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Re: Comments on Proposed Rules Relating to Shareholder Approval of Executive Compensation and Golden Parachute Compensation (the "Proposal")

Release Nos. 33-9153 and 34-63124
File Number S7-31-10

November 16, 2010

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 (the "**Commission**") for comments on the proposed rules to implement Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**"), which amends the Securities Exchange Act of 1934 (the "**Exchange Act**") by adding Section 14A. Section 14A requires companies to conduct separate shareholder advisory votes to (i) approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K ("**say-on-pay**"), (ii) determine how often an issuer will conduct a say-on-pay vote ("**frequency of say-on-pay**") and (iii) approve compensation arrangements with executives in connection with certain merger or acquisition transactions ("**say-on-golden parachutes**"). In addition, Section 14A also requires companies soliciting votes to approve merger or acquisition transactions to provide disclosure of golden parachute arrangements. We appreciate the opportunity to comment on the Proposal.

Shareholder Approval of Executive Compensation

Proposed Rule 14a-21(a): No specific language or form of resolution for say-on-pay

Proposed Rule 14a-21(a) requires that issuers provide a say-on-pay vote not less frequently than once every three years, and does not mandate the use of any specific language or form of resolution to be voted on by shareholders so long as the vote relates to all executive compensation disclosure set forth pursuant to Item 402 of Regulation S-K. We support these efforts as providing issuers with the necessary flexibility to meet their obligations and believe that more specific requirements regarding the manner in which say-on-pay is presented, such as designating specific language to be used and/or requiring issuers to frame the vote in the form of a resolution, is unnecessary. The Commission adopted the same approach in its previous rulemaking for companies that are subject to similar requirements to seek a shareholder vote on executive compensation under the Troubled Asset Relief Program ("**TARP**"), and we do not believe that the ability of each company to use its own method to obtain the vote has caused any shareholder confusion. In addition, the structure of the proposed rule is consistent with the statement in footnote 39 of the Proposal that issuers are not precluded from seeking more specific shareholder opinion through separate votes.

Proposed Amendments to Item 402(b) of Regulation S-K: Disclosure of the consideration of the results of prior say-on-pay votes

The Proposal amends Item 402(b) of Regulation S-K to add a new requirement to the Compensation Discussion and Analysis (the "**CD&A**") to discuss "[w]hether and if so, how the registrant has considered the results of previous shareholder advisory votes on executive compensation required by Section 14A of the Exchange Act." We recommend that the final rule not require the CD&A to include such disclosure. No such disclosure as to effect is required under the Dodd-Frank Act, and the same disclosure is not mandated in a proxy statement for any other shareholder votes, including the election of directors, management proposals and shareholder proposals.

The Dodd-Frank Act and the Proposal make clear that the say-on-pay vote is advisory in nature. While the experience has been limited, the outcome of say-on-pay votes held during the last proxy season suggests that many, if not most, companies are likely to receive majority approval from shareholders on their say-on-pay votes.[1] These companies will understandably interpret the majority approval to mean that its shareholders largely support the executive compensation as disclosed in their proxy statements and thus it will be difficult for them to describe how they took the vote into account. Requiring discussion in the CD&A in these circumstances is akin to "proving the negative"; it will add length to the CD&A without providing much meaningful information to shareholders. Where it is the case that a company has made changes in its executive compensation programs in response to shareholder input, it is reasonable to assume that they will say so in describing the changes made and the reasons for them.

If the Commission determines, nonetheless, to include such disclosure in the CD&A, we recommend that the disclosure be included in Item 402(b)(2) of Regulation S-K as a non-exclusive example of information that should be addressed, depending upon materiality based on the issuer's individual facts and circumstances, rather than under Item 402(b)(1) as a mandatory principles-based topic. This would reinforce the advisory nature of the say-on-pay vote and would provide issuers with greater ability to stay silent if they determine that the information as to whether and how they consider the results of the vote is not material.

