual revenue of \$11 billion, MMC provides analysis, advice and transactional capabilities to clients in more than 100 countries.



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## **Summary of Mercer's Comments on Proposed Amendments to Item 407(e)(3)**

The proposed amendments to Item 407(e)(3) ('Proposed Item 407(e)(3)') would require disclosure of fees and the nature of services provided where a consultant played any role in determining or recommending executive or director compensation *and* the consulting firm or its affiliates provided any other services to the registrant. The rationale is to address 'the appearance, or risk, of a conflict of interest that may call into question the objectivity of the consultants' executive pay recommendations.' The disclosure is 'intended to enable investors to assess any incentives a compensation consultant may have in recommending executive compensation and better assess the compensation decisions made by the board.'

As described in more detail below, we oppose requiring fee disclosure as set forth in Proposed Item 407(e)(3). We believe the proposed disclosure (i) will not effectively address the concerns raised by the Commission but rather will provide potentially misleading information to investors, and (ii) is anticompetitive because it favors single service boutique consulting firms over multiservice consulting firms.

## **Role of an Executive Compensation Consultant**

We acknowledge that the role of compensation consultants may be poorly understood by investors. We provide objective information, insights and advice to clients (compensation committees and management) to help *them* make informed decisions on executive compensation. We do not tell compensation committees or management what to do, negotiate employment or compensation arrangements, set compensation philosophy, or determine pay levels, equity awards or incentive plan payouts.

Compensation committees have the primary responsibility for determining executive compensation. Our comments are based primarily on the premise that these committees, rather than investors, are in the best position to determine whether they are making decisions that are not properly considered and inappropriately influenced by conflicts of interest.



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## Alternative Disclosure Rule

We support efforts to ensure that investors have a better understanding of the consultant's role and receive meaningful information about the consultants who provide advice to compensation committees<sup>1</sup> in support of their executive compensation decision-making. The disclosure should be directed at helping investors understand the compensation committee decision-making process. Therefore, we are proposing below an alternative disclosure rule that we believe is responsive to the Commission's stated objectives, would provide meaningful information to investors about how committee consultants are selected and how their work is conducted, and would apply to all firms regardless of their business model. Our alternative would preserve needed consulting resources in the market.

We have attached our alternative amendment to Item 407(e)(3) ('Alternative Item 407(e)(3)') (Appendix 1) and a sample of the disclosure that our Alternative Item 407(e)(3) would require (Appendix 2). The alternative rule language and sample disclosure were developed in consultation with three other multiservice global human resource consulting firms: Hewitt Associates, Towers Perrin and Watson Wyatt. Alternative Item 407(e)(3) achieves the following:

- It preserves the current Item 407(e)(3) disclosure for consulting firms that provide executive and/or director compensation advice to management or the compensation committee and their mandates.
- It applies to *all* consultants retained by the committee, whether or not other services are provided to the registrant. In this respect our proposed alternative creates a level playing field for the all consulting firms retained by compensation committees.
- It provides investors with important context about the process and criteria used to select the committee's compensation consultant. We believe this will result in a more fulsome and effective disclosure than either the current Item 407(e)(3) or Proposed Item 407(e)(3).

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<sup>1</sup> For simplicity we use the terms 'compensation committee' or 'committee' as shorthand for the board of directors or a committee of the board that retains a consultant to advise on executive and/or director compensation matters.



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- It uses revenue concentration as a trigger for disclosure of fees and details regarding the protocols considered by the compensation committee to ensure consultant objectivity. This expanded disclosure (fees and protocols) would be triggered where the consulting firms' revenues from the registrant (including fees from the committee) exceed 0.5% of the consulting firm's total revenues. In this manner, fees can be put into the context of the consulting firm's total economic relationship with the company, the potential for conflict can be fairly assessed, and investors can see how the committee exercised its judgment to ensure that it is receiving objective advice.

