



April 28, 2011

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-0609

Attention: Elizabeth M. Murphy, Secretary, Securities and Exchange Commission

Re: Comments on Listing Standards For Compensation Committees, File No. S7-13-11

Ladies and Gentlemen:

We appreciate the opportunity to provide our comments on certain aspects of the Securities and Exchange Commission's (the "Commission's") proposed rules for listing standards for compensation committees under new Section 10C of the Securities Exchange Act of 1934 (the "Exchange Act") contained in Releases Nos. 33-9199 and 34-64149 (the "Releases").

Provisions Related to Legal Counsel for Compensation Committee

*Comments on Proposed Rules 10C-1(b)(2) and (3)*

Section 10C(d)(1) of the Exchange Act provides that compensation committees must have the authority to hire "independent legal counsel," and Section 10C(e) of the Exchange Act provides that a listed issuer must provide appropriate funding to a compensation committee for payment of reasonable compensation to "independent legal counsel." Proposed Rules 10C-1(b)(2) and (3) incorporate these requirements using the same "independent legal counsel" terminology.

The references to "independent legal counsel" have engendered some confusion among compensation committees, issuers and counsel. Prior to the Releases, there was concern that, based on the statute, a compensation committee may only be able to retain or obtain advice from legal counsel which was independent, or that the issuer could be required to make special disclosures regarding the independence (or lack thereof) of any counsel which the compensation committee did retain or obtain advice from. The Releases helpfully clarify that in spite of the references in the statute and the Proposed Rules to "independent legal counsel," a compensation

committee is not required to retain its own counsel, is not precluded from retaining counsel that is not independent, and is not precluded from obtaining advice from in-house counsel or the issuer's outside counsel. We believe this position is correct and is an important clarification that should be included in the rules themselves. There is still a concern that a compensation committee reading the Proposed Rules, without referencing the clarifying notes in the Releases, could incorrectly conclude that it could only retain or obtain advice from legal counsel which is independent. This could result in compensation committees incurring unnecessary expenses for retaining independent legal counsel in situations where that independent counsel is not necessary.

We believe the Commission's position of not requiring legal advisors to the compensation committee to be independent is appropriate. The ethical requirements for legal counsel who advise a compensation committee already require that, without the informed consent of both parties, the counsel may not represent the committee if the counsel has any conflict of interest in providing advice to the committee. See, e.g., American Bar Association Model Rules of Professional Conduct, Rule 1.7. Therefore, a legal advisor to a compensation committee is already under an ethical duty to inform the compensation committee if there is any conflict of interest that would impinge on the advice to be given. Because the legal advice provided by a counsel to a compensation committee can cover a range of issues, it is more cost-efficient for a committee to identify and engage independent legal counsel only when necessary, including when a potential conflict is raised by in-house counsel or the company's outside counsel.

The Commission also solicited comment on whether it should define the term "independent legal counsel" for purposes of Proposed Rules 10C-1(b)(2) and (3). The statute and Proposed Rules appear to mean that a compensation committee need only have the authority to retain legal counsel, and that an issuer need only be obligated to provide funding for legal counsel, if the counsel the committee wishes to retain is independent. To avoid potential disputes between compensation committees and issuers over the committee's authority to retain or right to receive funding with respect to the retention of legal counsel, we believe the Commission should clarify that the independence of legal counsel for purposes of these two Rules is to be determined in the discretion of the committee.

*Comment on Proposed Rule 10C-1(b)(4)*

Proposed Rule 10C-1(b)(4), in accordance with Section 10C(b) of the Exchange Act, provides that, before it "select[s]" a compensation consultant, legal counsel or other advisor, the compensation committee must take into consideration certain specified factors (including any additional factors subsequently identified by the national securities exchanges and associations). While the Releases helpfully clarify that the legal counsel (or other advisor) selected by the committee need not actually be independent – only that the committee consider the specified factors before making the selection – it is less clear what it means for the committee to "select" legal counsel or other advisors for this purpose.

