



Via Hand Delivery

March 31, 2014

Keith F. Higgins
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Compensation Arrangements between Nominating Shareholders and Board Nominees

Dear Mr. Higgins:

I am writing on behalf of the Council of Institutional Investors (“CII”). CII is a nonprofit, nonpartisan association of more than 130 public, corporate and union pension funds, and other employee benefit plans, foundations and endowments with combined assets that exceed \$ 3 trillion.¹ As long-term investors with the duty to protect the assets of millions of current and future retirees, our members believe transparency is essential to the efficient functioning of our capital markets.

CII has had a long interest in pay-related disclosure for non-employee directors and candidates.² We are writing to express our concerns with respect to the transparency of compensation paid to directors or director nominees by nominating shareholders in the context of threatened or completed proxy contests.³ We are requesting that the SEC review its proxy rules for ways to ensure complete information is provided to investors about such arrangements.

CII Policies Regarding Director Compensation

Many of the provisions of CII’s director compensation policy are implicated by director compensation arrangements, including the following:

¹ For more information about the Council of Institutional Investors (“CII”), including its members, please visit CII’s website at http://www.cii.org/become_a_member/become_a_member.

² See, e.g., Appendix 1, page 12 of letter dated March 29, 2006 from Ann Yerger, Executive Director, to Nancy Morris, Secretary, available at <http://www.sec.gov/rules/proposed/s70306/s70306-74.pdf>.

³ See Wall Street Journal, Golden Leash Payments Fuel Debate, David Benoit and Joan S. Lublin, November 26, 2013.

- Director compensation policies should accomplish the following goals: (1) attract highly qualified candidates, (2) retain highly qualified directors, (3) align directors' interests with those of the long-term owners of the corporation and (4) provide complete disclosure to shareowners regarding all components of director compensation including the philosophy behind the program and all forms of compensation. Section 6.1
- Investors must have complete and clear disclosure of both the philosophy behind the compensation plan as well as the actual compensation awarded under the plan. Section 6.1
- Because director pay is set by the board and has inherent conflicts of interest, care must be taken to ensure there is no appearance of impropriety. Section 6.1
- The compensation committee (or alternative committee comprised solely of independent directors) is responsible for structuring director pay, subject to approval of all the independent directors, so that it is aligned with the long-term interests of shareowners. Section 6.2⁴

Current SEC Requirements

We believe that the proxy rules currently do not require the disclosure of adequate information regarding compensation arrangements between a nominee and the party that nominated the nominee. For example, Item 8 of Schedule 14A provides that a proxy solicitation that involves the election of directors should include the information required by Item 402 of Regulation S-K. Item 402(k), which is the provision in Item 402 that relates to director compensation, requires the disclosure of, among other things:

- a summary compensation table that includes information concerning the compensation of the directors *for the issuer's last completed fiscal year*; and
- a narrative description of any material factors necessary to an understanding of the director compensation disclosed in the summary compensation table.

These requirements do not address compensation to be paid to a board nominee by a nominating shareholder if the nominee is elected to a company's board.

Item 5 of Schedule 14A requires disclosure regarding any interests that participants in a proxy solicitation may have in the issuer that is the subject of the solicitation. For these purposes, the term "participant" includes any

⁴ CII's director compensation policy may be found at http://www.cii.org/corp_gov_policies.

nominee for whose election as a director proxies are solicited. Among other things, Item 5(b) requires disclosure regarding:

- the participant's present principal occupation or employment;
- certain legal proceedings in which the participant has been a party in the last ten years;
- the amount of securities of the issuer that the participant owns and recent transactions in the issuer's securities by the participant;
- any contracts, arrangements or understandings to which the participant is a party that involve the securities of the issuer;
- any arrangement or understanding that the participant has with any person
 - with respect to any future employment by the issuer or its affiliates; or
 - with respect to any future transactions to which the issuer or any of its affiliates will or may be a party; and
- any interest that a nominating party has in any matter to be acted upon at the meeting.

Read closely, none of the foregoing disclosures specifically require disclosure of compensatory arrangements between a board nominee and the group that nominated such nominee. For example, Schedule 14A requires information regarding arrangements involving the securities of the issuer, but that would not pick up an arrangement where the nominating shareholder's candidate is compensated with a cash retainer for his or her candidacy or service on the board. Similarly, the disclosures regarding employment of a nominee by the issuer and future transactions involving an issuer would not necessarily pick up the many ways in which a compensation arrangement between a nominee and a nominating shareholder can be structured.

In addition, none of the foregoing requirements call for disclosure about conflicts of interest presented by compensatory arrangements between a nominee and a nominating shareholder. As illustrated by the staff's own comments on recent proxy solicitations, these kinds of disclosures are important to provide to investors as they evaluate how they will vote in contested proxy solicitations.⁵

Request for Interpretive Guidance or Rulemaking

⁵ See Comments 4-11 of the Comment Letter from the Staff of the SEC's Division of Corporation Finance, dated March 28, 2013, to Elliott Associates L.P. et al.

As we believe the foregoing discussion illustrates, the disclosure rules that apply to contested proxy solicitations fail to sufficiently address compensation arrangements between a nominating shareholder and a nominee to the board of directors. While Item 5 of Schedule 14A requires some disclosure regarding arrangements between a nominating group and a board nominee, such disclosure requirements are not nearly as specific or prescriptive as the comprehensive disclosures required for compensation paid by an issuer to its officers and directors under Item 402 of Regulation S-K.

Going forward, we believe that there will be an increasing need for the SEC to act to ensure that investors are provided with information that will enable them to make informed voting decisions. We encourage the SEC to explore the issuance of interpretive guidance or amendments to the proxy rules that require additional disclosure about these kinds of arrangements. At minimum, we believe that contestants in a proxy contest should be required to disclose:

- the existence of any compensatory arrangements between a board nominee and a nominating shareholder relating to the nominee's candidacy or board service;
- the specific components of any compensatory arrangements between a board nominee and a nominating shareholder relating to the nominee's candidacy or board service, including:
 - any cash compensation, including salary, non-equity incentive and bonus to be paid to the nominee;
 - any equity compensation to be paid to the nominee;
 - any terms of the compensation, including performance criteria, payout formulas, any peer group companies used, measurement periods and vesting provisions;
 - the range of total compensation that may be paid under various performance scenarios;
- the goals and objectives of such compensation arrangements, including whether the arrangements relate to the nominee's willingness to be a nominee for the board or for his or her service on the board once elected;
- any indemnification and similar arrangements between the nominee and the nominating shareholder;
- disclosure regarding any conflicts of interest presented by such compensation arrangements; and
- any other material features of the compensation arrangements.

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Interpretive guidance or amendments to the proxy rules that require the disclosures outlined above will enhance shareholder protection and strengthen the shareowner franchise. As strategies in shareholder activism evolve, it is critical that reporting obligations evolve to include information that could be decisive in shaping investors' voting decisions.

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As always, we would welcome the opportunity to discuss this request with you or your staff at your convenience. Please feel free to contact me directly at (202) 261-7081 or jeff@cii.org, or our director of research, Glenn Davis, at (202) 261-7097 or glenn@cii.org.

Sincerely,

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

Jeff Mahoney
General Counsel