Alternative Item 407(e)(3) provides for the following disclosure in all cases where the compensation committee retains a consultant, whether a single service boutique or a multiservice firm, for advice on executive or director compensation:

- **Process for selecting the consultant**, including how the criteria are determined, how potential consultants are identified, the screening and interview process and the role, if any, played by management in choosing a consultant
- **Selection criteria**, including for example, industry or other relevant experience, staff support, data and information resources, global experience and data, and related expertise on matters such as tax, accounting, disclosure and pensions

In addition, where consulting firm fees exceed the revenue concentration threshold (described above), the following additional disclosures would be required:

- **Consulting fees** for services performed by the firm for the committee and for all other services performed by the consulting firm for the company.
- **Protocols in place to ensure objective and quality advice**, including full disclosure of the factors considered by the committee regarding the consulting firm's relationship with the company including fees and services, direct reporting relationship to the committee without management intervention, procedures regarding information and recommendations that can and cannot be shared with management, executive sessions with the committee without management present, annual review of the consultant's performance, the structure of the consultant's personal compensation and reporting relationship, and any policies, procedures or safeguards that the consulting firm has in place to ensure that management does not inappropriately influence the consultant's advice.



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We believe that Alternative Item 407(e)(3) would provide investors with insights into how committees select their consultants and why, and would provide robust information on the steps taken to ensure consultant objectivity. And by providing a revenue concentration trigger to fee disclosure, the alternative approach minimizes the risk that investors will be misled by a simplistic fee disclosure approach. In this way, we believe our Alternative Item 407(e)(3) would provide more effective disclosure and would truly enable investors to assess whether the compensation committee members addressed any incentives that may impact a compensation consultant's recommendations regarding executive compensation.

Our proposed alternative does *not* require disclosure where consultants work *only* for management (beyond that required under the current rule). As discussed in more detail below, working for management in multiple capacities cannot create a conflict of interest and therefore, further disclosure about that relationship is not needed.

### **Proposed Item 407(e)(3) Does Not Effectively Address the Commission's Concerns**

We oppose Proposed Item 407(e)(3) because it is based on the false premise that compensation consultants who work for multiservice firms such as Mercer are failing to provide their clients with objective advice and that investors would be in a better position than compensation committees to determine whether conflicts of interest exist or are being addressed. Even if conflicts of interest were pervasive, fee disclosure is a poor proxy for determining whether a consultant provides objective advice.

Proposed Item 407(e)(3) does not improve investors' ability to understand or assess the *role* of the consultant. We believe it will require the provision of potentially misleading information that will not enable investors to assess potential conflicts but rather will serve as a de facto standard that a conflict exists whenever the disclosure is made because a multiservice firm is used to provide services. We believe our Alternative Item 407(e)(3) precisely addresses the objectives of enabling investors to better assess our role and the potential for conflicts and how that potential is mitigated. Expanding current disclosures about the *committee's* decision-making process and its rationale for decisions is the only way to help investors better assess decisions.

*1. Executive pay levels are not influenced by perceived consultant conflicts of interest*



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The proposed rule is based on the false premise that compensation consultants who are employed by multiservice firms, such as Mercer, fail in their role to provide objective advice to their compensation committee clients and instead enhance management's compensation levels in an effort to establish, preserve or enhance consulting fees from other engagements with management. The corollary premise, also false, is that single service boutique firms recommend lower pay for management and therefore, the use of such firms should escape investor or regulatory scrutiny.

These premises are intuitively appealing but flawed nonetheless. There is no evidence that companies that use multiservice firms have higher CEO pay or that those who use single service boutiques have lower pay. In fact, at least three independent academic studies have rigorously analyzed the data and found no correlation between the consulting firm's business model and US CEO pay levels.<sup>2</sup>

## *II. Compensation Committees should be able to rely upon protocols adopted by multiservice consulting firms to mitigate any potential conflicts*

The one-dimensional fee disclosure approach to determining conflicts applied in Proposed Item 407(e)(3) does not take into account the steps that have been taken by many multiservice consulting firms and by registrants to mitigate potential conflicts of interest. For example, Mercer has adopted processes and procedures to minimize the potential for the firm's relationship with a client to inappropriately influence executive compensation advice. We believe that the academic studies cited above are evidence that the standards have in fact worked.

- In addition to its overall Code of Conduct, Mercer has adopted **Global Business Standards** (copy attached) to manage any potential conflicts related to executive compensation consulting. These are incorporated into our engagement letters, which are required for all client relationships.

