TO:	MS. ELIZABETH M. MURPHY, SECRETARY U.S. SECURITIES AND EXCHANGE COMMISSION
FROM:	MARY K. BLASY, ESQ. SCOTT + SCOTT, LLP
DATE:	AUGUST 5, 2009
RE:	RELEASE NUMBER 34-60218, FILE NO. S7-12-09 - "SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION OF TARP RECIPIENTS"

This memorandum provides the Commission with a response to the proposed rule from the perspective of a securities and corporate law litigation attorney engaged in private practice. Having specialized in investigating, commencing and prosecuting shareholder purchaser and holder class and derivative actions on behalf of institutional and individual investors for nine years, including recent actions involving TARP recipients where EESA and ARRA executive compensation restrictions are implicated, I would respond to the Commission's specific inquiries as follows:

- *Should we 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 we 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?*

  No. Formulaic requirements invite formulaic responses. As the law of unintended consequences dictates, though neither the Congress nor the Commission intends it, even non-binding say-on-pay voting results are likely to be championed by corporate executives and directors hoping to avoid legal scrutiny in litigation challenging excessive executive compensation. Though the law of Delaware and other states expressly precludes the so-called "shareholder ratification" defense to such litigation where disclosures were neither effective nor complete, formulaic requirements are likely to invite federal pre-emption arguments in legal actions brought under state corporate law statutes and common law that provide shareholders with viable remedies (i.e. "the SEC rules mandated that we state the proposal just this way, providing no more or no less information, and to the extent state law conflicts, the federal regulatory scheme prevails…."). More importantly, different companies have different compensation schemes, became TARP recipients for different reasons, face widely divergent financial circumstances and so a formulaic, "less is more" approach is more likely to result in an uninformed vote.

One way to avoid this potential problem altogether would be for the Commission's rule to expressly provide that just as the "say-on-pay" vote is non-binding on corporate boards, any right to rely on any shareholder approval of a compensation scheme as a defense to any litigation challenging executive compensation decisions is being expressly waived by any issuer and its executives and directors. The agreement Treasury makes TARP recipients sign already requires waivers of claims against the issuers and the government by the top five SEOs relating to executive compensation claims, so this requirement would merely codify the existing protocol and extend it to cover all officers and directors of TARP recipients.

- *Should we 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?*

  Yes. For the reasons identified above, a complete and meaningful explanation is warranted.

- *Should we 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 we consider?*

  Yes. EESA and ARRA provide for an incentive compensation claw-back provision applicable to a TARP recipient's 25 most highly compensated employees where it's previously reported financial results contained material misstatements. In its June 2009 guidance release, Treasury confirmed that unlike §304 of the Sarbanes Oxley Act of 2002 (the SOX claw back provision), the TARP claw back provision does not require a formal earnings restatement, does not limit the reach of the claw-back provision to the CEO and the CFO, does not require a showing of "misconduct," and does not include a restriction as to the time period over which incentive compensation may be clawed back. From this investor protection advocate's position, this was a step in the right direction. However, like SOX §304, TARP failed to provide an express private right of action and the judicial decisions refusing to recognize an implied right of action under SOX §304 will likely be applied with equal force to the TARP claw back provision. Moreover, Treasury's June 2009 guidance expressly stated that Treasury's "compensation czar" was only affirmatively charged with reviewing the past incentive compensation of the seven exceptional TARP recipients to determine whether past incentive compensation should be clawed back, stating that rest of the TARP recipients could, if they desired to do so, consult with the compensation czar to determine if a claw back was required. This essentially leaves the fox in charge of the henhouse because EESA and ARRA also provide that the federal government may seek recovery of improvidently paid executive compensation directly from TARP recipients regardless of whether their boards of directors saw fit to exercise the TARP recipient's TARP claw back rights. Essentially the TARP recipients (and by definition their public shareholder owners) would be forced to reimburse the federal government for improvidently paid incentive compensation where corporate boards failed to seek recovery from the top 25 most highly compensated employees.

As such, at bare minimal, if an issuer has restated, reclassified or in any material way simply corrected previously reported financial results, including taking cumulatively or individually substantial impairment charges, significantly and suddenly increasing loan loss reserves, or taking other significant one time accounting charges that call into question the quality of previously reported financial results, the Commission's rule should require disclosure of the "correction" in the say-on-pay proposal presented to shareholders. Additionally, the Commission's rule should require that the TARP recipient's board of directors explain the extent to which incentive compensation is being clawed back and if not, why not. Finally, in order to provide meaningful disclosure, the Commission's rule should require the identification of a TARP recipient's 25 most highly compensated employees and how much they were paid each year that previously reported financial results contained material misstatements.

- *Should we require any additional disclosures to be included with a TARP recipient's compensation discussion and analysis or other disclosures provided under Item 402 of Regulation S-K?*

  Yes. For the reasons discussed immediately above, disclosure of material misstatements in previously reported financial results and the reasons for the board's determination as to any claw back rights should be disclosed.

- *Should we 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 our proposed amendments?*

  No comment.

- *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?*

  No comment.

- *Should we 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?*

  No comment.

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