

SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000

FACSIMILE: 1-212-558-3588

WWW.SULLCROM.COM

125 Broad Street
New York, NY 10004-2498

LOS ANGELES • PALO ALTO • WASHINGTON, D.C.

FRANKFURT • LONDON • PARIS

BEIJING • HONG KONG • TOKYO

MELBOURNE • SYDNEY

September 8, 2009

Via E-mail: rule-comments@sec.gov

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

Re: Shareholder Approval of Executive Compensation of TARP Recipients – File No. S7-12-09

Dear Ms. Murphy:

We are pleased to submit this letter in response to Release No. 34-60218 (the “Proposing Release”) in which the Securities and Exchange Commission (the “Commission”) solicits comments on proposed new Rule 14a-20 under the Securities Exchange Act of 1934 to help implement Section 111(e) of the Emergency Economic Stabilization Act of 2008 (“EESA”), which requires companies that have received financial assistance under the Troubled Asset Relief Program (“TARP”) to permit a separate shareholder advisory vote to approve executive compensation.

We support the Commission’s efforts to provide greater clarity regarding how registrants that are TARP recipients must comply with Section 111(e) of EESA. However, we believe that the Commission could assist TARP recipients by providing greater clarity and guidance in several areas as discussed below.

A. The Commission should create a uniform voting standard.

In the Proposing Release, the Commission notes that it has not proposed to create any “specific language or form of resolution”. The Commission does, however, note that neither a proposal to approve only compensation policies or procedures nor a proposal to adopt a policy to provide for non-binding shareholder votes on executive compensation in the future would satisfy Section 111(e) of EESA or proposed Rule 14a-20. We believe that it would be desirable and appropriate for the Commission to create a uniform standard. A uniform standard would create a level playing field and

ensure that shareholders are given an opportunity to exercise their franchise as contemplated by Section 111(e) of EESA. We suggest the following:

“RESOLVED, that the holders of the common stock of [_____] (the “Company”) approve the compensation of the Company’s executives named in the Summary Compensation Table of the Company’s Proxy Statement for the [___] Annual Meeting of Shareholders, including the Compensation Discussion and Analysis, the Executive Compensation tables and the related disclosure contained in the Proxy Statement”.

We believe that the adoption of this formulation would provide needed guidance and uniformity and promote the purposes of Section 111(e).

B. The Commission should amend Rule 14a-6(a) so that TARP recipients are not required to file a preliminary proxy statement as a consequence of providing a separate shareholder vote on executive compensation.

We believe that Rule 14a-6 should be amended to eliminate the requirement to file a preliminary proxy statement when a TARP recipient provides for a separate shareholder vote on executive compensation in accordance with Section 111(e) of EESA and Rule 14a-20.

As noted in the Proposing Release, “[t]he matters that do not require filing of preliminary materials include various items that regularly arise at annual meetings, such as the election of directors, ratification of the selection of auditors, approval or ratification of certain employee benefits plans, and shareholder proposals under Rule 14a-8”. In its 1987 release announcing the original list of actions exempted from the requirements of Rule 14a-6(a), the Commission stated its intention to “decrease burdens on registrants associated with the filing of preliminary proxy material” where such proxy statements deal solely with “ordinary matters” that are “unlikely to be reviewed by the staff”.¹

We urge the Commission to include a shareholder vote on executive compensation pursuant to proposed Rule 14a-20 in the list of items that do not trigger a requirement to file a preliminary proxy statement pursuant to Rule 14a-6. We believe that this type of shareholder vote is substantially similar to the other types of matters that

¹ *Proxy Rules – Proposed Amendments to Eliminate Filing Requirements for Preliminary Proxy Material Under Certain Circumstances; Filing Fees Where Only Definitive Proxy Material is Filed; Proposed Amendments With Regard to Rule 14a-8, Shareholder Proposals*, Rel. No. 34-24552, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,131, at 88,708 (June 4, 1987).

are excluded from this requirement and that these proposals, due to their routine and non-binding nature, are unlikely to be reviewed by the Commission staff. This action would effectively reduce the costs and other burdens on registrants associated with filing preliminary proxy statements that deal solely with routine matters.