Shareholder Approval of the Frequency of Shareholder Votes on Executive Compensation

Proposed Rule 14a-21(b): Frequency of say-on-pay and initial public offerings

Under proposed Rule 14a-21(b), issuers would be required, not less frequently than once every six years, to provide a separate shareholder advisory vote in proxy statements for annual

[1] According to the 2010 U.S. Postseason Report published by Institutional Shareholder Services (ISS), only three of the 145 management say-on-pay proposals for Russell 3000 companies filed between October 12, 2009 and October 11, 2010 failed to receive majority approval from shareholders. The average support was 89.6%.

meetings to determine whether the say-on-pay vote required by Section 14A(a)(1) will take place every one, two or three years.

The Commission has requested comment as to whether a new issuer should be permitted to disclose the frequency of its say-on-pay vote in the registration statement for its initial public offering and be exempted from conducting say-on-pay and frequency of say-on-pay votes until the year disclosed. We support allowing a new issuer to (a) disclose the frequency of the say-on-pay vote in its registration statement and (b) not hold a say-on-pay or frequency of say-on-pay vote until the annual meeting of the year disclosed. The executive compensation practices of a new issuer are often in transition for some period after it becomes public, as it takes time to change from the standards previously applicable to a private company to those applicable to a public company. Having say-on-pay and frequency of say-on-pay votes in the first annual meeting after a company becomes public will not be meaningful due to the nature of IPO companies. For example, a newly public company may be starting to grant equity-based compensation awards or use performance metrics that are facilitated by having a market for its equity securities, such as total shareholder return or earnings per share. In addition, IPO companies may also be undergoing changes to management personnel or additions to their boards of directors in the first few years of becoming public, all of which would have an effect on executive compensation. Congress has previously recognized the special circumstances of IPO companies by allowing them a transition period before becoming subject to the compensation deductibility rules of Section 162(m) of the Internal Revenue Code.[2] As noted in that legislative history, Congress effectively deemed these compensation arrangements to have been approved by shareholders where disclosure applicable to publicly held companies is provided in the IPO registration statement on the basis that shareholders were aware of the compensation arrangements of the company when they made their investment decision and decided to buy shares.[3]

Proposed Amendment to Rule 14a-4: Corresponding changes to Item 5.07 of Form 8-K

Proposed amendment to Rule 14a-4 requires that issuers present four choices to their shareholders with respect to the frequency of say-on-pay vote: the choice of one, two or three years or abstain. Corresponding changes to Item 5.07 of Form 8-K, which requires issuers to disclose the results of shareholder votes, should be made. Currently, Item 5.07 requires issuers to state the number of votes cast “for, against or withheld” on matters submitted to a vote of shareholders.

Proposed Amendment to Rule 14a-8: Status of shareholder proposals on say-on-pay and frequency of say-on-pay

Under the proposed amendment to Rule 14a-8, a new note would be added to Rule 14a-8(i)(10) to permit the exclusion of a shareholder proposal that would provide a say-on-pay vote or seeks future say-on-pay votes or that relates to the frequency of say-on-pay votes, provided the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent vote in accordance with Rule 14a-21(b). We believe that the inclusion of a standard is useful to provide clarity to both issuers and shareholders. We recommend that the Commission also consider permitting issuers to exclude shareholder proposals seeking a different frequency of say-on-pay if an issuer adopts a policy of conducting say-on-pay votes more often than the frequency voted on by the plurality of shareholders during the most recent vote. For example, if having a say-on-pay vote every three years received a plurality of the votes, then a

[2] *See* Treas. Reg § 1.162.27(f) (1993).

[3] *See* Budget Reconciliation Act, Pub. L. No. 103-66 (1993).

shareholder proposal seeking a say-on-pay vote every year should be considered substantially implemented if an issuer adopts a policy to conduct a say-on-pay vote every other year.

