New York
Menlo Park
Washington DC
London
Paris
Madrid
Tokyo
Beijing
Hong Kong

Davis Polk

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

212 450 4000 tel
212 701 5800 fax

Re: Comments on Proposed Rules Relating to Listing Standards for Compensation Committees (the "Proposal")

Release Nos. 33-9199 and 34-64149
File Number S7-13-11

April 28, 2011

VIA E-MAIL: rule-comments@sec.gov

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

Dear Ms. Murphy:

We are submitting this letter in response to the solicitation by the Securities and Exchange Commission for comments on the proposed rules to implement Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which amends the Securities Exchange Act of 1934 by adding Section 10C. Section 10C requires the Commission to direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer (subject to certain exemptions) that does not comply with the requirements that each member of the compensation committee of the board of directors of an issuer be a member of the board of directors of the issuer and independent. The Commission's rules must provide that, in determining "independence" for this purpose, the national securities exchanges and the national securities associations consider relevant factors, including: (a) the source of compensation of a board member, including any consulting, advisory or other compensatory fee paid by the issuer to such board member; and (b) whether a board member is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer.

In addition, Section 10C also directs the Commission to identify factors that affect the independence of a compensation consultant, legal counsel or other adviser to a compensation committee, which factors the compensation committee of a board of directors of a listed issuer must consider when selecting such consultant, legal counsel or other adviser to the compensation committee. Further, Section 10C requires an issuer to disclose in any proxy statement for an annual meeting of the issuer's shareholders (or a special meeting in lieu of the annual meeting) occurring on or after the date that is one year after the enactment of Section 10C, in accordance with regulations of the Commission, (a) whether the compensation committee of the issuer's board of directors retained or obtained the advice of a compensation consultant and (b) whether the work of the

compensation consultant has raised any conflict of interest, and, if so, the nature of the conflict and how the conflict is being addressed.

We appreciate the opportunity to comment on the Proposal.

Compensation Committee Member Independence Requirements

Proposed Rule 10C-1(b)(1): The final rules should continue to permit each exchange to establish its own independence criteria, provided that the exchange considers the relevant factors specified in Section 10C relating to sources of compensation and affiliate relationships.

Proposed Rule 10C-1(b)(1) relates to the independence of compensation committee members. We strongly support the Commission's approach in permitting the exchanges to establish their own independence criteria. As the Commission notes as a point of reference, Section 301 of the Sarbanes-Oxley Act included bright-line prohibitions mandated for members of an audit committee of an issuer's board. However, the Dodd-Frank Act is less prescriptive with respect to the determination of compensation committee independence, stating instead that the rules of the Commission shall require that the national securities exchanges and the national securities associations "*consider relevant factors*," including certain fees and affiliations with the issuer.

We agree with the Commission that this is an important distinction that merits taking a different approach in rulemaking implementation, including permitting the exchanges significant flexibility in developing standards that recognize the differences between audit committees and compensation committees. The relevant factors and analysis of independence for an issuer's audit committee differ from the factors and analysis of independence of a compensation committee. In addition, as considered by the Commission, most exchanges that list equity securities require that the board of the issuer be composed of a majority of directors that qualify as "independent" under their listing standards. For example, in addition to specific bright-line standards, the boards of directors of issuers listed on the New York Stock Exchange must already make an affirmative determination that a director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company) before determining the independence of a director.[1] Similarly, Nasdaq corporate governance requirements indicate that boards have a responsibility to make an affirmative determination that no relationship exists that would impair independence.[2]

Proposed Rule 10C-1(b)(1) is consistent with the existing mandate of the exchanges to establish governance standards for listed companies, will provide an opportunity for the exchanges to review their current board independence listing standards as they relate to compensation committees and ensure that boards consider the relevant factors for compensation committees, including those prescribed by the Dodd-Frank Act. Because the statute does not mandate any bright-line rules with respect to compensation committee independence, we believe that the final rules should make clear that the exchanges may implement listing standards by requiring relevant factors for board consideration as expressly provided in the Dodd-Frank Act, rather than adopting per se prohibitions on specific relationships. While we respond below to the specific questions that are asked in the Commission's release, we do not believe that there should be any inference that the existing listing standards do not already adequately address the considerations of all of the facts and circumstances surrounding a director's relationship with the issuer, or the issuer's management, that may affect

[1] NYSE Corporate Governance Standards, Rule 303A.02(a).

[2] Nasdaq Stock Market Corporate Governance Requirements, Rule 5605(a)(2).

compensation committee member independence and are consistent with the objectives of the Dodd-Frank Act and the proposed rulemaking.