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<sup>2</sup> The Incentives of Compensation Consultants and CEO Pay, by Brian Cadman (David Eccles School of Business University of Utah), Mary Ellen Carter (Carroll School of Management Boston College) and Stephen Hillegeist (INSEAD), February 2009; Executive Pay and "Independent" Compensation Consultants, Kevin J. Murphy (Marshall School of Business, University of Southern California), Tatiana Sandino (Leventhal School of Accounting, Marshall School of Business, University of Southern California), April 28, 2009; and Economic Characteristics, Corporate Governance, and the Influence of Compensation Consultants on Executive Pay Levels, Christopher S. Armstrong (The Wharton School, University of Pennsylvania), Christopher D. Ittner (The Wharton School, University of Pennsylvania), David F. Larcker (Stanford University Graduate School of Business, Rock Center for Corporate Governance), June 12, 2008.



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- Specifically, we establish and document clear **reporting relationships** between the consultant and the committee, and rules regarding whether and how **information and recommendations are shared** with management team members.
- We **disclose** to our compensation committee clients Mercer's relationship with the client organization, including fees and services.
- **Our compensation programs** for consultants also support objectivity. Consultants are not paid bonuses or commissions for sales of other services to clients. Consultants' compensation does not depend on the compensation programs they design.
- **Our reporting structure** also supports objectivity. Executive compensation consultants do not report to client relationship managers or to consultants in other lines of business. They report through our human capital line of business, of which executive compensation is one segment.
- Executive compensation consultants are required to **report to our leadership** any effort on the part of management or another Mercer consultant to influence our executive compensation advice.

We also work with our clients to establish any additional safeguards tailored to meet their specific needs or concerns. We believe that our Global Business Standards mitigate the potential for our compensation committee consultants to be inappropriately influenced by management.

### III. Fee disclosure is a poor proxy for assessing conflicts of interest

Even if one rejects the findings of the academic studies referenced earlier, the Commission's proposed fee disclosure is not a solution. We are well aware that some groups have requested committee consultant fee disclosure because they believe that it, and it alone, demonstrates that companies are receiving biased advice. This is a flawed conclusion and the Commission is in effect lending credence to these arguments in Proposed Item 407(e)(3). In reality, fee disclosure is a poor proxy for determining whether or not a conflict of interest is influencing a consultant's advice. It suggests that there is only one dimension to determining whether advice is unbiased. And yet, the figures can be prejudicial and



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misinterpreted, may reveal proprietary information and give no insight into the committee's decision-making process.

The implication of the proposed disclosure is that the mere difference in magnitude between fees paid for executive compensation consulting services and fees paid for other services indicates that the consulting advice was not objective. However, the existence of a disparity does not indicate that the committee received biased advice. For example, a single service boutique firm's financial stability may be threatened if it provides advice that a client does not want to hear and yet, under the approach in Proposed Item 407(e)(3), the lack of disparity (since there are no other services) would indicate that there is no conflict and therefore no need for disclosure. Our Alternative Item 407(e)(3) enables investors to assess this risk through revenue concentration disclosure.

Similarly, an affiliate of Mercer might have an economic relationship with a registrant that is several multiples of Mercer's executive compensation fees. The fact of the affiliate relationship may not be known to Mercer and even the registrant's management team may be unaware of it. Under that fact pattern, there is no conflict and yet the Commission's disclosure strategy would presume that a conflict exists.

### **Proposed Item 407(e)(3) Will Reduce Competition and Registrant Choice**

Proposed Item 407(e)(3) is broad in scope. It would apply regardless of whether the compensation consulting services were performed for management or the compensation committee. In operation, however, its effect will be narrow. The rule would effectively exempt from disclosure the fees and services of single service boutique operations, which generally do not have the capability to provide services beyond compensation consulting. Accordingly, only the clients of a handful of global, multiservice firms, such as Mercer, would be subject to this disclosure requirement. Further, to our knowledge, because of the size and breadth of our parent company, Mercer is the only firm that would be materially affected by the requirement to disclose fees and services performed by affiliates.

Given the burdens to registrants associated with fee disclosure, the consequence of implementing Proposed Item 407(e)(3) would be to discourage registrants from using multiservice firms such as Mercer in more than one capacity and therefore diminish the consulting resources available in the market. This in turn will discourage multiservice firms from providing executive compensation services. This outcome is contrary to the interests of investors who benefit from the breadth and depth of resources that large, global multiservice





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firms such as Mercer bring to the issues of executive and director compensation. Furthermore, as previously stated, registrants would likely turn to single service boutique consulting firms whose fees would not need to be disclosed, yet these firms may be influenced by the high percentage of revenues that a single client may represent.