We also encourage the Commission to permit the exclusion of shareholder proposals that are similar to, but not exactly the same as, proposals seeking a say-on-pay vote. A shareholder proposal seeking a vote on a specific section of Item 402 disclosure in annual meeting proxy statements, such as the CD&A or the summary compensation table, should for this purpose be considered a "say-on-pay vote" even if it focuses on some, but not all, of the required disclosure. These types of proposals should also be excludable on the basis of substantial implementation for the same reasons.

In addition, we believe that this new note to Rule 14a-8(i)(10) is not intended to change the Staff's existing interpretation of the rule and, therefore, should be clarified. For example, a company that receives a plurality of shareholder votes seeking say-on-pay votes on a biennial basis may decide to nonetheless adopt annual say-on-pay. As currently drafted, the new note seems to indicate that this would preclude the company from being able to exclude a shareholder proposal seeking a say-on-pay vote (or a similar type of vote such as a vote on a specific section of Item 402 disclosure), even if the company were to include a substantially similar management proposal in the same proxy statement, because the company failed to adopt the frequency that was favored by the plurality of shareholders. Under the Staff's existing interpretation of Rule 14a-8(i)(10), we believe this proposal would otherwise be excludable on the basis of substantial implementation.

Proposed Amendments to Form 10-K and Form 10-Q: Disclosure of policy on frequency of say-on-pay

The proposed amendments to Item 9B of Form 10-K and new Item 5(c) of Part II of Form 10-Q require an issuer to disclose, in the quarterly report on Form 10-Q covering the period during which the frequency of say-on-pay vote occurs, or in the annual report on Form 10-K if the frequency of say-on-pay vote occurs during the issuer's fourth quarter, its decision regarding how frequently it will conduct say-on-pay votes in light of the results of the frequency of say-on-pay vote. While the Commission indicates that it believes this will notify shareholders on a "timely" basis, it is possible that an issuer will not have determined how often it intends to hold a say-on-pay vote by the time the Form 10-Q or Form 10-K is filed, especially if the annual meeting occurs near the end of a quarter. Alternatively, some issuers will be able to make this determination shortly after the annual meeting, if the voting results for example are consistent with their recommendations to shareholders on how to cast the vote. We recommend that the Commission consider allowing issuers to report this decision in any of (a) their Form 8-K reporting shareholder voting results for the annual meeting; (b) the Form 10-Q or Form 10-K covering the period during which the annual meeting took place as currently proposed; or (c) the Form 10-Q or Form 10-K covering the period following the one in which the annual meeting took place.

Section 14A(a)(2) states that the frequency of say-on-pay vote should be held "not less frequently than once every six years," indicating that issuers can decide to conduct such vote more often in their annual meeting proxy statements than every six years. Therefore, we believe the language in the proposed statutory amendment for Item 5(c) of Part II of Form 10-Q and Item 9B of Form 10-K should not include "for the six years subsequent to such meeting" or should otherwise be revised.

Issues Relating to Both Shareholder Votes Required by Section 14A(a)

Proposed Amendments to Rule 14a-6: No preliminary proxy statements

Proposed amendments to Rule 14a-6(a) would add say-on-pay and the frequency of say-on-pay votes required by Section 14A(a) to the list of items that do not trigger a preliminary proxy statement filing. We agree with these amendments and support the change, as requiring a preliminary proxy statement due merely to the inclusion of these advisory votes will greatly increase administrative burdens for the Commission and preparation costs for issuers, without the review of these proxy statements in preliminary form yielding significant benefits.

Proposed Item 24 of Schedule 14A: Required disclosure about say-on-pay and frequency of say-on-pay

Proposed Item 24 of Schedule 14A requires issuers to briefly explain the general effect of the say-on-pay and frequency of say-on-pay votes, such as whether the vote is non-binding. As currently required for TARP companies, we believe this disclosure is useful to shareholders and no other disclosures are needed to be provided by issuers regarding these votes.

