November 18, 2010

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

Re: File Number S7-31-10, Shareholder Approval of Executive Compensation and Golden Parachute Compensation

Dear Ms. Murphy:

Since 1977, the National Association of Corporate Directors (NACD), a nonprofit educational organization, has provided corporate directors with resources to help them fulfill their board responsibilities. We convene, educate, and inform 10,000+ members on many issues, including compensation. Indeed, the board's role in hiring, overseeing, and compensating executives has been central to our mission since our founding. Over the years, NACD has issued many points of guidance for compensation committees, flagging problems in executive pay and suggesting practical solutions.

We are grateful for this opportunity to comment on your proposed rules for Shareholder Approval of Executive Compensation and Golden Parachute Compensation, issued October 18, 2010 (http://sec.gov/rules/proposed/2010/33-9153.pdf). Past NACD letters to the SEC have addressed a variety of topics including internal controls, nominating committee practices, proxy access, enhanced proxy disclosures (including pay disclosures), and, most recently, the proxy system. Now, in this comment, we will give our views on proposed new disclosures and voting procedures for executive pay, including golden parachutes.

General Overview

The Dodd-Frank Act (section 951) amends the Securities Exchange Act of 1934 by adding Section 14A requiring shareholder votes on **pay, pay frequency,** and **golden parachutes.** Companies must conduct separate shareholder advisory votes to approve the compensation of executives and determine how often shareholders will vote on executive compensation. Companies soliciting votes to approve merger or acquisition transactions must disclose any "golden parachute" compensation arrangements and, in certain circumstances, conduct a separate shareholder advisory vote to approve them. The SEC asked for comments on these as well as any "**other matters**" that might have an impact on them.

NACD appreciates the symbolic value of say on pay. However, we believe that it is a poor substitute for dialogue. It is much more valuable to have shareholder communication well in advance of plans or votes on plans.

Say on pay is a yes or no, backward-looking vote that may have little utility except to express a very general shareholder view of a pay plan already in effect. Our surveys show that an increasing number of companies have been holding meetings with their institutional shareholders. This may explain why say-on-pay votes for early adopters have been substantially positive, in the main. For companies that have had successful communications with their shareholders, say on pay may become a meaningless ritual. Companies and shareholders alike may find it burdensome as a strict and universal requirement. Say on pay is now the law of the land, subject to final rules. Therefore, in this comment letter we will express NACD's views on:

- Say on pay (new proposed Rule 14a-21(a))
- Frequency of say-on-pay votes (new proposed Rule 14a-21(b))
- Say on golden parachutes (new proposed Item 402(t) of Regulation S-K)
- Other matters pertaining to executive compensation

The SEC asked a number of questions of particular relevance to directors. The following four sections summarize the rules at issue and then give NACD's view, based on a recent survey of our members, as well as the values implicit in the findings of "thought leadership" groups such as NACD Blue Ribbon Commissions, roundtables with NACD chapter leaders, director and committee leader forums, and other events focused on leading practices.

Say on Pay (Proposed Rule 14a-21(a))

Summary

Under the proposed rule, at least once every three years shareholders are to be given the opportunity to provide an advisory vote in proxy statements to approve the compensation of senior executives. Shareholders are to vote on the compensation as disclosed in the compensation discussion and analysis (CD&A) section of the proxy compensation tables and other narrative executive compensation disclosures. Smaller reporting companies (those with less than $75 million in public float), though not required to include a CD&A, may be required to allow shareholders to vote on the compensation of their "named executive officers" (the top five most highly paid company officers). The SEC may also include a new requirement in the CD&A to show whether, and if so, how, company compensation policies and decisions have taken into account the results of shareholder advisory votes on executive compensation.

SEC Questions/NACD Comments

Should the SEC designate specific language to be used to frame the say-on-pay vote on executive compensation?

NACD believes that specific language may not be helpful as companies should be able to frame the issues in accordance with company needs. Companies should have flexibility to frame the issues in a meaningful way for shareholders, taking into consideration the variation amongst companies and industries.

Should the rules exempt smaller reporting companies ($75 million or less in public float) from the say-on-pay requirement?

NACD strongly supports an exemption for smaller companies. Relative to company size, the cost of paperwork tends to be relatively high for smaller companies, so the strain of this extra step could be counterproductive.

Should the proposed requirement relate only to consideration of the most recent say-on-pay vote?

NACD strongly recommends that only the most recent say-on-pay vote should be disclosed. The current proposal requires issuers to discuss how they considered the results of "previous" shareholder votes on compensation, but seeks a finer definition. NACD believes that "previous" should mean only the most recent vote. Given the rapid pace of change in the economy and in company performance, as well as commensurate advancements in pay approaches, going back further in time should not be required.

Should there be an exemption from say-on-pay and say-on-frequency votes for a company's first annual meeting as a reporting company?

