



Via Email

November 1, 2012

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

Re: File Number SR-NASDAQ-2012-109¹

Dear Ms. Murphy:

I am writing on behalf of the Council of Institutional Investors (“Council”), a non-profit association of corporate, public and union employee benefit plans with combined assets in excess of \$ 3 trillion.² Council members are large, long-term shareowners responsible for safeguarding the retirement savings of millions of American workers. The purpose of this letter is to respond to your invitation for comment on the NASDAQ Stock Market’s (“Nasdaq”) proposed rule change to modify the listing rules for compensation committees to comply with Rule 10C-1 under the Exchange Act and make other related changes (“Proposed Rule”).³

At the outset, we note that the Financial Crisis Inquiry Commission (“FCIC”) concluded:

Compensation systems—designed in an environment of cheap money, intense competition, and light regulation—too often rewarded the quick deal, the short-term gain—without proper consideration of long-term consequences. Often, those systems encouraged the big bet—where the payoff on the upside could be huge and the downside limited. This was the case up and down the line—from the corporate boardroom to the mortgage broker on the street.⁴

¹ Notice of Filing of Proposed Rule Change to Modify the Listing Rules for Compensation Committees to Comply with Rule 10C-1 under the Exchange Act and Make Other Related Changes, Exchange Act Release No. 68,013 (Oct. 9, 2012), <http://www.sec.gov/rules/sro/nasdaq/2012/34-68013.pdf> [hereinafter Proposed Rule].

² For more information about the Council of Institutional Investors (Council) and its members, please visit the Council’s website at http://www.cii.org/become_a_member/become_a_member.

³ Proposed Rule, *supra* note 1, at 1.

⁴ The Financial Crisis Inquiry Report *xix* (Jan. 2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

Significant responsibility for the faulty compensation systems identified by the FCIC resides with compensation committees that approved, sometimes following the recommendations of conflicted external advisers, poorly structured pay packages that encouraged a get-rich-quick mentality and overly risky behavior that helped bring the capital markets to their knees.⁵ We, therefore, generally supported Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) which is the statutory authority for the Proposed Rule.⁶

Our support for Section 952 of Dodd-Frank was derived from the Council’s membership approved policies which include a number of substantive provisions on “principles and practices for compensation committees,”⁷ and, importantly, a detailed “independent director definition.”⁸ Combined those policies support fully-independent compensation committees to help ensure that executive pay decision-making is free of actual or perceived conflicts of interest that could color committee members’ judgment.⁹ Those policies also support the concept of minimizing and disclosing potential conflicts of interest among pay advisers.¹⁰ In our view, pay advisers who, for example, count on lucrative actuarial or employee benefit contracts from senior management may be inclined to recommend overly-generous pay packages for those executives.¹¹

⁵ Letter from Justin Levis, Senior Research Associate, Council of Institutional Investors to Ms. Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission 1 (Apr. 20, 2011) (Commenting on the U.S. Securities and Exchange Commission proposal that resulted in Rule 10C-1 implementing Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)), <http://www.cii.org/UserFiles/file/CII%20Letter%20on%20SEC%20Proposal%20on%20Comp%20Cmtes%20final.pdf>.

⁶ *See, e.g.*, Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Christopher J. Dodd, Chairman, Senate Committee on Banking, Housing, and Urban Affairs 2 (Nov. 18, 2009) (“Reforms included in the discussion draft [the predecessor to Section 952 of Dodd-Frank] would help ensure that compensation committees are free of conflicts and receive unbiased advice.”), <http://www.cii.org/UserFiles/file/Dodd%20Reform%20Bill%20Discussion%20Draft%20Letter%2011-18-09.pdf>.

⁷ Council of Institutional Investors, Corporate Governance Policies § 5.5 **Role of Compensation Committee** (updated Oct. 5, 2012), [http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2010-5-12%20FINAL\(2\).pdf](http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2010-5-12%20FINAL(2).pdf).

⁸ *Id.* § 7 **Independent Director Definition**.

⁹ *See id.* § 5.5a **Committee Composition** (“All members of the compensation committee should be independent.”).

¹⁰ *Id.* § 5.5g **Outside Advice** (“the committee should annually disclose an assessment of its advisers’ independence, along with a description of the nature and dollar amounts of services commissioned from the advisers and their firms by the client company’s management”); *see also* Investors’ Working Group, U.S. Financial Regulatory Reform: The Investors’ Perspective 23 (July 2009), [http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20\(July%202009\).pdf](http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20(July%202009).pdf) (findings endorsed by Council membership include that “[c]onflicts of interest [of compensation advisers] contribute to a ratcheting-up effect for executive pay . . . [and] should be minimized and disclosed”).

¹¹ *See, e.g.*, Investors’ Working Group at 23.