The audit firm model is frequently cited as the expected outcome of consultant fee disclosure. However, we believe the economics of the compensation consulting business differ from the audit model. Audit fees for large companies can be very substantial (e.g. around \$20 million a year) and the relationships last for multiple years because it is costly and onerous to change auditors. If an audit firm is precluded from performing other services for a given company, the audit fees still provide a healthy revenue stream from that company. On the other hand, executive compensation consulting arrangements for committees at large companies may be in the range of \$200,000, while the revenue opportunity for human resourcing consulting services with a large company may be many millions. Further, while registrants may not choose to go out to bid on compensation consulting every year, the work is always at risk. It is not expensive or particularly burdensome to change consultants.

As a result of these economics, Mercer is generally unwilling to accept compensation committee engagements that are conditioned upon agreeing that Mercer or its affiliates will be excluded from other opportunities with the company. We believe that the other multiservice firms are similarly positioned. Therefore, an independence requirement, whether mandated directly or done indirectly through fee disclosure, will reduce competition in the consulting industry and reduce client choice.

This is not hyperbole. It is already occurring as some directors are avoiding criticism by not using a firm also used by management for other services – a trend that Proposed Item 407(e)(3) will exacerbate. The multiservice firms have lost market share according to Equilar's Executive Compensation Trends July 2009, which reported that the single service boutiques had a 39.3% market share in 2008, up from 35% in 2006.

This diminished choice has adverse implications for executive compensation program design. Only the large multiservice firms have global knowledge and presence, have the financial resources to invest in substantial databases and research, or the depth of talent to staff intensive projects such as a merger or acquisition. As companies are being asked to assess risk in their incentive plans, multiservice firms have the analytic tools and the business consulting expertise to assist them.



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## **Fee disclosure should not apply to relationships with management**

The rationale for Proposed Item 407(e)(3) does not support extending fee disclosure to services provided solely for management. There is no basis for requiring disclosure of fees where **all** services performed by the consulting firm are at the behest of management. There can be no conflict of interest, actual or potential, where the registrant is the sole client. In these cases, the committee is well aware that materials presented by management or by management's consultants reflect management's recommendations. It is up to the committee to exercise judgment, being aware of the obvious potential for bias, in evaluating the quality and objectivity of such recommendations. Therefore, we argue, that it is sufficient for investors to know who management's consultant is and the consultant's mandate with respect to executive compensation as is currently required under Item 407(e)(3).

Requiring disclosure in the case where all services are performed for management will only serve to deter management from engaging multiservice firms in order to avoid having to disclose the fees it pays for other services, particularly where there may be sensitivities, e.g. where the consultant evaluated a potential acquisition.

Disclosing fees for management work provides no information about conflicts or insight into how the compensation committee makes compensation decisions. For this reason, even investors have not asked for this information. They have focused on the work done for the committee where the ultimate decision-making responsibility rests. Implementation of management fee disclosure would have unintended consequences, including impaired choice in the marketplace and burdensome compliance challenges. Therefore, our Alternative Item 407(e)(3) expands existing disclosure requirements only where the consulting firm works for the committee, and we ask the SEC in its final release to clarify that where consulting services are provided solely to management, there would be no obligation to disclose the nature of other services or any fees.

## **Disclosure should not include the nature of other services or individual fees**

We believe that a detailed description of the other services is *not* material to an investors' ability to assess the role of the consultant, the committee's decisions or the potential for conflicts of interest. We urge the Commission to limit the disclosure to a very general description of the nature of the services and fees in the aggregate to avoid disclosing competitive or sensitive information. Detailed disclosure of services or individual fees could



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create competitive issues for the consulting firms. And more detailed information could also create problems for the registrant, such as disclosures about pursuing a potential merger or acquisition.

### **Fee disclosure should not extend to affiliates**

Proposed Item 407(e)(3) would require registrants to disclose fees for services performed not just by the compensation consulting firm but by all affiliated entities of such firm. In the case of a consultant such as Mercer, which is owned by MMC, the consultant's affiliates may have broad global reach across diverse sectors. The flawed premise of fee disclosure, that disparity between fees is the determinant of objective consulting advice, is put in sharp relief by a structure, such as that at MMC, where affiliated companies have separate management. Executive compensation consultants at Mercer are unlikely to know the nature and scope of services provided by affiliated companies for clients around the world. There can be no conflict where there is no knowledge. And even where there is knowledge, there is no impact on the consultant's compensation since incentives for committee consultants are based on executive compensation revenues. Registrants may choose to disclose that compensation committees considered the reach of affiliate relationships and the organizational structure of the consultant in determining whether it was obtaining objective advice, but fee disclosure of affiliate relationships will not provide any useful information to investors. We request that the Commission eliminate this requirement in the final rule as it is not narrowly tailored to meet the Commission's stated objectives.