In context, we believe that a compensation committee should only be required to consider the specified independence-related factors with respect to legal counsel or other advisors when the

committee is itself retaining or engaging the legal counsel or other advisor pursuant to the authority given it by Sections 10C(c)(1) and (d)(1) of the Exchange Act, not when the compensation committee is merely obtaining advice from an advisor without itself retaining the advisor, such as when the committee obtains advice from in-house legal counsel or the company's outside legal counsel. We believe it would be helpful for the Commission to clarify in Rule 10C-1(b)(4) that "select" for this purpose specifically refers to when the compensation committee itself retains or engages an advisor pursuant to the authority given it by Sections 10C(c)(1) and (d)(1) of the Exchange Act.

*Comment on Proposed Item 407(e)(3)*

The Commission also solicited comment on whether issuers should be required to make conflict of interest disclosures in their proxy statements with respect to legal counsel or other advisors from whom the compensation committee retains or obtains advice, similar to the conflict of interest disclosures issuers are required to make with respect to compensation consultants under the statute and Proposed Rules.

In our view, Item 407 should not be amended to require any disclosures about whether a compensation committee has retained or obtained advice from legal counsel or whether the work performed by legal counsel has raised any conflicts of interest, including any disclosures with respect to the amount of any compensation paid to legal counsel from whom the compensation committee has retained or obtained advice. We believe the specific statutory reference in Section 10C(c)(2) of the Exchange Act to "compensation consultants" as opposed to consultants, legal counsel and other advisors (as in Sections 10C(d)(1) and (e)) reflects a deliberate policy choice by Congress to limit these additional required disclosures to compensation consultants alone. This difference is appropriate given the differences in the roles of compensation consultants as compared to other advisors to a compensation committee.

In addition, many compensation committees only retain or utilize legal counsel when an unusual or potential controversial issue arises. In many situations, a disclosure about the retention of legal counsel and about fees paid to that counsel could be incomplete and potentially misleading to shareholders without a broader disclosure of the surrounding circumstances in which the fees were paid. In many cases, the broader disclosure would have to include information on the inner workings of the compensation committee that is not otherwise required to be disclosed. For example, if a compensation committee consulted with independent legal counsel about a compensation proposal but ultimately determined not to adopt that proposal, that process would not normally have to be disclosed in the compensation discussion and analysis (CD&A), and disclosure in the context of the retention of legal counsel should be unnecessary as well.

Retention of Compensation Consultant

We believe that proposed Item 407(e)(3) should not require any description of the process and selection factors used by the compensation committee in selecting a compensation consultant. In many cases, the compensation committee will engage in an extensive process that may include a formal request for proposal and multiple interviews. Because the chemistry between a

compensation committee and a compensation consultant is critical to a productive relationship, the committee is making a decision among multiple qualified consultants based on subjective factors. Attempting to describe this process and the factors that went into the ultimate decision would not be of any material benefit to shareholders.

Objective Standards for Compensation Advisor Independence

The Releases request comments on whether the independence standards for compensation advisors which committees must consider in selecting an advisor should include materiality, numeric or other bright-line standards or thresholds. We agree with the position taken in the Releases that any such standards should be left to individual compensation committees to determine. In our view, the question of independence is sufficiently complex that very few issues would provide the basis for a bright-line standard that should prevent a compensation advisor from being treated as independent.

Disclosure of Decision Not to Retain Compensation Consultant

Proposed Item 407(e)(3)(iii) requires disclosure of “[w]hether the compensation committee (or another board committee performing equivalent functions) retained or obtained the advice of a compensation consultant.” We would interpret this language to require an affirmative statement if a compensation committee did not retain a compensation consultant. In circumstance when a compensation committee did not retain a compensation consultant, we would recommend that the compensation committee not be required to explain this decision. Otherwise, there would seem to be a presumption that the compensation committee should retain a compensation consultant. We would suggest that an instruction be added to clarify these points.

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We wish to thank the Commission for the opportunity to submit our comments on the proposed rule and rule amendments. Any questions in relation to our comments may be directed to Steven D. Kittrell in our Washington, D.C. office at (202) 857-1700 or Jeffrey R. Capwell in our Charlotte, N.C. office at 704-373-8999.

Sincerely,

McGUIREWOODS LLP