Consistent with the Council's membership approved policies, the Council provides the following specific comments on the Proposed Rule:

Requirement to Have a Compensation Committee

The Council generally supports the Proposed Rule's change to the current listing rules eliminating the "alternative" that permits Nasdaq-listed companies to avoid establishing a standing compensation committee of the board.¹² The proposed change is supported by a Council membership approved policy that provides that "[c]ompanies should have . . . compensation committees, and all members of these committees should be independent."¹³ We note that the basis for the Council's policy is generally consistent with the following description of the basis for the Nasdaq's proposed change:

Since responsibility for executive compensation decisions is one of the most important responsibilities entrusted to a board of directors, Nasdaq believes that there are benefits from a board having a standing committee dedicated solely to oversight of executive compensation. Specifically, directors on a standing compensation committee may develop expertise in a company's executive compensation program in the same way that directors on a standing audit committee develop expertise in a Company's accounting and financial reporting processes. In addition, a formal committee structure may help promote accountability to stockholders for executive compensation decisions.¹⁴

¹² Proposed Rule, *supra* note 1, at 8 ("Nasdaq proposes to eliminate the Alternative and require Nasdaq-listed Companies to have a standing compensation committee with the responsibility for determining, or recommending to the full board for determination, the compensation of the chief executive officer and all other Executive Officers of the Company.").

¹³ Council of Institutional Investors § 2.5 **All-independent Board Committees**.

¹⁴ Proposed Rule, *supra* note 1, at 7; *cf.* Letter from Justin Levis at 2 ("Executive compensation is so important to the long-term health of the company and so complex that it deserves special, ongoing attention by a dedicated working group of the board.").

Compensation Committee Composition – Compensatory Fees

The Council generally supports the Proposed Rule’s change to the current listing standards to “adopt the same standard for compensation committee members that applies to audit committee members under Rule 10A-3 under the Exchange Act with respect to compensatory fees[] . . . [thereby prohibiting] a compensation committee member from accepting directly or indirectly any consulting, advisory or compensatory fee from an issuer or any subsidiary.”¹⁵ The more rigid independence requirements proposed for compensation committee members would move the independence requirements for those members closer to the Council’s membership approved independent director policies.

We note that the Council’s policies would generally result in a finding that a director is not independent if he or she “[h]as, or in the past five years has had, . . . a personal contract with the corporation, an executive officer or any affiliate of the corporation.”¹⁶ That provision explains “Council members believe that even small personal contracts, no matter how formulated, can threaten a director’s complete independence.”¹⁷

More broadly, the introduction to the Council’s independent director definition states that a narrowly drawn definition of an independent director is in the financial interest of issuers and long-term shareowner’s because:

- Independence is critical to a properly functioning board;
- Certain clearly definable relationships pose a threat to a director’s unqualified independence;
- The effect of a conflict of interest on an individual is likely to be almost impossible to detect, either by shareowners or other board members; and
- While an across-the-board application of *any* definition to a large number of people will inevitably miscategorize a few of them, this risk is sufficiently small and is far outweighed by the significant benefits.¹⁸

¹⁵ Proposed Rule, *supra* note 1, at 12-13.

¹⁶ Council of Institutional Investors § 7.3d.

¹⁷ *Id.*

¹⁸ *Id.* § 7.1 Introduction.

While the Council's policies on independence relating to the acceptance of compensatory fees are clearly more narrowly drawn than those of the Proposed Rule, particularly in terms of a look back period,¹⁹ we acknowledge that "there is no compelling justification to have different independence standards for audit and compensation committee members with respect to the acceptance of compensatory fees from a Company."²⁰ Longer term, however, we would respectfully request that the Nasdaq consider, perhaps as part of a future rulemaking, developing a more comprehensive and robust definition of an independent director that would be applicable to *all* board committees consistent with the best practices reflected in the Council's membership approved policies. To assist you in that regard attached to this letter for your consideration is the entire Council membership approved "Independent Director Definition."

Compensation Committee Composition – Affiliation

The Council does not object to the Proposed Rule's change to the current listing standards to require "that Companies' boards of directors should consider affiliation in making an eligibility determination for compensation committee members, but . . . not propose bright-line rules around this factor."²¹ We also do not object to Nasdaq's decision not to propose that compensation committee members meet the affiliation standards currently applicable to Nasdaq audit committee members because doing so would impose a blanket prohibition on "representatives of significant stockholders, to serve on compensation committees [notwithstanding that] . . . their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program."²²

We, however, would respectfully request that, when considering affiliation in making an eligibility determination for compensation committee members, the final rule explicitly require the board to consider "personal or business relationships between members of the compensation committee and the listed issuer's executive officers" as described by the U.S. Securities and Exchange Commission ("Commission") in promulgating Rule 10C-1.²³ As suggested by the Commission, we believe that personal or business relationships between the compensation committee members and the issuer's executive officers are not uncommon and can result in the loss of independence.²⁴

¹⁹ Proposed Rule, *supra* note 1, at 13 ("the proposed requirement applicable to compensation committee members will not include a 'look-back' period").

