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**Re: Comments on Proposed Amendments to the Proxy Rules Under the Securities Exchange Act of 1934 (the “Exchange Act”) Relating to Shareholder Approval of Executive Compensation of TARP Recipients (the “Proposal”)**

**Release No. 34-60218  
File Number S7-12-09**

September 4, 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

Dear Ms. Murphy:

We are submitting this letter in response to the solicitation by the Securities and Exchange Commission (the “**Commission**”) for comments on the proposed amendments to the proxy rules under the Exchange Act that set forth certain requirements for U.S. registrants subject to Section 111(e) of the Emergency Economic Stabilization Act of 2008 (“**EESA**”), due to their receipt of financial assistance under the Troubled Asset Relief Program (“**TARP**”). As set forth in the Proposal, these registrants are required to permit a separate shareholder advisory vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the Commission, during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding (the “**Advisory Vote**”). We appreciate the opportunity to comment on the matters discussed in the Proposal.

The Proposal helps implement the inclusion of the Advisory Vote in TARP recipient proxy materials by clarifying the requirement of Section 111(e) of EESA in the context of the federal proxy rules. We support the Commission’s efforts to structure proposed Rule 14a-20 and proposed Item 20 of Schedule 14A (the “**Proposed Rules**”) in such a way as to afford TARP recipients “adequate flexibility to meet their obligations under Section 111(e) of the EESA.”

We believe that the Commission should retain the flexibility it has provided in the Proposed Rules and not include more specific requirements regarding the manner in which registrants present the Advisory Vote. The Proposal already provides sufficient clarity and direction to registrants through its indication that a discussion of the reason why the registrant is providing the Advisory Vote and an explanation of the effect of the Advisory Vote “would provide investors with information that would help them to make informed voting decisions.” Further, proposed Item 20 of Schedule 14A requires disclosure of the fact that

the Advisory Vote is provided as required by EESA and a brief explanation of the general effect of the vote. Registrants implementing the Advisory Vote will have varying compensation structures that will result in tailored disclosure pursuant to the compensation disclosure rules of the Commission. In order for a registrant to provide its investors with information that will adequately assist its investors in making informed voting decisions, the registrant needs flexibility in framing its Advisory Vote proposal.

While we support the Commission in clarifying the rules with regard to the implementation of the Advisory Vote, we have also set forth below certain aspects of the Proposal that we believe require amendment. In particular, we do not see a compelling reason why the inclusion of the Advisory Vote should require filing of a preliminary proxy statement.

1. *The Commission should not require filing of a preliminary proxy statement due to the Advisory Vote.*

The Proposal states that “the matters that do not require filing of a preliminary statement include various items that **regularly arise at annual meetings**” (emphasis added). The Advisory Vote will arise at the annual meeting of all TARP recipients subject to the Proposal, which the Commission estimates to be approximately 275 registrants. The matter will continue to regularly arise at annual meetings in coming years as long as registrants remain in TARP and are subject to the requirements of EESA. Further, new financial institutions continue to receive TARP funds, with more than 65 new institutions having received TARP funds between May 1, 2009 and August 1, 2009, increasing the number of registrants required to include the Advisory Vote in their proxy materials. We note that the inclusion of a proposal to approve or ratify an employment benefit plan as defined in Item 402(a)(6)(ii) of Regulation S-K does not require the filing of a preliminary proxy statement, even though the disclosure related to such proposals is more extensive and variable among companies than the Advisory Vote. In the case of these proposals, the results are binding, unlike the Advisory Vote.

In light of recent legislative developments, all U.S. companies that file proxy statements may soon be required to include an advisory vote on executive compensation in their proxy statements. Requiring the filing of a preliminary proxy statement for the Advisory Vote implies that preliminary proxy statements could become mandatory for all of these companies. As we view this to be an undesirable result as expressed below, we urge the Commission take this opportunity to amend the rule.

When the Commission previously adopted the amendment to Rule 14a-6(a) that eliminated the filing of preliminary proxy statements under certain circumstances, the Commission indicated that it “intended to relieve registrants and the Commission of unnecessary administrative burdens and preparation and processing costs associated with the filing and processing of proxy material that is currently subject to selective review procedures, but ordinarily is not selected for review in preliminary form.” (Release No. 34-25217, December 21, 1987). Requiring a preliminary proxy statement for registrants due merely to the inclusion of the required Advisory Vote will greatly increase administrative burdens for the Commission and preparation costs for registrants, while review of the Advisory Vote proposals in preliminary form is unlikely to yield significant benefits.

