

Securities and Exchange Commission issues further Compliance and Disclosure Interpretations related to the “Say on Pay” requirements of the American Recovery and Reinvestment Act of 2009

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the “Act”) which, *inter alia*, amended Section 111(e) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221) (the “EESA”) and thereby added “say on pay” provisions to the EESA. On February 24, 2009, the Securities and Exchange Commission (the “Commission”) issued initial Compliance and Disclosure Interpretations (the “Initial CDI”) related to the “say on pay” provisions of the Act.¹ On February 26, 2009, the Commission issued further Compliance and Disclosure Interpretations (the “Updated CDI”) related to these “say on pay” provisions.² The Updated CDI are summarized below.

I. Effective Date for Separate Shareholder Vote Requirement

The Act requires that any proxy or consent or authorization for an annual or other meeting of the shareholders of any TARP recipient³ during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding must permit a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the Commission (which disclosure must include the compensation discussion and analysis, the compensation tables, and any related material). The Act does not specify an effective date for application of this separate shareholder vote requirement.

By a letter sent to the Chairman of the Commission and dated February 20, 2009 (the “Letter”), the Chairman of the Senate Committee on Banking, Housing and Urban Affairs, Senator Christopher Dodd, shared his view that the Act’s separate shareholder vote requirement became effective on February 17, 2009. Therefore, the Senator noted that the separate shareholder vote requirement would not apply to preliminary (and related definitive proxy statements filed after February 17, 2009) or definitive proxy statements filed with the Commission on or before February 17, 2009, but would apply to proxies filed after that date.

The Updated CDI states that the Commission’s Division staff is following the views of Senator Dodd as expressed in the Letter. Consequently, the separate shareholder vote requirement became effective on February 17, 2009 and applies to preliminary or definitive proxy statements (other than definitive proxy statements which relate to preliminary proxy statements filed on or before February 17, 2009) filed with the Commission after February 17, 2009.

¹ The Initial CDI, as well as the executive compensation and corporate governance provisions contained in the Act, are summarized in our memorandum “The American Recovery and Reinvestment Act of 2009: Executive Compensation and Corporate Governance Provisions,” dated February 25, 2009, available at <http://www.cahill.com/news/memoranda/000152>.

² Available at <http://sec.gov/divisions/corpfin/guidance/arrainterp.htm>.

³ The term “TARP recipient” is defined in the Act as “any entity that has received or will receive financial assistance under the financial assistance provided under the TARP.”

II. Effective Date for CEO/CFO Certification Requirement

As amended by the Act, Section 111 of the EESA now requires the chief executive officer and chief financial officer (or the equivalents thereof) of each TARP recipient to provide a written certification of compliance by the TARP recipient with the requirements of Section 111 in the following manner:

- in the case of TARP recipients whose securities are publicly traded, to the Commission, together with annual filings required under the securities laws; and
- in the case of TARP recipients that are not publicly traded companies, to the Secretary of the Treasury (presumably on an annual basis although this is not specified by the Act).

The Act does not specify an effective date for application of the CEO/CFO certification requirement.

Regarding the effective date of this requirement, Senator Dodd in his Letter stated his view that, “[a]s this certification requirement relates to compliance with executive compensation and corporate governance standards that have yet to be established by the Secretary of the Treasury, it is my view that this requirement is not yet effective and therefore CEOs and CFOs will not be required to certify as to their company’s compliance with such standards until they have been established.”

The Updated CDI states that the Commission’s Division staff is following Senator Dodd’s view and; consequently, the CEO/CFO certification requirement will not be effective until the related executive compensation and corporate governance standards have been established by the Secretary of the Treasury.

III. No Requirement for Shareholder Proposal on Approving Executive Compensation

The Updated CDI clarifies the meaning of some wording of the Act related to the separate shareholder vote requirement. The Act requires that TARP recipients “shall permit a separate shareholder vote to approve the compensation of executives” and the Updated CDI clarifies this language by stating that the Act does not condition the requirement for a vote on the receipt of a shareholder proposal on approving executive compensation. Rather, the intention of the Act is to require a yearly vote by shareholders.

IV. Actual, Non-binding Vote is Required

The Updated CDI states that the Act’s requirement for separate shareholder votes as disclosed pursuant to the Commission’s compensation disclosure rules would not be satisfied by a shareholder proposal on “say on pay” that only asks the company to adopt a policy providing for annual shareholder votes on executive compensation in the future. Rather, the Act requires an actual, non-binding vote by the shareholders to approve executive compensation.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Mike Wenzel at 212.701.3527 or mwenzel@cahill.com.