1700 N. Moore Street, Suite 2250, Arlington, VA 22209
Phone: (703) 841-2300 Fax: (703) 841-1184
Email: info@rila.org Web: www.rila.org

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

Re: **Proxy Disclosure and Solicitation Enhancements (File Number S7-13-09)**

The Retail Industry Leaders Association ("RILA") is pleased to respond to the Securities and Exchange Commission's ("SEC") request for comments on the proposed rule titled "Proxy Disclosure and Solicitation Enhancements" (the "Proposed Rule").

RILA is an alliance of the world's most successful and innovative retailer and supplier companies – the leaders of the retail industry. RILA members represent more than $1.5 trillion in sales annually and operate more than 100,000 stores, manufacturing facilities and distribution centers throughout the United States. Its member retailers and suppliers have facilities in all 50 states, as well as internationally, and employ millions of workers domestically and worldwide.

RILA would generally prefer that the SEC allow companies to make the disclosures contemplated by the Proposed Rule in their discretion based on the company's individual circumstances. Public companies are already motivated to implement effective corporate governance practices and share information about their governance with their shareholders. Mandating such disclosures for public companies in the Proposed Rule is a one-size-fits-all approach that does not permit consideration of whether such disclosures are appropriate in the context of the governance and compensation practices specific to each company and that company's industry.

Instead, RILA would prefer that companies continuously evaluate their governance practices through ongoing dialogue with their shareholders, with the goal of implementing and communicating governance practices that reflect their shareholders' particular concerns on a company-specific basis. Companies and shareholders have effectively used this process (and are still doing so) with respect to the compensation discussion and analysis ("CD&A") revisions made by the SEC just three years ago. We believe that this process will continue to be effective in addressing the issues raised by the Proposed Rule.

The one-size-fits-all approach contemplated by the Proposed Rule is particularly inappropriate for the retail industry. First, the requirements of the Proposed Rule do not accommodate the breadth of public company size and scale as a whole, or even within the retail industry alone. Disclosure regarding compensation, risk management, and governance

structures, which may be appropriate for a diversified international retailer, may be less relevant for a smaller retailer with fewer employees, geographic touchpoints, and product categories. Second, retailers often start as entrepreneurial enterprises where founding and/or current management may also be large shareholders. In such enterprises, management and shareholder interests are already intertwined and aligned, making the Proposed Rule unnecessary. Third, competition in the retail industry is particularly fierce, because entry barriers are lower than most other industries, strategic initiatives may be more easily replicated in retail than in industries where products and technologies may be protected by law, and rapidly changing consumer preferences can quickly make today's winner tomorrow's laggard, which constantly provides openings for new entrants with good ideas. For these and other reasons detailed below, certain proposed disclosure requirements contemplated by the Proposed Rule are not appropriate for the retail industry.

**Compensation Discussion and Analysis Disclosure**

The Proposed Rule contemplates expanding CD&A disclosure concerning a company's overall compensation program as it relates to risk management and risk-taking incentives. RILA does not support this aspect of the Proposed Rule because (1) the existing risk-disclosure regime is sufficient; (2) defining risks in relation to compensation programs is ambiguous; (3) the proposed risk disclosures would be of limited utility to shareholders; and (4) the proposed risk disclosures could cause competitive harm.

The existing disclosure regime for risk factors and Management's Discussion & Analysis already provides shareholders with sufficient information about the particular risks facing a company. This established framework is, and should continue to be, the appropriate vehicle for management to communicate its risk-management strategies as a matter of good corporate governance. Mixing information relating to executive compensation with the discussion of risk-management factors would confuse and upset this established framework.

Moreover, it is difficult to define risk in relation to compensation programs and project the effects of potential risk over time. For example, a stable business unit with long-term incentive plans for its executives may become subject to risks in the future due to circumstances that a company cannot anticipate or control. There is no clear approach for determining the appropriate level of forward-looking disclosure with respect to the risks for the long-term incentive plans for such executives.

Requiring CD&A disclosure regarding risk-management and risk-taking incentives also would only have limited benefit for shareholders. Risk management and risk taking are inherent in the ordinary course of the operation of a company's business. To the extent that such risks occur in the ordinary course of business, RILA would respectfully submit that a discussion of how executives are compensated for simply managing risks arising from the ordinary course of business – i.e., simply doing their job – would not be meaningful for shareholders.

Risks that are "special," such as those related to the execution of business strategy or a significant transaction, and management's rewards for pursuing such risks, are justifiably of

greater concern to shareholders. However, it is precisely these risks that could cause the most competitive harm if disclosed. For example, a retailer's board of directors may establish tiered incentives for management to open a certain number of stores in a geographic market within a certain timeline. Alternatively, new growth areas where a company is developing business may have incentive correlated to the level of strategic business priority. Mandating public disclosure of these incentives, and the strategic imperative associated with these incentives, would give competitors insight into the company's proprietary business strategy. In RILA's view, this competitive harm outweighs the potential benefit of the proposed risk disclosures.