C. The proxy rules should not subject companies to multiple and duplicative “say-on-pay” requirements.

Under the proposed amendments, TARP recipients who provide for the shareholder vote required by proposed Rule 14a-20 may be subject to multiple “say-on-pay” requirements under the proxy rules if the registrant is required to include shareholder proposals on executive compensation in its proxy statement pursuant to Rule 14a-8. We believe that this potential redundancy undercuts the Commission’s stated objective to provide U.S. registrants with certainty and flexibility with respect to the requirements imposed by Section 111(e) of EESA.

Specifically, we urge the Commission to allow TARP recipients subject to Rule 14a-20 to omit shareholder proposals relating to advisory votes on executive compensation under Rule 14a-8. In the Proposing Release, the Commission noted that the Commission staff had previously declined to concur with two separate no-action requests from TARP recipients to be permitted “to exclude from their proxy materials shareholder proposals that requested policies of holding annual shareholder advisory votes on executive compensation” in light of the fact such registrants were subject to the shareholder advisory vote provision in Section 111(e) of EESA.² These requests posited that the shareholder proposals in question could be excluded in reliance on Rule 14a-8(i)(9) (applicable to shareholder proposals that directly conflict with one of the company's own proposals to be submitted to shareholders at the same meeting), Rule 14a-8(i)(10) (applicable to shareholder proposals that have already been substantially implemented by the company), or both.

We strongly recommend that the Commission reconsider this position. Subjecting a company to two or more “say on pay” requirements in a single proxy statement has the potential to create an unreasonable degree of uncertainty and confusion among both shareholders and the registrant itself. This uncertainty would be particularly magnified in circumstances where the proposals contain conflicting provisions or language.

² See *Bank of America Corp.*, SEC No-Action Letter (Mar. 11, 2009) and *CoBiz Financial Inc.*, SEC No-Action Letter (Mar. 25, 2009) at http://www.sec.gov/divisions/corpfin/cf-noaction/2009_14a-8.shtml.

D. The Commission should clarify that if the TARP assistance is repaid at any time prior to the meeting date, the issuer does not have to submit the advisory proposal to a vote.

Proposed Rule 14a-20 provides that if the “solicitation” occurs during the period in which any obligation arising from financial assistance under TARP remains outstanding, the TARP recipient must provide for a separate vote on executive compensation. We believe that this formulation will create interpretational issues. For example, if an issuer repays all of its TARP financial assistance prior to the meeting date but after proxies have been mailed or otherwise distributed, must the issuer submit the advisory vote to shareholders at the meeting? We believe that the answer to this question is clearly no, but proposed Rule 14a-20 leaves this ambiguous since the “solicitation” could refer to the initial issuance of proxy materials or the notice of internet availability of proxy materials. We believe that the Commission should clarify that the TARP assistance must be outstanding as of the meeting date in order for proposed Rule 14a-20 to apply.

E. The Commission should clarify statements that a TARP recipient may make with respect to the advisory vote.

As the Commission indicates in the Proposing Release, Section 111(e) of EESA provides that the required vote on executive compensation is non-binding, does not override any decision of the board of directors, and does not create or imply any additional fiduciary duty of the board of directors. To provide clarity, Rule 14a-20 should expressly permit these statements to be made by the TARP recipient in connection with the advisory vote. This would be consistent with the Commission’s proposal that proposed Item 20 to Schedule 14A require TARP recipients to “explain the general effect of the vote”.

F. The reference in the Note to Rule 14a-20 should be to paragraphs (n) through (q).

* * *

We appreciate this opportunity to comment on the proposed rule, and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to Robert W. Reeder, III (212-558-3755) in our New York office or Andrew R. Bernstein (202-956-7085) in our Washington, DC office.

Very truly yours,

/s/ SULLIVAN & CROMWELL LLP