Proposed Rule 10C-1(b)(1): The final rules should defer to the exchanges on whether to include a "look-back" period that relates to independence factors.

The Commission has requested comment as to whether the required independence factors that are to be considered by a board for purposes of its compensation committee should include a "look-back" period. As the Commission acknowledges, Rule 10A-3 does not include a "look-back" period for audit committee member independence determinations. We believe that whether a "look-back" period should be included in any particular factor relevant to determining the independence of compensation committee members should be determined by the exchanges for purposes of their own listing standards. The Commission notes that the listing standards of the exchanges currently have "look-back" periods included in the exchanges' respective definitions for board independence. As the exchanges consider the independence factors relevant to members of compensation committees of boards of the issuers listed on their exchanges, the exchanges will be best-positioned to determine whether a "look-back" period is appropriate for a particular independence factor.

Proposed Rule 10C-1(b)(1): The final rules should defer to the exchanges on whether to include additional factors.

As discussed above, we support the Commission's approach in permitting the exchanges to establish their own independence criteria, which includes determining whether other factors not required under the Dodd-Frank Act may also be appropriate. The Commission has requested comment as to whether the exchanges should be required to consider board interlocks as an independence factor for purposes of a compensation committee. We believe that, because of the existing requirement in Item 407(e)(4)(iii) of Regulation S-K of the Exchange Act to disclose and describe in an issuer's annual proxy statement any board interlocks among the persons serving as executive officers, directors and compensation committee members, the consideration of such relationships effectively becomes part of evaluating compensation committee composition. In addition, NYSE listing standards currently prohibit a director from being considered independent if the director or an immediate family member is, or has been with the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee.[3] Given these existing requirements, we do not believe that it is necessary for the Commission to include board interlocks as a mandatory factor.

The Commission has also requested comment as to whether the exchanges should be required to include as a mandatory factor for consideration by listed issuers for purposes of compensation committee independence the employment of a director at a company that is included in the issuer's compensation peer group. We believe that such a requirement may unduly restrain an issuer in setting the composition of its compensation committee. An issuer's *compensation* peer group may draw from a significant number of companies included in a broad index that corresponds to the market capitalization or annual revenues of the issuer and spans a number of disparate industries. The compensation peer group is often based on recommendations of, and changes in recommendations offered by, the compensation committee's compensation consultant. In determining and monitoring the independence of committee members, nominating and governance

[3] NYSE Rule 303A.02(b)(iv).

committees (or the entire board) should be able to consider all factors which they deem relevant and we believe that overly prescriptive rules are not necessary.

Proposed Rule 10C-1(b)(1): The final rules should not provide a bright-line test for consideration of the affiliated person factor and do not require additional or different guidance regarding affiliations.

We support the Commission's approach in requiring the exchanges to include in their own listing standards consideration of affiliate relationships for purposes of a board's compensation committee, as required by Section 10C, but deferring to the exchanges to determine whether additional guidance is necessary. We agree with commentators noted in the Proposal who believe that directors affiliated with large shareholders should continue to be permitted to serve on compensation committees because their interests are aligned with other shareholders with respect to compensation matters. Directors nominated by shareholders that are private equity or similar firms with a contractual right to nominate the director are independent from management and well-suited to serve on a compensation committee. We do not believe that the affiliated person factor requires additional or different guidance from the Commission.

Applicability of Listing Requirements

Proposed Rule 10C-1(b): The final rules should not apply to a board committee that oversees the compensation of non-employee directors of the board.

Proposed Rule 10C-1(b) will apply to the compensation committees of listed issuers, including a committee of the board performing functions typically performed by a compensation committee, even if it is not specifically designated as a compensation committee or also serves other functions. As the Commission notes in its discussion of the Proposal, "Proposed Rule 10C-1(b) would direct the exchanges to adopt listing standards that would be applicable to any committee of the board that oversees *executive compensation*" (emphasis added).[4] We recommend that the final rule make clear that it applies only to board committees that are charged with determining executive compensation, and does not apply to a committee of the board that oversees the compensation of non-employee directors of the board if such committee is different from the compensation committee.

It is not unusual for a listed issuer to delegate to a committee of the board other than the compensation committee the responsibility for determining the compensation of its non-employee directors. For example, a nominating and governance committee or similar committee tasked with the responsibility of directing the governance of an issuer and nominating directors to the board may be responsible for oversight of the compensation paid to the board's non-employee directors. We do not believe that the Commission intended Proposed Rule 10C-1(b) to apply to members of such a committee, unless this committee also acts as the compensation committee, meaning a committee whose primary responsibility is determining the compensation of the issuer's executives.