NACD would strongly support an exemption for newly public companies. Road shows for initial public offerings (IPOs) already give shareholders a chance to evaluate and accept pay packages, so it makes little sense to make changes in year one. Furthermore, although companies with IPOs may not be small (many IPOs exceed $75 million), they do need an exemption for the same reason small companies do: namely, the need to focus on substance over process during a period of critical growth. Given the amount of paperwork it takes to go public, it would be burdensome to add this obligation in a company's very first year as a public company.

<u>Frequency of Say-on-Pay Votes (Proposed Rule 14a-21(b))</u>

Summary

The proposed rule would require that every six years, shareholders must be provided an advisory vote to determine whether the say-on-pay vote will be held every 1, 2, or 3 years. A company will be required to give shareholders four options, i.e., to hold the vote every 1, 2, or 3 years, or to abstain from voting. Companies must leave the choice up to shareholders (not frame it as a yes or no choice based on a company proposal). Also, they must make it clear that the vote will be nonbinding.

SEC Questions/NACD Comments

If an issuer materially changes its compensation program, should shareholders be permitted to submit a proposal to change the frequency vote prior to the next regularly scheduled vote?

NACD would oppose permitting an interim vote, which would be disruptive.

Say-on-"Golden Parachute" Agreements (New Proposed Item 402(t) of Regulation S-K)

Summary

The new rules will require expanded disclosure and a shareholder advisory vote of "golden parachute" compensation in an extraordinary corporate transaction, to include the "named executive officers" of, not only the target corporation, but also the acquiring corporation. The new requirements expand on the old ones previously required, including disclosure of any material obligations or conditions applicable to the receipt of payment (including non-compete, non-solicitation agreements) as a result of the proposed transaction, and a description of the specific circumstances that would trigger payment. The new disclosure is in both narrative and tabular format, and includes columns for: cash severance payment, equity, pension and nonqualified deferred compensation, perquisites, and other personal, health, and welfare benefits, tax reimbursements, and other items.

In the annual proxy statement, companies can choose to either follow the old or new disclosure requirements. However, companies that submit disclosures under the new style—which have been subject to an overall say-on-pay advisory vote—do not have to solicit the shareholder advisory vote in the event of an extraordinary corporate transaction. If the original disclosures have been changed since previous disclosure, new golden parachute agreements, and any revisions to golden parachute agreements that were subject to a prior shareholder vote, are subject to the separate merger proxy vote. Corporations need only subject the **new** arrangements and revised terms to a separate shareholder vote. This situation requires the disclosure of two tables: the first disclosing all golden parachute compensation, including that already voted on along with the new arrangements or revisions; the second highlighting just the new arrangements or revisions.

SEC Questions/NACD Comments

Currently, disclosure of golden parachute compensation packages are required for only "named executive officers." Should this rule be expanded to include more individuals?

NACD does not believe that companies need to give individual figures for parachutes beyond the top five officers. If this disclosure is not required for companies in general, it should not be required in times of M&A.

The golden parachutes proposal currently requires disclosure of cash, equity, pensions/non-qualified deferred compensation, perquisites/benefits, and tax reimbursements. Should the proposal be expanded to include additional areas, such as vested compensation, previously vested restricted stock, or relocation subsidies?

NACD believes that expansion beyond the items already required for disclosure is unnecessary. The directors we surveyed were fairly evenly divided between the two options, with a slight preference for *less* disclosure.

Although there is some support among observers to include full "takeout" value in the current termination disclosures, including the executive's vested equity, this does not stand to reason. Vested equity is separate from the incremental amount that could be created due to the transaction, and should not be combined with it. In a recent Client Advisory (dated October 25, 2010), Pearl Meyer & Partners notes "the proposed rules seem to confirm the SEC's intent to require only unvested values in displaying termination benefits," and we would concur with that approach.

Should the board be required to disclose its reasoning for choosing each form of compensation in the golden parachute packages?

NACD does not believe that companies must be required to make a disclosure about this choice. However, based on the findings of our past Blue Ribbon Commissions, NACD would encourage voluntary disclosure about these matters.

In the event of an extraordinary transaction such as a proposed merger, do you believe your board should quantify and disclose any <u>continuing employment agreements</u> that executive officers of the target company enter into?

NACD could strongly support such a disclosure requirement for individuals who will become "named executive officers." (Again, if this disclosure is not required for companies in general, it need not be required in times of M&A.) Any senior executive in the target company who joins the acquiring company is important, not only for the amount of money he or she will be earning, but also for the human capital that individual brings to the organization. Stockholders have a right to know about their leadership team and its compensation.

In the event of an extraordinary transaction, should the rule require that shareholders have the opportunity to vote on the full golden parachute compensation package, or only any amendments made to the plan?

For greatest clarity, consistent with our past reports and with survey results, NACD would favor a focus on changes, rather than re-voting on an entire package. As mentioned at the outset of this letter, we question the value of a yes or no vote on a large and complex plan that has already gone into effect. A yes or no vote on amendments is much more useful.

