

## **SEC Proposes Amendments to Proxy Rules Requiring TARP Recipients to Seek Advisory Shareholder Votes on Compensation**

On July 1, 2009, the Securities and Exchange Commission (the “SEC”) released proposed amendments to the proxy rules under the Securities Exchange Act of 1934 (the “Exchange Act”) (the “Proposed Amendments”).<sup>1</sup> The Proposed Amendments set forth requirements for U.S. registrants subject to Section 111(e) of the Emergency Economic Stabilization Act of 2008 (the “EESA”). Section 111(e) requires companies that have received financial assistance under the Troubled Asset Relief Program (“TARP”) to permit a separate shareholder advisory vote<sup>2</sup> to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the SEC, during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.<sup>3</sup> The Proposed Amendments are intended to help implement this separate shareholder vote requirement by specifying and clarifying it in the context of the SEC’s proxy rules.

### **Proposed Amendments**

#### **New Rule 14a-20**

The SEC proposes to add a new Rule 14a-20 under the Exchange Act for the purpose of clarifying that the separate shareholder vote required by Section 111(e)(1) of the EESA would only be required for a proxy solicited for a meeting of security holders for which proxies will be solicited for the election of directors.<sup>4</sup>

The SEC also proposes to include an instruction to the proposed new Rule 14a-20 to clarify that smaller reporting companies would not be required to provide a compensation discussion and analysis in order to comply with the requirements of Rule 14a-20.

The SEC noted in the Release that at this time it does not intend to amend Rule 14a-6 of the Exchange Act to add the vote required for TARP recipients to the list of items that do not trigger a preliminary filing.

<sup>1</sup> “Shareholder Approval of Executive Compensation of TARP Recipients” Release No. 34-60218; File No. S7-12-09 (July 1, 2009) (the “Release”), available at <http://www.sec.gov/rules/proposed/2009/34-60218.pdf>. The opening statement by SEC staff at the related SEC Open Meeting is available at <http://www.sec.gov/news/speech/2009/spch070109jh.htm>.

<sup>2</sup> Section 111(e) of the EESA specifies that such votes “shall not be binding on the board of directors of a TARP recipient, and may not be construed as overruling a decision by such board, nor to create or imply any additional fiduciary duty by such board, nor shall such vote be construed to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.”

<sup>3</sup> Section 111 of the EESA defines this period to exclude any period during which the Federal Government “only holds warrants to purchase common stock of the TARP recipient.” 12 U.S.C. 5221(a)(5).

<sup>4</sup> The proposed new Rule 14a-20 reads as follows: “If a solicitation is made by a registrant that is a TARP recipient, as defined in section 111(a)(3) of the [EESA], during the period in which any obligation arising from financial assistance provided under the TARP, as defined in section 3(8) of the [EESA], remains outstanding and the solicitation relates to an annual (or special meeting in lieu of the annual) meeting of security holders for which proxies will be solicited for the election of directors, as required pursuant to section 111(e)(1) of the [EESA], the registrant shall provide a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K, including the compensation discussion and analysis, the compensation tables, and any related material.” [citations omitted]

Consequently, proxy statements that include the vote on executive compensation required by Section 111(e) of EESA and proposed Rule 14a-20 would be required to be filed in preliminary form.<sup>5</sup>

The SEC stated that it is also proposing to accelerate the filing schedule for reporting results of shareholder votes generally by moving the requirement from Forms 10-Q and 10-K to Form 8-K. If that proposal is adopted, it would apply to reporting results of the vote required by Rule 14a-20.<sup>6</sup> This proposal is to be made in a separate release which is not yet available on the SEC's Web site.

## **Amendment to Item 20 of Schedule 14A**

The SEC also proposes to amend Schedule 14A<sup>7</sup> under the Exchange Act which sets forth the disclosure requirements for proxy statements filed by U.S. issuers. Pursuant to the amendment proposed by the SEC, registrants which are TARP recipients and are required to provide a separate shareholder vote on executive compensation pursuant to Section 111(e)(1) of the EESA and proposed Rule 14a-20 would be required to disclose in the proxy statement that they are providing a separate shareholder vote on executive compensation pursuant to the requirements of the EESA, and to briefly explain the general effect of the vote, such as whether the vote is non-binding.<sup>8</sup>

## **SEC Requests for Comment**

The SEC indicated in the Release that it is particularly interested in receiving comments on the following questions:

- Should the SEC include more specific requirements regarding the manner in which registrants that are TARP recipients should present the shareholder vote on executive compensation? For example, should the SEC designate the specific language to be used and/or require TARP recipients to frame the shareholder vote to approve executive compensation in the form of a resolution?
- Should the SEC require registrants that are TARP recipients to disclose the reasons why they are providing for a separate shareholder vote on executive compensation and an explanation of the effect of that vote, as proposed?

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<sup>5</sup> Rule 14a-6 under the Exchange Act generally requires registrants to file proxy statements in preliminary form at least ten calendar days before definitive proxy materials are first sent to shareholders, unless the items included for a shareholder vote in the proxy statement are limited to specified matters. 17 CFR 240.14a-6(a).

<sup>6</sup> "In the Proxy Disclosure and Solicitation Enhancements Release, the Commission is proposing amendments that would require reporting companies to disclose on Form 8-K the results of a shareholder vote, and to file that information within four business days after the end of the meeting at which the vote was held." See Release note 17 at 6 and related text.

<sup>7</sup> 17 CFR 240.14a-101.

<sup>8</sup> The SEC stated in the Release that it is not proposing to require registrants to use any specific language or form of resolution. The SEC did note however that, as Section 111(e)(1) of the EESA requires that the vote must be to approve "the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the Commission (which disclosure shall include the compensation discussion and analysis, the compensation tables, and any related material)," the SEC believes that a vote to approve a proposal on a different subject matter, such as a vote to approve only compensation policies and procedures, would not satisfy the requirements of Section 111(e)(1) of the EESA or proposed Rule 14a-20.

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- Should the SEC require any additional disclosures about TARP recipients or the requirements of Section 111(e) of the EESA to be included with the vote to approve executive compensation? If so, what disclosures should the SEC consider?
- Should the SEC require any additional disclosures to be included with a TARP recipient's compensation discussion and analysis or other disclosures made pursuant to Item 402 of Regulation S-K?
- Should the SEC clarify by instruction, as proposed, that smaller reporting companies that are TARP recipients are not required to include a compensation discussion and analysis in their proxy statements in order to comply with the SEC's proposed amendments?
- Should language be added to proposed Rule 14a-20 to indicate explicitly that, as required by Section 111(e) of the EESA, the separate shareholder vote on the compensation of executives would be a non-binding advisory vote, or is the statutory reference sufficient for this purpose?
- Should the SEC amend Rule 14a-6(a) under the Exchange Act so that registrants that are TARP recipients are not required to file a preliminary proxy statement as a consequence of providing a separate shareholder vote on executive compensation?

The SEC will accept public comments to the Proposed Amendments received on or before 60 days after publication in the Federal Register.

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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 Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com); or Mike Wenzel at 212.701.3527 or [mwenzel@cahill.com](mailto:mwenzel@cahill.com).