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November 17, 2010

Via Internet Comment Form

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 Arrangements

Dear Ms. Murphy:

On October 28, 2010, the Commission published in the Federal Register proposed rules regarding the shareholder approval requirements added by section 14A of the Securities Exchange Act of 1934, as added by section 951 of the Dodd-Frank Wall Reform and Consumer Protection Act (Dodd-Frank Act). This letter sets forth the comments of Frederic W. Cook & Co., Inc. with respect to the proposed rules. Our comments are primarily in the form of responses to seven of the SEC's Requests for Comments. In addition, we have included one additional comment at the end of this letter.

Frederic W. Cook & Co., Inc. provides compensation consulting services to corporations, boards of directors, and compensation committees with respect to the compensation of executives and directors. The Firm's services are provided to companies in all industries and size categories. We have provided compensation consulting services to more than 2000 companies since we were founded 37 years ago. We are the independent compensation consultants to approximately 33% of the S&P Top 100 companies.

(21) Should the proposed note to Rule 14a–8(i)(10) be available if the issuer has materially changed its compensation program in the time period since the most recent say-on-pay vote required by Section 14A(a)(1) and Rule 14a–21(a) or the most recent frequency vote required by Section 14A(a)(2) and Rule 14a–21(b)?

The proposed note to Rule 14a-8(i)(10) would allow an issuer to exclude a shareholder proposal with respect to an advisory vote on executive compensation if it has implemented a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes in its most recent shareholder vote. Since the issuer has acted in accordance with an expressed shareholder preference with respect to the frequency of say-on-pay votes, we see no public

policy that would be served by requiring a say-on-pay vote on a time schedule that differs from the time schedule approved by the shareholders.

In addition, allowing additional say-on-pay votes when the compensation program has been "materially changed" imposes a materiality standard in an area where there are no guidelines as to materiality for an issuer to rely on. When is a large hiring bonus material? Is it material when long-term incentives remain the same in aggregate value for NEOs, but the performance criteria for performance shares is changed? We would expect the imposition of a materiality standard to embroil issuers and the SEC in complicated (and ultimately uncertain) fact finding inquiries that are unnecessary since the shareholders (who are well aware that compensation programs often change materially) will have already stated a preference for the frequency of say-on-pay votes.

<u>(23) Would the proposed Form 10–Q or Form 10–K disclosure notify shareholders on a timely basis of the issuer's determination regarding the frequency of the say-on-pay vote? Should this disclosure instead be included in the Form 8–K reporting the voting results otherwise required to be filed within four business days after the end of the shareholder meeting, or in a separate Form 8–K required to be filed within four business days of when an issuer determines how frequently it will conduct shareholder votes on executive compensation in light of the results of the shareholder vote on frequency?</u>

As described in more detail below in our response to Request for Comment (24), we do not believe the SEC should impose a shorter time period for reporting the issuer's determination with respect to the say-on-frequency vote, and, in fact, we consider the proposed rule unnecessarily constraining.

<u>(24) Would the amendments to Form 10–Q and 10–K, as proposed, allow an issuer sufficient time to analyze the results of the shareholder votes on the frequency of shareholder votes on executive compensation and reach a conclusion on how it should respond? Should the issuer's plans with respect to the frequency of such shareholder votes instead be required to be disclosed no later than in the Form 10–Q or Form 10–K for the next full time period ended subsequent to the vote (for example, if the vote occurs in the second quarter of the issuer's fiscal year, the disclosure would be required no later than in the Form 10–Q for the third quarter)?</u>

SEC rules require Form 10-Q to be filed within 40 days of the end of the quarter for large accelerated filers. Depending on the timing of the issuer's annual meeting, a requirement to report an issuer's say-on-frequency policy by the next 10-Q filing will create unnecessary hardships with no corresponding public benefit.

Depending on the circumstances, the say-on-frequency decision could require both a committee meeting (typically the compensation committee or the governance committee) and a board meeting. While corporate meeting policies obviously differ, it is not uncommon for both board and committee meetings to occur on a quarterly cycle. Especially if the annual meeting occurs near the end of a fiscal quarter, a requirement to report the issuer's decision in the first

10-Q after the annual meeting will result in the need for many issuers to schedule one or more out-of-cycle committee and board meetings to comply with the SEC's timing rules.