Proposed Rule 10C-1(b): The final rules should not apply to a board committee that oversees broad-based employee compensation or benefit plans.

For the reasons similar to those discussed above, we do not believe that the Commission intended Proposed Rule 10C-1(b) to apply to members of a committee responsible for making decisions with respect to the issuer's broad-based employee compensation or benefit plans in which

[4] Also, the legislative history of the Dodd-Frank Act makes clear that Subtitle E "Accountability and Executive Compensation" is designed to address shareholder rights and executive compensation practices. *See* H.R. Rep. No. 111-517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E "Accountability and Executive Compensation," at 872-873 (Conf. Rep.) (June 29, 2010).

the issuer's executive officers also participate if such committee is different from the board's compensation committee or a committee performing similar functions. For example, a board may have a separate "Human Resources" or "Employee Benefits" committee to administer broad-based employee plans maintained by the issuer, such as a tax-qualified employee pension or 401(k) plan. We recommend that the final rule make clear that it does not apply to any such committee if different from the issuer's compensation committee.

Authority to Engage Compensation Advisers; Responsibilities; and Funding

Proposed Rules 10C-1(b)(2), 10C-1(b)(4) and proposed amendments to Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act: The final rules should clarify that they are not intended to require the compensation committee to determine the independence of the issuer's in-house or outside counsel retained by management.

Proposed Rule 10C-1(b)(2) permits the compensation committee, in its sole discretion, to retain or obtain the advice of compensation consultants, independent legal counsel or other advisers. Proposed Rule 10C-1(b)(4) requires the compensation committee to consider the independence of any such advisers prior to engaging their services. The proposed amendments to Item 407(e) of Regulation S-K of the Exchange Act would require additional disclosures relating to the work of compensation consultants.

We support the Proposal's recognition that it is valuable for a compensation committee to be able to consult with and receive the perspective and advice of the issuer's in-house or outside counsel retained by management. Given the importance of this relationship, we believe the Commission should clarify that Proposed Rule 10C-1(b)(2) is not intended to preclude the compensation committee from conferring with the issuer's in-house or outside counsel retained by management. Further, we believe the Commission should clarify that, if the compensation committee seeks such consultation and advice from in-house or outside counsel retained by management, then this should not mean that the compensation committee has in fact retained such counsel as its own, and therefore must subject them to the same requirements under the proposed rules as applicable to advisers specifically retained by the compensation committee. It is often the case that the issuer's in-house or outside counsel who are directly responsible for a particular compensation agreement, plan or policy are most knowledgeable about the details of its contractual provisions or its general impact on employees. In addition, consulting with the issuer's in-house or outside counsel retained by management on any new compensation agreement or plan design feature may be the most efficient way for the compensation committee to understand the legal constraints and ramifications of any new compensation arrangement that the compensation committee is considering, and documenting any such arrangement. We believe that the Dodd-Frank Act intended for Proposed Rules 10C-1(b)(2) and (4) and the proposed amendments to Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act to apply solely to advisers that are separately and specifically engaged by the compensation committee to assist in its oversight role. In order to avoid any uncertainty, we recommend that the Commission clarify that a compensation committee's consultation with, or receipt of advice from, the issuer's in-house or outside counsel retained by management is not subject to the provisions of Proposed Rule 10C-1(b)(2) or (4) or the disclosure requirements of the proposed amendments to Regulation S-K of the Exchange Act.

Compensation Adviser Independence Factors

Proposed Rule 10C-1(b)(4): The Commission should not adopt rule amendments to Regulation S-K to require listed issuers to describe the compensation committee's process for selecting compensation advisers pursuant to the new listing standards.

The Commission has requested comment as to whether it should adopt rule amendments to Regulation S-K to require listed issuers to describe the compensation committee's process for selecting compensation advisers pursuant to the new listing standards. We do not believe that such amendments are necessary, because any such additional disclosure would result in too much detail that would not be relevant to a shareholder evaluating the issuer's executive compensation program. The disclosure will likely result in additional boilerplate description regarding process that will not assist shareholders in evaluating the compensation committee's selection of advisers, since it is quite likely that almost all issuers will address the same matters related to considerations of relevant experience, expertise, independence and costs. Including discussion in an issuer's annual disclosure to shareholders on the issuer's executive compensation will add bulk to an already lengthy document with little to no material benefit to the issuer's shareholders.

Opportunity to Cure Defects

Proposed Rule 10C-1(a)(3): The final rules should permit each exchange to establish its own procedures that would give a listed issuer a reasonable opportunity to cure any defects that would be the basis for delisting the issuer from the exchange.

