Center On Executive Compensation

November 18, 2010

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

RE: Comments on the Commission's Proposed Rule on Shareholder Approval of Executive Compensation and Golden Parachutes, File Number S7-31-10

Dear Ms. Murphy:

The Center On Executive Compensation is pleased to submit comments to the Securities and Exchange Commission ("Commission") providing its perspective on the Commission's proposed rules implementing Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). We appreciate the Commission's initiative to complete the final rule on say on pay before the January 21, 2011 effective date. However, we believe that there are several areas in which we believe the Commission should revise its approach in the final rule.

The Center On Executive Compensation is a research and advocacy organization that seeks to provide a principles-based approach to executive compensation policy from the perspective of the senior human resource officers of leading companies. The Center is a division of HR Policy Association, which represents the chief human resource officers of over 300 large companies, and the Center's more than 70 subscribing companies are HR Policy members that represent a broad cross-section of industries. Because senior human resource officers play a unique role in supporting the compensation committee chair, we believe our views can be particularly helpful in understanding the important role that carefully constructed executive compensation packages play in ensuring a strong link between pay and performance. Our comments are focused on a practical approach to ensuring that the Commission's implementation of the say on pay and golden parachute rules are consistent with the underlying statute and accomplish the goals of the statute without imposing significant unintended consequences.

I. Shareholder Vote on Executive Compensation Disclosures

The Center appreciates and agrees with the Commission's determination that the say on pay vote is nonbinding and that companies are not required to file a preliminary proxy statement merely because there is an advisory shareholder vote on the proxy. As discussed below, we also support the flexibility provided in structuring the say on pay resolution, but we disagree with the additional disclosure of how the company has reacted to a say on pay vote. In our view, this requirement is unnecessary given the Commission's existing disclosure requirements, which require companies to disclose the rationale for programs, the process for evaluation of changes to pay programs and the reasons for any change. To the extent that the say on pay vote affected company pay decisions, the company would be compelled to disclose that fact.

A. Flexibility in Structuring Say on Pay Resolution and Supporting Statement

The Center supports the Commission's proposal not to require specific language or a form of resolution for the nonbinding shareholder vote. This is consistent with the language of the Dodd-Frank Act, which requires the say on pay resolution "to approve the compensation of executives" as disclosed in the Commission's executive compensation disclosure rules in Item 402 of Regulation S-K. It is also consistent with the approach used for TARP companies.

B. Proposed Mandatory Disclosure of the Impact of Say on Pay Votes on Compensation Policies and Decisions Is Inconsistent with a Nonbinding Vote

The Center disagrees with the Commission's proposed mandatory disclosure in the Compensation Discussion and Analysis regarding whether and if so, how issuers' "compensation policies and decisions have taken into account the results of shareholder advisory votes on executive compensation."[1] By definition, the shareholder vote on executive compensation is nonbinding on companies. To our knowledge, there is no precedent for including disclosure specific to the outcome of a nonbinding shareholder vote. In addition, if included in the final rule, the proposed disclosure would have the effect of requiring all companies to explain how they are changing their compensation in response to the results of a shareholder vote. Based on the experience under TARP, and in the United Kingdom, most companies will receive substantial majority support for their say on pay votes. In this situation, additional disclosure would not add value and is less relevant. Where majority support is not achieved existing SEC rules already require disclosure in the CD&A regarding the rationale for existing programs, the process for review and evaluation of such programs and the explanation of any changes to be made. To the extent that the say on pay vote affected company pay decisions, the company would be compelled to disclose that fact.

The Center also believes that the proposed CD&A disclosure would be redundant with existing disclosure requirements under the CD&A. Issuers are already required to disclose in their CD&A why the company chooses to pay each element of compensation and how the company determines the amounts and formulas that result in compensation. They are also required to disclose how each element of compensation affects decisions regarding other elements. By singling out the shareholder vote results, the proposed disclosure requires employers to explain the nexus between the say on pay vote and compensation changes. Yet, compensation committees make changes to compensation plans for many reasons, including changes in the economy or the competitive environment, changes in the company's strategic plan, current, planned or former personnel changes, just to name a few. Existing disclosures already ensure that shareholders are appropriately informed regarding all material changes made to the company's executive compensation elements, structures or amounts and why those changes were made. A new disclosure requirement unique to a nonbinding shareholder vote should not be added.

The proposed disclosure also suffers from a disconnect in terms of the timing of the shareholder vote and decisions on compensation plans. The say on pay vote will always be on compensation over the previous 1, 2 or 3 years, and even if a company discloses changes that have been approved going forward in its proxy, most of the CD&A and compensation tables will

[1] SEC Release at 16.

not reflect those changes. For example, assume an employer holds a say on pay vote annually starting in 2011. The say on pay vote held in 2011 will be on 2010 compensation. However, by then, the compensation structures for 2011 will already be set. If an employer receives a substantial negative vote in 2011, the changes, if any that are made in response to the negative vote, will be made on the 2012 compensation program. The say on pay vote in 2012 will be made primarily on 2011 compensation, which will not have been changed to account for the previous vote. This lag in the response to the non-binding vote, combined with the fact that a variety of factors influence potential changes in the design of executive compensation arrangements, makes the required disclosure less meaningful and potentially confusing to investors. We strongly recommend this proposed requirement be dropped.