Relationship to Shareholder Votes on Executive Compensation for TARP Companies: Exemption until debt repaid

Under proposed Rules 14a-21(a) and (b), issuers with outstanding indebtedness under TARP would not be required to conduct a say-on-pay vote under Rule 14a-21(a) until the first annual meeting after the issuer has repaid all outstanding indebtedness under TARP, and similarly would be exempt from the requirements of Rule 14a-21(b) and Section 14A(a)(2) until such time. We agree with the Commission that "Section 14A(a)(2) would burden TARP issuers and their shareholders with an additional vote while providing little benefit to either the issuer or its shareholders." There is no reason to require TARP companies to hold a vote under Rule 14a-21(a) that is essentially the same as the vote they are required to conduct under Rule 14a-20. In addition, since TARP companies must conduct annual advisory votes on executive compensation, having a frequency of say-on-pay vote under Rule 14a-21(b) would only be confusing, or misleading at worst, if shareholders vote for a different frequency that then must be ignored by TARP companies.

Annual Meeting or Other Meeting of Shareholders: Require shareholder votes with respect to an annual meeting or a special meeting in lieu of an annual meeting, for which proxies will be solicited for the election of directors

We support the Commission's view in footnote 16 that say-on-pay and frequency of say-on-pay votes are required "only with respect to an annual meeting of shareholders for which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting." Consistent with this view, if an issuer does not normally hold an annual meeting for which proxies or consents are required to be solicited pursuant to the proxy rules (*e.g.*, a publicly-traded partnership or limited liability company, where the directors of the issuer's non-publicly traded general partner or managing member, as applicable, are elected by a controlling shareholder), the issuer should not be required to conduct say-on-pay and frequency of say-on-pay votes with respect to special meetings where unitholder approval is sought, even if executive compensation disclosure is provided (*e.g.*, a special meeting called to approve an equity compensation plan pursuant to the listing rules). In contrast to the Commission's focus in the proposed rules on annual shareholder meetings at which directors may be elected pursuant to the proxy rules, a say-on-pay vote at a publicly-traded partnership with a privately-owned general partner would occur sporadically and not necessarily on an annual, biennial or triennial cycle. In addition, a frequency of say-on-pay vote would be meaningless for such an issuer since such an issuer is not required to follow any schedule in calling special meetings of unitholders, and it would be possible for the interval between meetings to be greater than 6 years.

Disclosure of Golden Parachute Arrangements and Shareholder Approval of Golden Parachute Arrangements

Proposed Item 402(t) of Regulation S-K: Tabular disclosure of golden parachute arrangements

The Proposal mandates that golden parachute disclosure, in accordance with proposed Item 402(t) of Regulation S-K, be included in most Commission filings for extraordinary transactions, whereas Section 14A(b)(1) requires such disclosure to be included only in a proxy or consent solicitation relating to extraordinary transactions. Proposed Item 402(t) would require disclosure of all golden parachute compensation arrangements among the target and acquiring companies and the named executive officers of each company that is based on or relates to the extraordinary transaction. An "**extraordinary transaction**" means an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets.

We do not believe it is necessary to extend the Item 402(t) disclosure requirement to annual meeting proxy statements generally, or to annual meeting proxy statements with say-on-pay votes. Item 402(j) of Regulation S-K currently provides for disclosure in an issuer's annual meeting proxy statement of potential payments upon termination or change-in-control. The major differences with Item 402(t) include disclosure (i) in a tabular format; (ii) about arrangements or agreements that do not discriminate in scope, terms or operation in favor of the executives; and (iii) *de minimis* perquisites and other personal benefits. None of these differences are sufficiently significant to warrant extending an already lengthy list of requirements to companies' burdens in complying with annual meeting proxy statements, particularly without any pending transactions and using assumed fiscal year-end calculations. In addition, other items of narrative disclosure regarding golden parachutes in extraordinary transactions, such as requiring issuers to describe the basis for selecting each form of payment and to describe why it chose the various forms of compensation, would not be useful for investors. This disclosure is not intended to replicate the CD&A.