We cannot think of any meaningful public purpose that would be met by a requirement to report the issuer's decision in the first following quarterly filing that would not be as readily served by a requirement that the issuer announce its decision in the second following quarterly filing. Since the currently proposed rules will impose additional costs on some issuers without a corresponding benefit, we believe the public interest will be better served by a role that allows the issuer to report its decision in the second following quarterly filing.

(32) Should Item 402(t) disclosure be required only in the context of an extraordinary transaction, as proposed? Should we extend the Item 402(t) disclosure requirement to annual meeting proxy statements generally, or in annual meeting proxy statements in which the shareholder advisory vote required by Section 14A(a)(1) is solicited? Would this disclosure be useful in annual meeting proxy statements in the absence of an actual transaction, or are the existing compensation disclosure requirements applicable to annual meeting proxy statements sufficient? Should we amend Item 402(j) to cover the matters required by Section 14A(b)(1) that are not otherwise required by that Item, rather than adopt proposed Item 402(t)?

We strongly recommend that the lengthy disclosures in Item 402(t) not become a mandatory part of all annual meeting proxy statements.

For many, if not most issuers, the termination/change in control disclosures implemented to comply with Item 402(j) are the most complicated and expensive part of the executive compensation disclosures required by Item 402. We have personally dealt with situations where the preparation and review of the tables required hundreds of hours and many tens of thousands of dollars. However, after four years of complying with the new rules, many issuers have managed to somewhat routinize the costs of these often burdensome calculations.

Making the Item 402(t) disclosures mandatory would introduce significant new costs into the disclosure process without, we believe, any corresponding public policy benefit. While the lengthy disclosures of Item 402(t) may be justifiable in the context of an actual merger, acquisition, sale, etc. (we will refer to these transactions generally as "reorganizations"), they are not justified on an ongoing basis (although, of course, issuers will have the option of electing to comply with new Item 402(t) if they so desire).

By way of example, we have identified the following issues under new Item 402(t) that may require significant new expenditures of effort by issuers:

- When does a payment of compensation "relate to" a reorganization? This is a different test than the current rule, which is generally interpreted to only include payments that occur on account of a change in control or a termination.
- The new rules state that, if "uncertainties exist as to the provision of payments or benefits," the issuer must make a "reasonable estimate" applicable to the payment or

benefit and disclose material assumptions underlying such estimates in its disclosures. Exactly what this means is unclear. Must the probability of termination after a change in control be estimated?

- Health care benefits must be computed using the assumptions used for financial reporting purposes under generally accepted accounting principles.

As has been often pointed out, the sheer length of executive compensation disclosures in the proxy has made it increasingly difficult for investors to comprehend the information placed before them. The Dodd-Frank Act mandates numerous additions to the executive compensation disclosure process that will further increase the complexity of the disclosures. In light of this, we believe the public interest is best served by not increasing the length of the change-in-control disclosures beyond the scope required by the Dodd-Frank Act.

<u>(38) Should employment agreements that named executive officers of the target issuer enter into with the acquiring issuer for services to be performed in the future be excluded from the table, as proposed? Are such agreements used to induce target executives to support the transaction? Should such employment agreements instead be required to be quantified and included in the table? If such agreements should be quantified, should they be quantified separately, such as in a separate table, or is there a better way to present such agreements? If quantification is appropriate, should we specify how employment agreements should be quantified, for example by requiring a reasonable estimate applicable to the payment or benefit and disclosure of material assumptions underlying such estimates, or a valuation based on projected first year annual compensation, or average annual basis, or a present value for this compensation? If so, please explain.</u>

We share the SEC's concern with respect to the complexity of including the value of post-reorganization employment contracts in the table. We don't see any way to present that information that would not potentially give the shareholders a misimpression of the benefits to the NEOs from reorganization. If, for example, the CEO agrees to a post-reorganization employment contract with a three-year term of employment at a salary of $1 million per year, we don't see any appropriate methodology for assigning a value to this contract for disclosure purposes. While you could value the contract at the present value of the salary, to do so would suggest the discounted amount is a benefit of the reorganization, while it might just as logically represent the amount the CEO would have been paid absent the reorganization.