### **Practical challenges of Proposed Item 407(e)(3)**

Proposed Item 407(e)(3) raises several implementation issues that should be addressed by the Commission in a final rule. These include potential disclosure of proprietary or competitive information, definitional issues and the practical problems associated with accurately disclosing fees.

#### *1. Proprietary or competitive information*

In addition to being misleading, specific fee disclosure may result in competitive or proprietary information being disclosed. For example, if Mercer is the investment consultant and the executive compensation consultant, the investment consulting fees would be disclosed as well as a description of the services. Competitors could use that information to gain insight into how Mercer prices its services and could target its clients. Registrants



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would also be reluctant to disclose services involved with potential mergers and acquisitions or changing a subsidiary or a division's business strategy. The easiest path for registrants to avoid these types of disclosure is to avoid using a multiservice firm for executive compensation consulting, thus limiting competition as discussed above.

## *II. Definition of 'executive' and 'compensation consultant'*

Requiring fee disclosure for executive compensation consulting services raises the issue of the definition of executive. Companies define 'executives' in different ways; there is no consensus on who is an executive beyond the top tier of management. This issue exists today under 407(e)(3). However, since fees are not attached to the disclosure and the disclosure of other services is not required, our experience is that companies are using a definition that approximates 'executive officer'. Most seem to focus the disclosure on the top tier of executives or on services that support recommendations made to the compensation committee.

Fee disclosure requires a higher level of precision. Without clarity, the requirement will be difficult if not impossible to implement. Compensation program design and administration is not typically done in a way that is as granular as the disclosure would seem to require. Many programs cover management employees (which would include executives) as well as non-management employees. It is not feasible for us to manage the financial aspects of this work so that fees on an integrated design project, for example, could be reported in such granular fashion.

We encourage the Commission to clarify that any work performed for the *compensation committee* triggers disclosure. If the Commission persists in requiring disclosure of work done for management, then executive should be defined as 'executive officer.'

We believe that the final rule should also clarify that a compensation consultant does not include a company that sells only data to a client without any related advice or recommendations. This should be the case regardless of whether the data is purchased at the behest of the committee or by the registrant's management.

## *III. Fee disclosure accuracy*

If fees for other services are required to be disclosed under the final rule, we urge the Commission to set a reasonable, good faith standard. Many registrants operate under



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multiple entities around the world; their financial systems are often not linked. Multiservice consulting firms may also operate under different names in different geographies or have affiliates, making it difficult for registrants to ensure that they have captured correctly all the fees paid to the compensation consulting firm for purposes of the disclosure. Therefore, we believe that the disclosure standard should be a good faith estimate of the fees paid.

## **The Commission's Request for Comments**

The following section addresses certain of the questions in the Proposed Rule related to the Proposed Item 407(e)(3) amendments that have not been addressed in the above discussion:

*Q: Are there additional disclosure regarding the potential conflicts of interest of compensation consultants that should be required? For example, would requiring disclosure of any ownership interest that an individual consultant may have in the compensation consultant or any affiliates of the compensation consultant that are providing the additional services to the company help provide information about potential conflicts?*

Our Alternative Item 407(e)(3) includes many additional disclosure points that we believe would be useful to investors in their assessment of the potential for conflicts of interest. Requiring disclosure of ownership interests of individual consultants will not shed any additional light on the potential for conflicts. Since all consultants have an obvious interest in the success of their employer – whether a single service boutique or a multiservice firm, we believe no legitimate purpose is served by disclosing this information. To do so would be an unwarranted invasion of the privacy of the individual consultants.