C. The Frequency Vote

The Center agrees with the Commission that the "frequency vote" is nonbinding on companies. We agree with the Commission that it is important that companies have the ability to recommend to shareholders their preferred the interval between say on pay votes, so that the shareholders have the benefit of the company's perspective of the most beneficial frequency between votes. The Center is concerned, however, with the Commission's approach on two important aspects of the frequency vote: The Center disagrees with the requirement that companies adopt the frequency of say on pay vote as chosen by the plurality of shareholders in order to exclude shareholder resolutions seeking votes on alternative frequencies for say on pay votes or other advisory shareholder votes as "substantially implemented." In addition, the Center believes that disclosure on the Form 10-Q filed following the company's annual meeting does not give companies sufficient time to determine and disclose which frequency they will adopt.

1. Proposed Amendment to Rule 14a-8: Companies Should Not Be Required to Implement the Results of the Frequency Vote to Eliminate Other Resolutions on Say on Pay or Frequency

The Center appreciates the Commission's willingness to provide relief to companies from shareholder proposals seeking an advisory shareholder vote on executive compensation or that relate to the frequency of shareholder votes. However, we believe that the Commission's proposal is inconsistent with the nonbinding nature of the say on pay vote and is too narrow overall and we urge it to take a broader approach.

The Center believes that shareholder resolutions seeking say on pay votes on the issuer's entire executive compensation disclosures or on a particular element or aspect of its disclosures ("mini say-on-pay" votes) or votes to change the frequency of say on pay should be prohibited. Section 14A of the Dodd-Frank Act put in place a system for addressing these issues on an ongoing periodic basis. Under the statute, shareholders have the opportunity at least every six years to vote on how often a shareholder vote should occur. Shareholders are given an advisory vote on executive compensation at least every three years. This combination adequately ensures that shareholder views are regularly obtained and also gives shareholders the opportunity to alter the frequency of such votes. Permitting shareholder resolutions on more or less frequent say on pay votes is redundant and overly burdensome to companies, given the cost of assessing the propriety of a resolution, engaging the proponent and fashioning a response to include in the proxy.

Commission's Proposal Is Inconsistent With the Nonbinding Status of the Frequency Vote. The Commission has proposed to allow a company to exclude shareholder proposals on alternative say on pay or frequency votes provided the company adopts the frequency of say on pay votes selected by the plurality of shareholders in the most recent frequency vote. The Center believes that this approach is inconsistent with the nonbinding nature of the frequency vote under the Dodd-Frank Act. The Commission has interpreted the frequency vote as nonbinding, yet when read in conjunction with the proposed amendment to rule 14a-8, this interpretation is virtually meaningless. If a company wishes to exclude shareholder resolutions on these subjects, its only alternative is to adopt the frequency selected by shareholders, making the frequency vote effectively binding.

The Center believes that a better and simpler approach is to prohibit all shareholder resolutions seeking alternate frequencies and to follow the statutory time frames for revisiting the shareholder vote on frequency (e.g., at least every six years).

All Resolutions Seeking Alternative Advisory Shareholder Votes On Compensation Should Be Prohibited. The Center believes that under the Dodd-Frank Act the Commission should adopt an interpretation that all resolutions seeking shareholder approval of the issuer's executive compensation disclosures in the proxy should be prohibited. This encompasses both the periodic shareholder vote on the company's complete executive compensation disclosures in the proxy and so-called "mini say-on-pays" – shareholder resolutions seeking an up or down advisory vote on individual elements or aspects of a company's compensation program. This appears to be consistent with Congressional intent and the SEC interpretation so far.[2] The Center urges the Commission should make this explicit in the final release.

Consistent with the rule of construction in section 14A(c)(4) of the Dodd-Frank Act, the Center does not believe that this approach would block nonbinding shareholder proposals asking the company to change particular compensation policies or programs rather than proposals for say on pay votes, which are governance rather than compensation issues. For example, a nonbinding proposal asking the company to change the structure of payments upon termination would not be prohibited but a say on pay or a vote frequency resolution would be prohibited.