Proposed Item 402(t) disclosure would require specific disclosure in tabular form of, and a total aggregate amount for:

- cash severance payments;
- the dollar value of accelerated stock awards, in-the-money option awards for which vesting would be accelerated, and payments in cancellation of stock and option awards;
- pension and non-qualified deferred compensation benefit enhancements;
- perquisites and other personal benefits and health and welfare benefits;
- tax reimbursements; and
- "other" elements of compensation.

We believe that this proposed disclosure captures the types of compensation (whether present, deferred, or contingent) that are based on, or otherwise relate to, an extraordinary transaction and no additional requirements are needed. Moreover, any items not specifically captured by the first five columns will need to be provided in the catch-all "other" column of the table.

We note that proposed Item 402(t)(1)(ii) of Regulation S-K currently requires disclosure of "any agreement or understanding . . . that is based on or otherwise relates to ***an*** acquisition, merger, consolidation, sale or other disposition of all or substantially all assets of the issuer." (emphasis added). We believe that the required disclosure is intended to apply to a specific transaction and therefore Item 402(t)(1)(ii) should be revised to provide that issuers must disclose all agreements or understandings that are based on or otherwise relate to ***the*** extraordinary transaction.

The inclusion of any other columns in addition to those proposed will only detract from the goal of Section 14A(b)(1) to provide such disclosure in a "clear and simple form." Similar to approaches adopted in annual meeting proxy statements, issuers can voluntarily include additional tabular information when they believe that such detail would be helpful to shareholders. We recommend that the tabular quantification of amounts be based on the deal price agreed to for the transaction, if known or determinable at the time of the filing, as this will provide the most accurate information to shareholders. If, for whatever reason, the deal price is not known or determinable at the time of the filing, we agree that providing the tabular quantification of amounts based on the closing price of the issuer's stock on the "latest practicable date" is appropriate since it is an objective and easily verifiable number.

We also agree that the Commission should not require disclosure of previously vested equity awards and pension benefits, including the value of vested pension and non-qualified deferred compensation, the value of previously vested restricted stock and the value of previously vested in-the-money options, because these amounts have already been earned by the executives and are not based on, or otherwise related to, the extraordinary transaction. Requiring these amounts for comparative or other reasons would again undermine the goal of making the disclosure easy to understand, in particular as providing such information in this context would overstate the total amount of compensation payable as a result of the extraordinary transaction, thus making the disclosure more confusing to shareholders.

We recommend that the Commission provide an exception under Item 402(t) for the disclosure of *de minimis* perquisites and other personal benefits akin to what is currently provided under Item 402(j). The exclusion of *de minimis* perquisites and other personal benefits will alleviate some of the burdens of considering and valuing every item that could constitute a benefit, no matter how small. We believe the omission of these amounts would be of little concern to shareholders.

Currently, it is proposed that *bona fide* post-transaction employment agreements entered into in connection with the extraordinary transaction be excluded from the Item 402(t) golden parachute disclosure table and narrative. We agree with the Commission that such agreements should not be required to be quantified and disclosed as they relate to compensation for future services.

<u>Proposed Item 402(t) of Regulation S-K: Named executive officers covered</u>

Proposed Item 402(t)(ii) of Regulation S-K requires, in any proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A, disclosure of golden parachute arrangements with respect to the named executive officers of both the acquiring company and the target company. The Proposal recognizes that this requirement is beyond the statutory mandate of the Dodd-Frank Act, which added Section 14A(b)(1) to only include disclosure of agreements or understandings between the person conducting the solicitation and any named executive officers of the issuer or any named executive officers of the acquiring issuer if the person conducting the solicitation is not the acquiring issuer. We encourage the Commission to reconsider the expansion of the express intent of the statute, in particular as the say-on-golden parachutes under proposed Rule 14a-21(c) is more restrictive and is aligned with the statutory language. Having the disclosure and the vote cover different arrangements will likely confuse investors since it is possible that as many as three separate disclosure tables would need to be provided.