*Q: The proposed disclosure requirement calls for disclosure of services during the prior year. Should we also require disclosure of any currently contemplated services in order to capture a situation where the compensation consultant provides services related to executive pay in one year and in the next year receives fees for other services? If so, should we require that fees for the currently contemplated services be estimated? Is there a better way to require that information, for instance through the date of filing? Should we require disclosure for the prior three years?*

Expanding the disclosure requirement would be inordinately burdensome on registrants and on the multiservice firms, further compounding the anticompetitive effect of Proposed Item 407(e)(3). To include 'currently contemplated services' will only raise definitional issues of



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what is or is not contemplated. Does it include services for which RFPs have been issued? Proposals received? Does it matter whether the company has even asked the consultant about performing the services? For example, if an internal decision has been made to freeze a pension plan, but the registrant's actuary has not yet been engaged but certainly will be, is that a contemplated service? In order to avoid disclosure, will companies time their RFP or decision-making process to a date beyond their proxy filing?

It will be difficult for us to help our clients comply with the Proposed Rule even if it becomes effective for services performed in 2009. To require three years of disclosure would be very burdensome on both the registrant and on us, but would not provide any more meaningful information to investors than one year of fee disclosure. We encourage the Commission not to expand fee disclosure beyond services performed in the preceding fiscal year.

*Q: Is the proposed exclusion for consulting services that are limited to broad-based, non-discriminatory plans appropriate? Should we consider any other exclusion for services that do not give rise to potential conflicts of interest? If so, describe them.*

We believe this exception is appropriate and important although its significance would be diminished if the Commission adopts our recommendation to eliminate fee disclosure where all services are performed for management. We suggest that other services which should fit within the exception include executive restoration plans (where the plan mirrors a qualified plan maintained by the registrant except for elimination of compensation and benefit limits imposed by the Internal Revenue Code) and requests for shareholders to approve share plan replenishment.

*Q: Should we establish a disclosure threshold based on the amount of fees for the non-executive compensation-related services, such as above a certain dollar amount or a percentage of income or revenues? If so, how should the threshold be computed?*

We proposed a revenue threshold trigger for expanded disclosure of protocols to mitigate the potential conflict of interest and of fees. We prefer our percentage of revenue approach rather than a fixed dollar amount. It is difficult to set an appropriate fixed dollar amount that would be meaningful for all circumstances and remain so over time. Our revenue threshold addresses the revenue concentration issue that is at the heart of investor concerns about conflicts.



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*Q: Would disclosure of the individual fees paid for non-executive related services provided by the compensation consultants be more useful to investors than disclosure of aggregate fees paid for non-compensation related services provided?*

We strongly oppose individual fee disclosure. This exacerbates the competitive and proprietary and practical concerns raised earlier in this letter, but does not provide meaningful information for investors to use in assessing the potential for conflicts of interest.

*Q: Are there other categories of consultants or advisors whose activities on behalf of companies should be disclosed to shareholders? If so, what kind of disclosure would be appropriate?*

As we discussed above, investors should have information about the selection process and criteria, regardless of whether the consultant is a multiservice firm or a single service boutique. In addition, in our experience, two external influencers of executive compensation are search firms and outside counsel. Search firms influence the level of executive pay by making recommendations to committees and registrants often based on anecdotal data. The registrant's outside counsel are in many cases very involved with the activities of the compensation committee in addition to advising the registrant. Counsel for executives and for the registrant may also influence employment terms, such as severance and change in control. The role played by these advisors should be more transparent to investors as well.

We thank the Commission for the opportunity to provide our perspective on Proposed Item 407(e)(3). We would be happy to discuss our Alternative Item 407(e)(3) or to answer any questions about our comments. I can be reached at 415 743 8748.

Sincerely

A handwritten signature in black ink that reads "Diane L. Doubleday".

Diane L. Doubleday  
Worldwide Partner



## Appendix 1

### Alternative Item 407(e)(3)

#### §229.407 (Item 407) Corporate governance.

\* \* \* \* \*

(e) \* \* \*

(3) \* \* \*

(iii) Any role of compensation consultants in determining or recommending the amount or form of executive and director compensation (other than any role limited to consulting on any broad-based plan that does not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant, and that is available generally to all salaried employees) during the registrant's last completed fiscal year, identifying such consultants, stating whether such consultants were engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person, describing the nature and scope of their assignment, and the material elements of the instructions or directions given to the consultants with respect to their performance of their duties under the engagement.