Shareholder Resolutions Be Excluded Regardless of the Scope of Changes to Compensation Programs. The Commission requested comment on whether the standard for excluding shareholder resolutions should vary based on whether the company has made changes to its compensation system. The Center believes that the shareholder resolutions seeking future say on pay votes or those related to the frequency of such votes should be blocked even if a company makes substantial changes to its compensation program. If shareholders are dissatisfied with a company's program, they can express their dissatisfaction on the next shareholder vote or directly with the company. Alternatively, shareholders can seek to engage directly with the

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[2] The Commission's rules state that an issuer could voluntarily seek an advisory vote on particular aspects of its compensation, such as cash compensation or golden parachutes. See, e.g., n.39. The preamble to the proposing release agrees with this: "a say on pay vote is defined as a separate resolution subject to shareholder vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K." Shareholder resolutions seeking a shareholder vote on individual elements of compensation would meet this definition and therefore should likewise be prohibited.

issuers, consistent with the purpose of say on pay – to increase communication between and among the stakeholders.

In sum, the Center believes that all shareholder resolutions seeking alternative say on pay votes or frequency votes should be blocked because the Dodd-Frank Act provides for clear mechanisms for providing regular shareholder input on both issues. Moreover, the Commission's proposed formulation is inconsistent with the nonbinding nature of the vote.

2. The Commission Should Provide a Longer Time Frame for Disclosure of the Frequency of Future Say on Pay Votes

If the Commission does not change its interpretation regarding exclusion of shareholder resolutions as substantially implemented as recommended above, the Center strongly urges the Commission to provide issuers with more time to determine whether it will adopt the frequency selected by the plurality of shareholders or adopt a different interval. The Commission's proposed rule requires companies to disclose whether they will adopt the results of the frequency vote on the 10Q following the company's annual meeting. Based on input from the Center's SEC Disclosure Working Group, the Center believes that mandating this disclosure is inappropriate and inconsistent with the timeframe within which boards hold meetings of their compensation committees.

As with the disclosure of say on pay votes, the Commission's proposed rule makes a nonbinding resolution appear to be binding by creating the impression that companies are obliged to act consistent with the vote. The frequency vote is a nonbinding vote. Consistent with the treatment of other nonbinding votes, companies should have the discretion to engage in a thoughtful and measured determination as to how they will proceed and when to disclose their decision. Rather than create a process that unnecessarily accelerates the shareholder proposal process, the Center believes that companies should be allowed an appropriate amount of time for analysis and deliberation to make the determination on the frequency vote as they do with other nonbinding votes.

III. Golden Parachute Disclosure and Shareholder Vote

The Center believes that the Commission's proposed disclosure and regulations proposing a shareholder vote on executive compensation in the event of a merger, acquisition or proposed sale leaves a number of unanswered questions and we urge the Commission to make several clarifications. The Center's views on these issues follow:

- The Commission should clarify that the compensation required to be disclosed in the table under proposed section 402(t) is that which would be paid to the named executive officers of the acquiring company and the target company that is triggered by the transaction. Disclosure should not be required for NEOs of the acquiring company if the transaction does not trigger any change-in-control payments for them.

- The preamble states that the acquiring company must disclose any golden parachute compensation paid to the NEOs of the target company that relates to the transaction. The experience of the Center's Subscribers is that such arrangements are very rare and thus disclosures will be infrequent. The commission should consider dropping this requirement.

- The Center agrees with the proposal that only compensation arrangements related to the merger transaction should be disclosed. Post-merger employment or other arrangements should not be disclosed.
- The Center believes that the new tabular disclosure for "golden parachute" arrangements in a merger situation should not be required to be included in every company's annual proxy statement. The existing termination disclosures are lengthy and detailed enough, and the proposed disclosure format would not provide additional insight or material information.
- The proposed disclosures should be limited to named executive officers only. Expanding the disclosures to all executive officers would add immensely to the complexity and the length of the disclosure without providing material information that is useful to investors. However, such information could be competitively harmful to the companies in the transaction.
- The disclosure should not cover previously vested equity awards or earned pension or nonqualified deferred compensation amounts. These amounts are already disclosed elsewhere in annual proxy statements and are not directly related to the transaction.
- Post-merger employment agreements should not be included in the disclosure, because they are already disclosed on Form 8-K following the transaction.
- The valuation of equity compensation related to the merger transaction is appropriate as disclosed, but the Commission should ensure that the company uses a valuation methodology consistent with its valuation of equity in its annual proxy.

Conclusion

The Center On Executive Compensation appreciates this opportunity to provide comments on our suggested approaches to regulation under the say on pay and golden parachute provisions of the Dodd-Frank Act. If you have any questions about these comments, please contact me at tbartl@execcomp.org.

Sincerely,

Timothy J. Bartl
Senior Vice President and General Counsel

cc: Securities and Exchange Commission
Hon. Mary L. Schapiro, Chairman
Hon. Kathleen L. Casey, Commissioner
Hon. Commissioner Elisse B. Walter, Commissioner
Hon. Commissioner Luis A. Aguilar, Commissioner
Hon. Commissioner Troy A. Paredes, Commissioner

Securities and Exchange Commission -- Division of Corporation Finance
Ms. Meredith Cross