²⁰ *Id.* at 12.

²¹ *Id.* at 15.

²² *Id.*

²³ Listing Standards for Compensation Committees, Exchange Act Release No. 67,220, at 24 (June 20, 2012), <http://www.sec.gov/rules/final/2012/33-9330.pdf>.

²⁴ *Id.* ("For example, the exchanges might conclude that personal or business relationships between members of the compensation committee and the listed issuer's executive officers should be addressed in the definition of independence").

As explained in our comment letter to the Commission in response to the promulgation of Rule 10C-1:

A director may lose objectivity in his/her oversight role if he/she, for instance, is associated with a firm that is a paid adviser to one of the *company's executive officers* or if he/she is associated with a non-profit organization that receives significant grants from one of the *company's officers*. Other examples include if the director is part of an interlocking directorate in which the *CEO or other officer of the company* serves on the board of a third-party entity (for-profit or not-for-profit) employing the director, or if the director delegates his/her decision making power as a director to *management*.²⁵

Exceptional and Limited Circumstances Exception

The Council generally does not support the Proposed Rule's retention of "its existing exception that allows a Company to have a non-Independent Director serve on the compensation committee under exceptional and limited circumstances."²⁶ As indicated, the Council's membership approved policies provide that "[a]ll members of the compensation committee should be independent."²⁷

We believe our policy is generally consistent with the language and intent of Section 10C to the Exchange Act ("Section 10C") providing that "each member of the compensation committee of the board of directors of an issuer be . . . independent."²⁸ We note that while the language of Section 10C explicitly provides an opportunity to cure a deficiency when an independent director loses his or her independent status, it does not provide for the appointment of a non-independent director in the first instance.²⁹

In addition, we do not find particularly compelling the Nasdaq's basis for the exception. The Proposed Rule explains that the exception is "an important means to allow Companies flexibility as to board and committee membership and composition in unusual circumstances, which may be particularly important to smaller companies."³⁰

²⁵ Letter from Justin Levis at 3 (emphasis added).

²⁶ Proposed Rule, *supra* note 1, at 16.

²⁷ Council of Institutional Investors § 5.5a **Committee Composition**.

²⁸ Securities Exchange Act of 1934, Pub. L. 111-203, § 10C(a)(2)(B) (July 21, 2010), <http://www.sec.gov/about/laws/sea34.pdf>.

²⁹ *Id.* § 10C(e)(2).

³⁰ Proposed Rule, *supra* note 1, at 17.

We are unaware of any “unusual circumstances” contemplated by the Nasdaq that would lead us to conclude that a non-independent board member on the compensation committee would benefit Council members and other long-term shareowners.

Compensation Committee Charter

We generally support the Proposed Rule’s requirement for “each Company to certify that it has adopted a formal written compensation committee charter and that the compensation committee will review and reassess the adequacy of the formal written charter on an annual basis.”³¹ The proposed requirement is consistent with Council membership approved policies which state:

To perform its oversight duties, the committee should approve, comply with and fully disclose a charter detailing its responsibilities.³²

The Council, however, does not support the Nasdaq’s decision to simply adopt the six independence factors enumerated in Rule 10C for compensation committee’s consideration in making an independence determination for a compensation consultant, legal counsel, or other adviser.³³ We believe that at least one additional independence factor should be considered—whether the compensation committee consultants, legal counsel, or other advisers require that their clients contractually agree to indemnify or limit their liability.

We note that it has become standard practice for many compensation consultants to include third party indemnification and limitation of liability clauses in contracts with their corporate clients. Consistent with Council membership approved policies, we believe that those contractual provisions raise conflict of interest red flags that every compensation committee should consider as a factor in determining the independence of the consultant.³⁴ In our view, compensation advisers and their firms should stand behind their work and buy insurance coverage if concerned about potential liability.

³¹ *Id.* at 18.

³² Council of Institutional Investors § 5.5c Oversight.

³³ Proposed Rule, *supra* note 1, at 21 (“Nasdaq considered whether to adopt other independence factors, but ultimately concluded that the six independence factors enumerated in Rule 10C-1 will provide compensation committees with a broad and sufficient range of facts and circumstances to consider in making an independence determination”).

³⁴ Council of Institutional Investors § 5.5g Outside Advice (“Companies should not agree to indemnify or limit the liability of compensation advisers or the advisers’ firms.”).

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We appreciate the opportunity to respond to the Proposed Rule. If you have any questions about this letter or need any additional information, please feel free to contact me at (202) 261-7081 or jeff@cii.org.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney
General Counsel

Attachment