(iv) If applicable, the compensation committee's (or persons performing the equivalent functions) process and criteria for selecting or determining whether to retain a compensation consultant as an advisor to the compensation committee (or persons performing the equivalent functions), including describing any role played by management in the selection or retention of the consultant to the compensation committee. If the compensation committee (or persons performing the equivalent functions) has decided not to use a compensation consultant, explain the rationale for this decision.

(v) If the compensation committee reasonably determines that the total fees paid to the compensation consultant for all services provided to the registrant and its affiliates during the preceding fiscal year exceed one-half of one percent (.5%) of the total revenues of the consultant from all sources for that fiscal year, then disclose the general nature of all services provided; specify for such year the aggregate fees paid to the consultant for advisory services to the compensation committee (or persons performing equivalent functions) and the aggregate fees paid to the consultant for all other services provided to the registrant and its affiliates; and discuss the protocols established by the compensation committee (or persons performing equivalent functions) to ensure that the consultant is able

to provide quality and objective advice and recommendations and is not inappropriately influenced by the registrant's management.





## Instruction to Item 407(e) (3) (iv) and (v)

Aspects of the process for selecting or determining whether to retain a compensation consultant that should be addressed if applicable and material include: how the selection criteria are determined; how qualified consultants are identified to perform the required services; the process for screening and interviewing qualified candidates; and the role of management in the selection process. Criteria for selecting compensation consultants that should be addressed if considered and material include: level of experience in advising companies in the registrant's industry; understanding the registrant's business and nature of the compensation issues confronted by the registrant; adequate staffing, expertise and thought leadership required to perform the requested services; appropriate informational resources, data, research and tools to undertake the services requested; access to related expertise (such as accounting, tax, actuarial, and pension); global experience, understanding and presence; and ability to provide quality and objective advice and recommendations.

Protocols the compensation committee may have in place to ensure the consultant is able to provide quality and objective advice and recommendations that should be addressed if material and applicable include:

- Requiring that the consultant be directly hired and fired by and have a direct reporting relationship to the committee;
- Ensuring that the consultant has direct, unfettered access to the committee chair and committee members;
- Ensuring that the consultant meets in executive session without management of the registrant present;
- Performing an annual review of the consultant's work;
- Receiving an annual update from the consultant on the consulting firm's relationship with the registrant, to enable the committee to evaluate and monitor the nature of the relationship, including a summary of all services (and related fees) performed by the consulting firm for the registrant during the preceding fiscal year (including fees from all services provided to the registrant relative to the consulting firm's total revenue); and
- Reviewing the consulting firm's policies, procedures, and safeguards to ensure that the consultant who provides the executive or director compensations services to the compensation committee is not inappropriately influenced by the registrant's management.

# MERCER



MARSH MERCER KROLL  
GUY CARPENTER OLIVER WYMAN

## Appendix 2

### Sample Disclosure under Alternative Item 407(e)(3)

#### How We Selected the Consultant

As permitted by the Compensation Committee (the “Committee”) charter, the Committee has retained XYZ Firm as its executive compensation consultant to assist in the Committee’s evaluation of the company’s executive officer compensation program and incentive plan design. The Committee’s consultant selection process included three steps. Board members were asked for potential candidates, the Committee worked with the Company’s chief human resource officer to prepare a request for proposal sent to seven candidates, and the Committee made its selection following committee interviews of three finalists selected based on the proposal responses.

In making the decision to select the incumbent, the Committee was impressed with the consultant’s industry knowledge and by her experience on several matters of particular importance to the Company’s unique business circumstances. The consulting firm’s database includes robust data relevant to the company. We were also influenced by the recommendations provided by other clients of the consultant, which noted the consultant had been both practical and creative in addressing difficult compensation and business issues. Finally, the individual consultant has a team and resources capable of meeting the Committee’s needs in a timely and effective manner.

#### How We Work With the Consultant

The Committee, with management input, determines the work to be performed by the consultant. The consultant works with management to gather data required in preparing analyses for Committee review.

The Compensation Committee has the sole authority to retain and terminate the executive compensation consultant. In considering the advice provided by the consultant, and whether to retain the consultant, the Committee requires that the Company regularly inform the

Committee of all work provided or to be provided by the consultant’s firm in addition to the executive compensation services provided to the Committee, and the fees charged or to be charged for those services. Annually, the Committee evaluates the quality of the services provided by the consultant and determines whether to continue to retain the consultant.