Should smaller reporting companies (less than $75 million in public float) be exempted from the vote on golden parachutes?

Consistent with our views on small company exemptions for say on pay, we would support such an exemption.

Where should disclosure of single-trigger and double-trigger arrangements appear—in the footnotes or main text? (A "single-trigger" arrangement is triggered by the change-in-control. A "double-trigger" arrangement requires a second event such as termination of employment without cause or resignation for good reason after the change-in-control.)

NACD would favor inclusion in the main text of the proxy, in the CD&A section, if material.

<u>Other Matters</u>

In closing, we would like to comment on several other compensation matters stemming from provisions in the Dodd-Frank Act:

Superclawbacks in financial institutions (Section 201). Under this provision, when a financial company becomes bankrupt, the FDIC would have the power to recapture compensation received two years prior to receivership from current or former senior executives or directors deemed "substantially responsible" for the company's failure—even if without any intent to defraud. The Federal Deposit Insurance Corporation, not the SEC, is responsible for administering this provision. Nonetheless, we hope that the SEC can join us in becoming a voice of reason on this matter. The FDIC will need to define the standards and process it will use to determine whether directors and officers are "responsible" for insolvency. Otherwise, enforcement of this provision could lead to witch hunts and expropriation.

Stock exchange listing standards regarding compensation committee independence and compensation advisor independence; SEC disclosure rules regarding compensation consultant conflicts (Section 952). Just as the rules coming out of the Sarbanes-Oxley Act strengthened audit committees, these changes could strengthen the governance of listed firms.

There is one area, though, where the SEC must exercise caution, and that is the area of consultant conflicts. If a consultant provides an independent board committee with a significant amount of work, even if that work constitutes a significant percentage of the consultant's income, this should not be viewed as a conflict. The important point is that the consultant does not work for management—a point we first raised in our 2003 Blue Ribbon Commission report.

Recovery of executive compensation (Section 954). The word "recovery" masks the potential for abuse in this situation. This provision enables companies to take back all or some of incentive compensation merely because the company has to restate its financial reporting numbers for the period in which the employee was awarded the compensation. The amount taken is the difference between the number reported in the original financial statement and the revised number that appears in the revised financial statement. This will occur even if no fraud is involved. Thus, hardworking and honest executives can be paid bonuses and then have to return some or all of their money back due to a restatement.

To implement this section, the SEC is required to issue regulations directing the stock exchanges to prohibit the listing of any security of an issuer that does not comply with these requirements. NACD believes that in the implementing regulations, there should be an exemption for companies that obtain shareholder approval for retention of the originally awarded compensation. In some cases—for example restatements due to changes in interpretations of accounting rules—the incentive pay is earned fair and square and should not be returned.

On a more general note, NACD would observe that companies are now using a variety of metrics to award incentive pay, not just accounting numbers that may be subject to restatement. If the clawback provision is enforced too aggressively without regard to valid exceptions approved by shareholders, companies may increase their use of nonfinancial metrics in compensation packages. In our *Report of the NACD Blue Ribbon Commission on Performance Metrics: Understanding the Board's Role,* we recommend that all metrics be expressed *quantitatively,* and recognize that metrics can and should be nonfinancial as well as financial.

Disclosure of pay for performance and of pay ratios of CEO to median pay of all other employees (Section 953). Pay for performance is a value NACD has been advocating since our founding. Our members and customers are well aware of it and are already doing it. They should have no problem expressing how they link pay to performance. NACD has no concerns about any straightforward rule that would require disclosure of pay for performance. However, we would request that the implementing rule give flexibility for companies to express their philosophies in their own words, and not have to fit their disclosure to some mold. Industries vary, companies vary, executives vary, and markets vary over time. We believe that disclosures should be allowed to vary as well. For example, it may be beneficial to enhance disclosures around valuations of options that are now out of the money (trading substantially below market value at grant date). If previous disclosures have indicated high values, there must be a recalculation that discloses the true value of those equity awards, and this change should be highlighted.

We are aware that the SEC will be postponing implementation of pay ratios until after the next proxy season, and commend the SEC for this decision. The median pay figure can be highly misleading for a global company operating in regions where there is a low cost of living and hence a lower level of wages. Indeed, there is simply no way to calculate this with any utility or accuracy. It would take global companies months and thousands of hours to come up with a completely useless number. We would urge the SEC to implement this provision with extreme care.

In closing, NACD would urge caution in the area of rulemaking. Compensation terms can be interpreted in an overly broad manner, regulating areas that are best left alone. For example, “golden parachutes” should be defined in the context of a change of control, and not include all severance pay (as under some past Troubled Asset Relief Program regulations).

NACD strives to guide our members in all their work, including the important task of awarding executive pay. We hope you will consider the thoughts we have offered today on say on pay, say on golden parachutes, and other concerns related to executive compensation.

Sincerely,

Barbara Franklin

Hon. Barbara H. Franklin
Chairman
NACD

Kenneth Daly
President and CEO
NACD