We support the Commission's approach in permitting the exchanges to include in their own listing standards procedures that would give a listed issuer a reasonable opportunity to cure any defects in compliance that might constitute a basis for delisting the issuer from the exchange. As the Commission notes, the current continued maintenance standards and delisting procedures of most exchanges would satisfy the requirement for there to be reasonable procedures for an issuer to have an opportunity to cure defects on an ongoing basis. We do not believe there is any need for Proposed Rule 10C-1(a)(3) to set specific time limits providing an opportunity to cure in certain instances, because any such rule may conflict with an exchange's existing listing standard cure procedures and result in the exchange issuing unnecessarily complicated cure procedures. In the event that a compensation committee member no longer qualifies as independent for reasons outside of the member's control, we agree with the Commission specifically authorizing in Rule 10C-1(a)(3) an exchange's ability to permit the compensation committee member to remain on the committee until the earlier of the next shareholders' meeting of the listed issuer or one year from the event that caused the member to no longer qualify as independent.

Compensation Consultants Disclosure and Conflicts of Interest

Proposed amendments to Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act implementing new Section 10C(c)(2) of the Exchange Act: The proposed amendments to Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act should clarify that obtaining the advice of a compensation consultant does not include receiving unsolicited materials or materials prepared for management but made available to the compensation committee.

We agree with the Commission's approach in implementing Section 10C(c)(2) of the Exchange Act by amending the existing requirements in Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act to disclose the role of compensation consultants in the compensation committee's recommendation or determination of executive and director compensation. Two sets of disclosure

requirements that relate to the role of compensation consultants would be confusing and would have the potential to result in lengthy and unnecessary disclosure to shareholders.

We recommend, however, that the Commission clarify what is meant by the words "obtained the advice" of a compensation consultant as used in the proposed amendments and as explained in proposed Instruction 1 to Item 407(e)(3). The proposed instruction states that a compensation committee has "obtained the advice" of a compensation consultant when the compensation committee or management has requested or received advice from a compensation consultant, regardless of whether there is a formal engagement of the consultant or a client relationship between the compensation consultant and the compensation committee or management or any payment of fees to the consultant for its advice. As drafted, proposed Item 407(e)(3)(iii) and proposed Instruction 1 to Item 407(e)(3) may be interpreted to require disclosure of the receipt of unsolicited materials, which are sent or otherwise provided to a compensation committee or to management by a compensation consultant. These may include unsolicited compensation survey results, market compensation reports or other materials that include compensation data. We do not believe that the Commission intends for proposed Item 407(e)(iii) to require disclosure when neither the compensation committee nor management specifically sought advice from the consultant.

In addition, as the Commission notes, the trigger for disclosure about compensation consultants under Section 10C(c)(2) of the Exchange Act is worded differently from the trigger for disclosure under current Item 407. The current rule refers to whether compensation consultants played "any role" in the issuer's process for determining or recommending the amount or form of executive or director compensation. The proposed rule would change the disclosure trigger to require the issuer to disclose whether the compensation committee has "retained or obtained" the advice of a compensation consultant. The Commission indicates that it anticipates that the practical effect of the proposed change would be minimal, as it would be unusual for a consultant to play a role in determining or recommending the amount of executive compensation without the compensation committee also retaining or obtaining the consultant's advice. Consistent with this stated purpose, we recommend that the words "obtained the advice" of a compensation consultant be further clarified to exclude materials prepared for management by a compensation consultant engaged by management, even if such materials are made available to the compensation committee. In our experience, it would not be unusual for materials requested by management that are prepared by a compensation consultant engaged by management also to be made available to the compensation committee. Under the existing rules, if management's compensation consultant merely provides information but does not also make any recommendations about, or gives advice with respect to, determinations of executive compensation, such compensation consultant's role in the compensation committee's process should not be required to be disclosed. It is possible that proposed Item 407(e)(3)(iii) and proposed Instruction 1 to Item 407(e)(3), however, may be interpreted to require the compensation committee to consider the independence of management's compensation consultant and disclose the work of such consultant simply because the materials prepared for management were also made available to the compensation committee. We do not believe that this is the intent of proposed Item 407(e)(iii), which purports to have a similar effect as the current rules, under which disclosure would be triggered only if management's compensation consultant was actively involved in assisting the compensation committee in determining or recommending the amount or form of executive or director compensation. The adviser independence factors that are required to be considered in determining whether a conflict of interest needs to be disclosed is incongruent when applied to management's compensation consultant, as the consultant need not be independent of management.