If the SEC does decide to move forward with the proposed amendments in the face of these concerns, however, RILA submits the following responses to the SEC's questions on the proposed scope of the amendments. The expanded CD&A disclosures should apply only to significant risks made by key decision-makers at a company, meaning named executive officers at companies who are large accelerated filers in industries such as financial services where risk management and risk-taking may have systemic effects on the broader U.S. economy. Expanded CD&A disclosures would not be appropriate for the retail industry where risk management and risk-taking does not have such systemic effects on the economy.

The proposed amendment to Item 402(b) of Regulation S-K of listing examples of the types of risk-management situations is preferable to requiring discussion of enumerated risks that may not apply to a company. A company that determines that disclosure under the Proposed Rule is not mandated should not be required to affirmatively state in its CD&A that it has determined that the risks arising from its broader compensation policies are not reasonably expected to have a material effect on the company. This affirmative statement could expose such a company to liability and litigation costs if the basis for its reasonable expectation of risks could, in retrospect, be disputed.

Separately, the Proposed Rule asked whether there were other initiatives that should be considered with respect to proxy disclosures, particularly with respect to disclosure regarding executive compensation. RILA does not support expanding required disclosure of compensation from named executive officers to all executive officers. Sweeping all executive officers into the CD&A would increase the already substantial burden in costs and time needed to prepare the CD&A by compensation committees, company staff, counsel, and compensation consultants. This issue is further exacerbated for companies operating in international jurisdictions where there may be additional tax, market practice, and other considerations to explain as well. Furthermore, disclosing the compensation of all executive officers could lead to competitors attempting to poach executive officers who are perceived as being underpaid.

Retail sales in particular are driven at least in part by compensation incentives and the incentive methodology can be part of what drives competitive success. Broader disclosure of these incentives and techniques both internally within a retailer and to competitors would inflict significant disruption and harm. Moreover, the more detailed strategy-driven compensation incentives seen in the retail industry belie simple explanation to shareholders in the manner contemplated by the Proposed Rule.

**Director and Nominee Disclosure**

The Proposed Rule contemplates requiring disclosure for each director or nominee that discusses the specific experience, qualifications, or skills that qualify that person to serve as a director and committee member. Such disclosure may result in competitive harm. Companies recruit directors who have the experience, qualifications, and skills to help execute the company's business strategy. Forcing disclosure of why companies selected a director may also force disclosure of the company's business strategy.

For example, when a retailer seeks to expand internationally, the company may nominate a director who has international retail experience to help develop and shape the company's expansion strategy. Publicly disclosing that a director was selected because of her international experience – particularly if it relates to particular geographic regions – would alert the company's competitors of the planned international expansion. Because of such competitive concerns, RILA does not support requiring disclosure for each director or nominee that discusses with specificity why the person is qualified to serve as a director. Furthermore, much information about directors and nominees is already widely and publicly available to any shareholder who desires such information from the disclosures already required in public company filings and other public sources. Requiring a company to disclose why it specifically selected each director or nominee would add little to shareholders' understanding of the individual's background and may result in competitive harm to the company.

RILA also advises against mandating disclosure regarding a director's or nominee's qualifications to serve on individual board committees. With respect to the audit committee, Item 407(d)(5) of Regulation S-K already requires appropriate disclosure of which directors the board of directors has determined are financial experts serving on the audit committee. With respect to the compensation and nominating committees, many nominees may initially have only limited experience with board-level executive compensation and corporate governance issues but still provide important objective perspectives. Requiring disclosure of such nominees' qualifications to serve on compensation and nominating committees would not serve a constructive purpose. Furthermore, such disclosure may not be necessary because third-party advisors, such as counsel and compensation consultants, frequently assist directors who may not have particular expertise in the committee's areas of responsibility at the outset to become effective members of such committees quite rapidly. Indeed, it is common practice for directors to gain experience on different board committees, and it should be the role of the nominating committee to ensure that all directors not only bring a wealth of specialized expertise, but that they are also allowed to expand their areas of knowledge through committee service.

RILA supports the Proposed Rule's required disclosure of any directorships held by each director and nominee at any time during the past 5 years at public companies, and lengthening the time during which disclosure of legal proceedings is required from 5 to 10 years. RILA would also support continuing to permit companies to exclude disclosure of legal proceedings of directors, director nominees, or executive officers when the company concludes that the information would not be material to an evaluation of the integrity of the director, director nominee, or executive officer.

**Disclosure about Company Leadership Structure and the Board's Role in the Risk Management Process**

The Proposed Rule would require disclosure of a company's leadership structure and why the company believes it is the best structure for it at the time of the filing. RILA believes it would not be useful for shareholders to mandate companies to disclose whether and why they have chosen to combine or separate the principal executive officer and board chairman. RILA also believes it would not be helpful to require disclosure of specific duties performed by the lead director and other board structure matters, such as the reasoning for the company's determination of the size of the board and the number of independent directors on the board. The existing disclosure requirements with respect to the company's leadership structure are sufficient.