<u>(39) In proxy statements soliciting shareholder approval of a merger or similar transaction, we are proposing that the tabular quantification of dollar amounts based on issuer stock price be based on the closing price per share as of the latest practicable date. Is this measurement date appropriate? Would a different measurement, such as the average closing price over the first five business days following the public announcement of the transaction, more accurately reflect the amounts payable to the named executive officers in connection with the transaction? If so, explain why.</u>

The current proposal presents two unwarranted complexities, determining the latest practicable date for the closing of a reorganization and computing the issuer's stock price on that date. Especially if the closing of a transaction is contingent on regulatory approvals, the "latest practicable date" concept presents unnecessary difficulties of calculation. This difficulty is compounded by requiring the issuer to speculate on the stock price as of that date.

We recommend that issuers be given the alternative of preparing the tabular computations as of the end of the month following the date scheduled for the shareholder vote and that the stock price could be the price as of the end of the second month preceding the filing of the proxy statement. Since the reorganization will have invariably been announced by this time, the stock price should reflect shareholder perceptions of the transaction.

(48) If golden parachute arrangements have been modified or amended subsequent to being subject to the annual shareholder vote under Rule 14a–21(a), should we require the merger proxy separate shareholder vote to cover the entire set of golden parachute arrangements or should we, as proposed, require a separate vote only as to the changes to such arrangements? For example, if a new arrangement is added, would the Section 14A(b)(2) shareholder advisory vote be meaningful if shareholders do not have the opportunity to express their approval or disapproval of the full complement of compensation that would be payable?

While we understand the nature of the SEC's concern, we believe the language of section 14A(b) clearly limits the SEC's authority to require a shareholder vote on all golden parachute arrangements just because one has been amended. As a practical matter, however, we do not believe this limitation is significant since shareholders who disapprove of the totality of golden parachute arrangements will likely use the vote on some golden parachute arrangements as a vehicle for expressing their dissatisfaction on all of the golden parachute arrangements.

Just to make sure our views are clear, we will use a very simplified example to illustrate our understanding of the SEC's concern. Suppose the CEO of an issuer has a golden parachute arrangement providing for severance pay, and the total severance pay is $10 million. The arrangement is fully disclosed pursuant to Item 402(t) and subject to an annual shareholder vote. The following year the CEO is granted restricted shares, the vesting of which will accelerate in the event of the CEO's involuntary termination within a certain time period following a change in control. The value of the shares is $10 million. Finally suppose that the shareholders who approved the severance pay arrangement think $15 million is the most the CEO should receive in the event of a change in control. They would approve the severance pay or the restricted stock, but not both.

It is our understanding that the SEC's concern is that, if the only resolution on the ballot is to approve the restricted stock, the shareholders are not being asked to vote on the appropriate question because, although the shareholders would approve the restricted stock if it were the only golden parachute arrangement, they find the sum of the golden parachute arrangements problematic. However, the ballot resolution would be more limited. It would state something to the effect of "Do you approve of the golden parachute arrangements described in Section __ of

the proxy statement," which would be a reference to the portion of the proxy statement disclosing the restricted stock.[1]

We disagree with the premise of the SEC's concern — that shareholders will approve the new arrangements even if they think the total amount of compensation is too high. Shareholders, especially institutional shareholders and proxy advisers, are much more sophisticated than that. Section 402(t) requires the disclosure of all golden parachute arrangements as part of the proxy solicitation although, as noted two tables will be used—one for previously approved arrangements and one for new arrangements. So, it will be easy to determine the overall magnitude of the arrangements. We believe it would be highly improbable that a shareholder would vote for the new arrangements if it found the terms of the total arrangements objectionable.

More importantly, we do not think that there is a statutory basis for requiring a vote on the prior arrangements. The last sentence of section 14A(b)(1) exempts from the vote requirement that "have been subject to a shareholder vote under subsection (a)." We don't see any basis for imposing a vote that is not within the scope of this very clear statutory language.