We support the exclusion of individuals who would have been among the most highly compensated executive officers but for the fact that they were not serving as an executive officer at the end of the last completed fiscal year from providing Item 402(t) information, and we believe this exclusion should apply regardless of whether such individuals remain employed by the issuer at the time of the proxy solicitation. Unlike Item 5 of Schedule 14A, golden parachute disclosure does not apply to directors of the issuer. Thus, the purpose of the golden parachute disclosure appears to be designed to inform investors about executive compensation or benefits and therefore should focus only on individuals who are actually executive officers at the time of the transaction.

In addition, we recommend that the Commission also exclude from this disclosure those individuals who are no longer employed by the issuer at the time of the proxy solicitation, even if such persons served as the principal executive officer or principal financial officer of the issuer during the last completed fiscal year or who were among the issuer's other most highly compensated executive officers at the end of that year. It is not clear what purpose is served by mandating disclosure of golden parachutes with former employees, especially as they are unlikely to be receiving any new or additional agreements or understandings as a direct result of the transaction.

Proposed Rule 14a-21(c): Vote on golden parachutes

Proposed Rule 14a-21(c) provides that a say-on-golden parachute vote would be required if a solicitation is made by an issuer for a meeting at which "shareholders are asked to ***approve*** an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets." (emphasis added). We ask that the Commission affirmatively clarify that the say-on-golden parachute vote applies only to proxy statements soliciting shareholders to approve an extraordinary transaction. For example, we believe that the say-on-golden parachute vote does not apply to registration statements and other Commission filings that are necessary to facilitate a transaction, even where proposed Item 402(t) disclosure is included and shareholder approval may be sought for other reasons, such as where an acquiring issuer seeks shareholder approval to issue more than 20% of the shares outstanding[4] or an acquiring issuer seeks an amendment to its charter to increase the number of shares available for issuance. This is consistent with Section 951 of the Dodd-Frank Act.

Proposed Item 402(t) of Regulation S-K and Proposed Rule 14a-21(c): Transition period

We recommend that the Commission adopt, in its final rules, a transition period for the application of both the golden parachute disclosure requirements as set forth in Item 402(t) of Regulation S-K and the shareholder vote required under Rule 14a-21(c). Companies need sufficient time to develop and include the disclosure and prepare for the vote in documents for extraordinary transactions that are already in process when the rules are adopted, and in some cases meeting dates or closings may be scheduled for the near term shortly after adoption.

Foreign Private issuers

The proposed rules apply only to issuers that are subject to the Commission's proxy rules, which exempt foreign private issuers. Rule 3a12-3 of the Exchange Act provides an exemption for foreign private issuers from complying with Section 14(a) of the Exchange Act, an exemption we

[4] *See* New York Stock Exchange Rule 312.03(c); NASDAQ Rule 5635(a)(1).

understand would extend to proposed Rule 14a-21. While there is no explicit exemption for compliance with Section 14A as added by the Dodd-Frank Act, we believe that the Commission intends to exclude foreign private issuers from Section 14A.

We also agree with the Commission's proposed rules which provide exceptions from the Item 402(t) disclosure requirements for bidders and target companies in third-party tender offers and filing persons in Rule 13e-3 going-private transactions where the acquirer or target is a foreign private issuer, as foreign private issuers are generally exempt from the proxy rules and it may be difficult to obtain the required disclosure.

* * *

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, Edmond T. FitzGerald, Kyoko Takahashi Lin, Phillip R. Mills, Barbara Nims or Richard J. Sandler at 212-450-4000.

Very truly yours,

DAVIS POLK & WARDWELL LLP