**Proxy Solicitation Process**

The Proposed Rule also contemplates revisions to the proxy solicitation process. RILA does not support the amendment that would allow persons furnishing a form of revocation to shareholders to rely on Exchange Act Rule 14a-2(b)(1) to exempt themselves from most of the requirements of the proxy solicitation rules. RILA supports the amendment to Rule 14a-2(b)(1)(ix) in order to disqualify persons who have a broad substantial interest in the solicitation from relying on Rule 14a-2(b)(1) to exempt themselves from most of the requirements of the proxy solicitation rules. RILA does not support the amendment to Rule 14a-4(d)(4) that would allow a person soliciting support for nominees to round out its short slate of nominees with nominees named in other soliciting persons' proxy statements. RILA supports the amendment to Rule 14a-4(e) that would require that the "reasonable specified conditions" for voting of a proxy must be objectively determinable. RILA also supports the amendment to Rule 14a-12(a)(1)(i) that would clarify that the required participant information be filed under cover of Schedule 14A as part of a proxy statement or other soliciting materials no later than the time the first soliciting communication is made.

**Response to the SEC's Other Requests for Comment**

RILA is pleased to respond to the SEC's other requests for comment. RILA supports the Proposed Rule's revisions to the summary compensation table, particularly the disclosure of the aggregate grant-date fair value of grants during the relevant fiscal year computed in accordance with FAS 123R. RILA also generally supports the Proposed Rule's additional disclosures with respect to compensation consultants who play a role in determining or recommending the amount or form of executive or director compensation, and also provide additional services to a company. RILA believes that the reporting of shareholder voting results on Form 8-K is appropriate in order to provide more timely information regarding the outcome of votes to shareholders and the market; however, RILA also believes that companies should be able to request an extension to reporting on Form 8-K in the case of a contested election or when there is a particularly close vote. Reporting preliminary voting results in a contested election or a close

vote seems premature, and four days may not be enough time to gather and verify voting information in companies with a significant number of shareholders and outstanding stock.

RILA supports retaining the instruction to the CD&A providing that performance targets can be excluded based on the potential adverse competitive effect of their disclosure on the company. This instruction is a crucial shield against disclosing proprietary information that could competitively harm a company. RILA does not support the Proposed Rule's proposal to require disclosure of performance targets on an after-the-fact basis, after the performance related to the award is measured, such as three or more fiscal years later. Disclosing the key metrics a company chose to use in the past and likely still uses to measure its performance may result in competitive harm. Furthermore, while the choice of metric may be proprietary, disclosure of whether the target was actually achieved three or more fiscal years later is simply disclosure of stale information and of limited benefit to shareholders.

RILA is against requiring disclosures of whether the amounts of executive compensation reflect any considerations of internal pay equity. The retail industry employs millions of workers, many in entry-level positions. As a result, discussions of internal pay equity in the retail industry are a particularly sensitive issue because the internal pay ratios are likely to be higher in the retail industry compared to other industries, not necessarily because executives are overpaid, but simply because the employee base is so broad.

RILA is opposed to the proposal to "file" the compensation committee report. Although the compensation committee works closely with company staff, counsel, and compensation consultants to prepare and review the CD&A, directors should not be personally responsible for all of the factual details of a CD&A, which are often primarily assembled and presented by company staff or counsel.

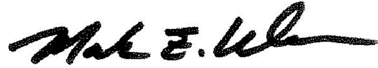
RILA does not support expanding disclosure requirements to include the total number of compensation plans a company has and the total number of variables in all of its compensation plans. Such a requirement would increase the already substantial burden in costs and time needed to prepare the CD&A with only limited benefit for shareholders in the case of non-material compensation plans. Such disclosure could also have adverse effects in terms of competitive harm.

**Concluding Remarks**

RILA appreciates the intent of the Proposed Rule to help shareholders in making investment and voting decisions. However, RILA believes that certain disclosure requirements contemplated by the Proposed Rule may result in proxy materials that are overloaded with information of marginal benefit. Adding more complexity to the proxy statement will further disenfranchise retail shareholders by placing even more reliance on unregulated third party shareholder-advisory services to interpret these documents and present voting recommendations, often without a direct interest in the success of the issuer. Instead, RILA would advocate for streamlined proxy disclosure that is user-friendly, flexible, and focuses on what matters most to shareholders.

RILA appreciates the opportunity to comment on the Proposed Rule. Thank you for taking RILA's comments under consideration. We would be pleased to discuss RILA's views with you further at your convenience.

Respectfully submitted,



Mark E. Warren
Vice President, Tax & Finance