Proposed Rule 10C-1(b)(4) and proposed amendments to Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act implementing new Section 10C(c)(2) of the Exchange Act: Proposed Rule 10C-1(b)(4) and the proposed amendments to Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act should extend the existing exclusion for a compensation consultant's advice on broad-based plans or provision of non-customized data.

The Commission has requested comment as to whether it should extend any of the current exclusions under Item 407(e)(3) to the new Section 10C(c)(2) disclosures. The current item excludes from the disclosure requirement any role of compensation consultants 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 issuer and that is available generally to all salaried employees, or limited to providing information that either is not customized for a particular issuer or is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.

We recognize that Section 10C(c)(2) requires disclosure if the compensation committee of the issuer retained or obtained the advice of a compensation consultant *and* the work of the consultant raised any conflict of interest (emphasis added). However, as the Commission notes in footnote 103 to the Proposal, the Commission has previously determined that the provision of such work by a compensation consultant does not raise conflict of interest concerns that warrant disclosure of the consultant's selection, terms of engagement or fees. We agree with the Commission's previous determination that such work does not raise conflict of interest concerns, and therefore the required disclosure would not be meaningful. Accordingly, we do not believe it is consistent with the purpose of Section 10C(c)(2) to (1) broaden the scope of the disclosure of existing Item 407(e)(3)(iii) to require the disclosure of this type of work and whether it raises any conflicts of interests or (2) require a compensation committee pursuant to proposed rule 10C-1(b)(4) to consider the independence of a compensation consultant that provides only these types of services to the compensation committee. We recommend that the existing exclusions under Item 407(e)(3) be retained in the final rules.

Application of Rules to Certain Types of Companies

Exemption for Foreign Private Issuers: Proposed Rules 10C-1(b)(2) through (4) should include an exemption for foreign private issuers.

Proposed Rule 10C-1(b)(1) exempts foreign private issuers from the compensation committee independence requirements if foreign private issuers disclose in their annual reports the reasons that they do not have an independent compensation committee. In addition, the Commission's current rules exempt foreign private issuers from the disclosure required by Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act. Further, the Commission's requirements for disclosure of executive compensation paid by foreign private issuers requires less detail than the disclosure required for domestic issuers.[5] We believe that the Commission and the exchanges have had a long practice of deferring to the corporate governance practices of a foreign private issuer's home country. We are not aware of any reason to take a different approach with respect to the ability of a foreign private issuer's compensation committee to use or select a compensation consultant, independent legal counsel or other adviser. We recommend that the Commission expressly exempt foreign private issuers from the requirements of Proposed Rules 10C-1(b)(2) through (4).

[5] *See* Item 402(a)(1) of Regulation S-K of the Exchange Act.

Further, the Commission has requested comment as to whether Exchange Act Forms 20-F and 40-F should be amended to require Proposed Item 407(e)(3)(iii) of Regulation S-K of the Exchange Act disclosure by foreign private issuers. Proposed Item 407(e)(3)(iii) requires disclosure of the role of compensation consultants retained by the compensation committee or management and any conflicts of interests that relate to the compensation consultant's provision of services. For the reasons discussed above, we believe foreign private issuers should remain exempt from the disclosure requirements of Proposed Item 407(e)(3)(iii).

Transition Period for issuers that have just completed initial public offerings: Proposed Rule 10C-1(b)(1) should include a transition period for issuers that have just completed initial public offerings.

Proposed Rule 10C-1(b)(1) relates to the independence of compensation committee members. The Commission has requested comment as to whether issuers that have just completed initial public offerings ("**IPO Companies**") should be given additional time to comply with the requirements of Rule 10C-1(b)(1). The exchanges currently provide IPO Companies a transition period to meet the listing exchange's requirements for board independence.[6] In addition, as the Commission notes, Rule 10A-3(b)(1)(iv)(A) under the Exchange Act provides time for IPO Companies to comply with audit committee independence requirements by exempting from such rules (1) all but one of the members of the audit committee for 90 days following the IPO Company's initial public offering and (2) a minority of the members of the audit committee for one year following the IPO Company's initial public offering. We believe the Commission should provide IPO Companies with at least as much time to comply with Proposed Rule 10C-1(b)(1)'s independence requirements for compensation committees as the Commission provided to IPO Companies for compliance with the independence requirements for audit committees.

* * *

We appreciate the opportunity to participate in this process, and would be pleased to discuss our comments or any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to Ning Chiu, Ada Dekhtyar Karczmer, Kyoko Takahashi Lin or Richard J. Sandler at 212-450-4000.

Very truly yours,

DAVIS POLK & WARDWELL LLP

[6] For example, *see* NYSE Corporate Governance Standards, Rule 303A (Transition Periods).