Specifically, the consultant provides the Compensation Committee with market trend information, data and recommendations to enable the Compensation Committee to make informed decisions and to stay abreast of changing market practices. In addition, the consultant provided analysis on the alignment of pay and performance and assisted in the process of preparing this disclosure. While it is necessary for the consultant to interact with management to gather information and obtain recommendations, the Committee has adopted protocols governing if and when the consultant's advice and recommendations can be shared with management. Ultimately, the consultant provides his recommendations and advice to the Compensation Committee in an executive session where company management is not present, which is when critical pay decisions are made. This approach ensures the Compensation Committee receives objective advice from the consultant so that it may make independent decisions about executive pay at the company.

## Other Consultant Work With the Company

During our selection process, we were fully informed of the other services XYZ provides to the company. XYZ provides outsourcing and actuarial services to the company. The total fees paid to XYZ for all these services in 2009 exceeded the revenue concentration threshold in Item 407(e)(3)(v). The fees paid to XYZ for executive compensation consulting services to the Committee was \$200,000 and for all other products and services was \$3 million, above the threshold of 0.5% of the consulting firm's total revenues. The Committee is confident that the advice they receive from the individual executive compensation consultant is objective and not influenced by XYZ's relationship with the Company because of the rigorous procedures XYZ and the Committee have in place. These include:

- The consultant receives no compensation based on the fees charged to the Company for other services;
- The consultant does not participate in XYZ sales meetings regarding opportunities at the Company
- XYZ's Code of Conduct specifically prohibits the individual consultant from considering any other relationships XYZ may have with the Company in rendering her advice and recommendations; and
- The protocols for the engagement (described above in How We Work With the Consultant) limit how the consultant may interact with management

The Committee believes the consultant's qualifications, expertise and protocols ensure that the advice provided to the Committee is both objective and of the highest quality available.



# Executive Remuneration Solutions Global Business Standards

Mercer is committed to providing objective advice to all of our clients. Ensuring the objectivity of consulting advice on executive remuneration is a corporate governance issue around the globe and is critical to our role as a trusted advisor to our clients. Accordingly, Mercer has adopted these Global Business Standards for its Executive Remuneration Solutions to manage potential conflicts of interest and to preserve the integrity of our advice. Our Executive Remuneration Solutions encompass all forms of remuneration (cash, equity, benefits and perquisites) for executives as well as for members of organizations' governing boards. The Global Business Standards address how we (i) manage the executive remuneration consulting relationship, (ii) ensure the quality of executive remuneration consulting services and (iii) structure our business to manage potential conflicts of interest.

## Managing the relationship

A clearly defined client relationship provides the foundation for ensuring the objectivity and integrity of our advice. At the beginning of each engagement, our consultants establish with clients a clear mutual understanding of our role and client reporting relationship, premised on our commitment to providing objective advice.

An engagement letter documents the key elements of the assignment and relationship: roles, responsibilities, scope of services, fees, timeframe and client reporting relationships including how and to whom information and recommendations are communicated. The engagement letter also sets out the parties' expectations regarding certain disclosures, such as information about other services provided by Mercer to the client.

## Ensuring the quality of our advice

Mercer is committed to providing the highest quality advice to our clients. To ensure that our professional standards are upheld, executive remuneration consulting services are performed only under the direction of a human capital business principal. All consulting advice is peer reviewed pursuant to Mercer's global professional standards before it is rendered. In addition, the structure of ongoing executive remuneration consulting relationships is subject to annual review to ensure that it continues to best serve the interests of the client and properly preserves the objectivity of our advice.

## Structuring our business

The structure of our business not only facilitates the seamless exchange of our best thinking but also demonstrates to employees and clients the integrity of our advice. Our human capital business is accountable for all of Mercer's executive remuneration consultants. Our human capital business leaders – not client relationship managers – evaluate performance and determine remuneration for all executive remuneration consultants. Consultants are not compensated based upon client revenue from other lines of business or other MMC companies other than to the extent that all employees of MMC benefit from the overall success of MMC and its subsidiaries.

Mercer's human capital business leadership requires our consultants to seek guidance from them whenever there is any question that our objectivity or integrity is at risk of being compromised. Consultants may discontinue executive remuneration consulting relationships where apparent or actual conflicts that would impact the quality or objectivity of our advice cannot be resolved to both our clients' and our satisfaction.