(49) Should we exempt certain changes to golden parachute arrangements that have been altered or amended subsequent to their being subject to the annual shareholder vote under Rule 14a–21(a)? For example, should we require a separate vote under Rule 14a–21(c) if the only change is the addition of a new named executive officer not included in the prior disclosure or a change in terms that would reduce the amounts payable? Should we provide an exemption for golden parachute arrangements previously subject to an annual shareholder vote if the only change is the subsequent grant, in the ordinary course, of additional awards under an employee benefit plan, such as stock options or restricted stock, that are subject to the same acceleration terms that applied to those already covered by the previous vote? For example, if subsequent to the previous vote, additional equity awards are granted in the ordinary course pursuant to a plan, such as an annual option grant, and those awards are subject to acceleration in the event of a change in control on the same terms as earlier awards that were subject to the previous vote, should we exempt those subsequent awards? Should any other types of changes to golden parachute compensation arrangements be so exempted?

We generally believe that additional golden parachute arrangements and material changes to previously approved golden parachute arrangements should trigger the shareholder vote requirement.

We appreciate the fact that requiring a new vote whenever arrangements are added or new equity grants made will both (1) decrease the inclination of issuers to comply with section 402(t) prior to an actual reorganization and (2) lead to the need for more votes in the case of a reorganization. In particular, the majority of large issuers annually issue equity awards and these awards routinely have some type of potential accelerated vesting in the event of a change in

[1] As required by Instruction 6 to Item 402(t), there would be a separate table with respect to the restricted stock.

control. Accordingly, for most issuers, there will always be a requirement to conduct a golden parachute vote since additional equity will have been issued since the last say-on-pay vote.

Nevertheless, we do not see how the purposes of section 14A(b) can be met without inordinate complexity unless any material amendment or new equity award triggers a requirement for a golden parachute vote. In many cases the key consideration for a shareholder is the overall magnitude of awards. While a shareholder may have been content to approve a golden parachute arrangement for the CEO with a value of $10 million, which arrangement includes restricted stock worth $2 million, it may not be willing to approve compensation arrangements with a value of $15 million, even if this incremental value were achieved through the issuance of restricted stock worth $5 million that had terms identical to the previously issued restricted stock. A rule that eliminated the golden parachute vote if the new arrangements were equity awards similar to prior awards appears inconsistent with giving shareholders an opportunity to express their opinion on the overall magnitude of golden parachute arrangements.

We have considered whether this issue could be addressed with some type of "ordinary course of business exception," that is, the requirement of a new vote would not be triggered if the new grant did not differ from those "ordinarily" granted. We question whether such an exception could be drafted in a way that would be of much practical benefit. The magnitude of equity grants, as well as their design, routinely changes and, in fact, it would be very unusual in our experience for the equity grants to be identical on a year-over-year basis. The mix of options, restricted stock, and performance shares frequently changes. Also, the NEO table frequently changes, so the addition of one new NEO would make the prior approvals insufficient. These and similar considerations cause us to suspect that an exception for "ordinary" grants would not be of much practical assistance.

Consistent with our comments, we do believe that the need for a golden parachute vote should not exist if the only change in the golden parachute arrangements involves a reduction in value. To take an extreme case, if the only difference is the vesting of previous equity awards so that the number of equity awards that could be accelerated by a change in control has decreased, there is no value in requiring another shareholder vote.

<u>Additional Comment: Final rules should allow registrants the option of presenting all golden parachute arrangements in one table along with a vote on all arrangements, even if some have been previously approved.</u>

There is one additional alternative that should be allowed under the final rules that has both potential shareholder and issuer value—giving issuers the option of a golden parachute vote on all arrangements, even if some have been previously approved.

Due to the complexity of the Item 402(t) tables and issues in determining what has been previously approved, we believe situations will occur where the issuer would prefer to present all the change in control information in one table, even if some of the arrangements have been previously approved. Preparing one table will be less costly since information will not need to

be split out. In addition, as described previously, regardless of the way the ballot proposition is phrased, a shareholder vote on golden parachute arrangements will be based on the totality of the arrangements. In light of this, we expect that many issuers would prefer to present all the information in one table and seek shareholder approval of all the arrangements — i.e., they will conclude that the shareholder vote will be the same, regardless of how the issue is phrased.

Although as noted previously we do not think that the SEC can require a vote on all the arrangements if some have been previously approved, there is undoubtedly authority to offer this additional alternative. We believe that many issuers will take advantage of it.

Respectfully submitted,

David E. Gordon, Managing Director

For Frederic W. Cook & Co., Inc.