The Proposed Rules will provide registrants with clear direction as to the required contents of their Advisory Votes, making it unlikely the Commission staff will find issues with the disclosure. However, the burdens imposed on registrants remain difficult and costly. Preliminary proxy statements must be filed with the Commission at least 10 days in advance of the distribution of the final proxy statement. Because registrants are uncertain as to whether the Commission’s staff may review and comment on the preliminary proxy statement, including the CD&A which is one of the primary focuses of the Advisory Vote, registrants will likely include the full and complete information that would be required in a final proxy statement. Recognizing that 10 days is insufficient for the usual back-and-forth discussions necessary when the

Commission staff provides comments on proxy disclosure, preliminary proxy statements are often filed two or even three weeks before registrants intend to distribute the final proxy statement. Preparation of a preliminary proxy statement therefore requires registrants to accelerate their proxy statement preparation timelines and incur additional costs. Registrants must gather and analyze time-sensitive information at an accelerated pace, as well as hold compensation committee meetings and resolve shareholder proposals in a shorter period of time than would otherwise be available. Registrants who are not fully prepared to meet this accelerated schedule may be forced to delay annual meetings, if comments are received and not resolved on a timely basis.

Further, the need to submit a preliminary proxy statement limits the viability of benefitting from notice and access under Rule 14a-16, which requires a registrant to furnish a final proxy statement to security holders 40 calendar days or more prior to the meeting date. With the addition of the time needed to file a preliminary proxy statement, TARP recipients subject to the Proposal must file a preliminary proxy statement almost two months in advance of their annual meetings if they want to use notice and access, making it impractical as a cost-saving alternative.

In addition, the Commission has just issued the proposed "Proxy Disclosure and Solicitation Enhancements" (Release Nos. 33-9052; 34-60280), which requires registrants to make additional new disclosures in proxy statements. If the proposed rules are adopted near the end of the 2009 calendar year for applicability in 2010, even those registrants not subject to accelerated proxy statement preparation will find it difficult to comply with the new disclosure requirements. For those registrants that are required to file preliminary proxy statements, compliance will be more burdensome. We believe that it is more important for registrants to have the necessary time to ensure full and accurate disclosure, rather than requiring that they rush to file preliminary proxy statements with little offsetting benefit.

While registrants that received TARP funds are required to include an Advisory Vote in their proxy statement, other registrants have also decided to submit their executive compensation disclosure to a shareholder vote, often after discussions with their shareholders. Many factors are considered by registrants in evaluating whether or not to voluntarily adopt the Advisory Vote, but we believe that the costs and burdens surrounding the need to file a preliminary proxy statement should not deter companies from engaging in this discussion.

If the Commission continues to require that preliminary proxy statements be submitted for proxy statements containing Advisory Vote proposals, we recommend that the Commission consider requiring preliminary proxy statements for only one year after adoption of these rules. This would address the Commission's concern that its staff needs the opportunity "to comment on the disclosure [required in the Proposed Rules] before final proxy materials are filed" in this "early stage" of the disclosure's development. Alternatively, we recommend that the Commission amend Rule 14a-6(a) to not require preliminary proxy statements for any company that has previously had an Advisory Vote and is submitting another proposal that is not materially different in a subsequent year. If a company already included such an Advisory Vote in a preliminary proxy statement, the Commission Staff had the opportunity to review the disclosure and comment on its sufficiency.

2. *The Commission should clarify the requirement under proposed Item 20 of Schedule 14A to "briefly explain the general effect of the vote" by qualifying the requirement with the language "such as whether the vote is non-binding."*

The Proposal indicates that, under the Proposed Rules, registrants will be required to briefly explain in their proxy statement "the general effect of the [Advisory Vote], such as whether the [Advisory Vote] is non-binding." We believe, based on this language, that the explanation of the effect of the Advisory Vote is intended to focus registrants on explaining the non-binding nature of the Advisory Vote.

However, in the text of Item 20 of Schedule 14A, the phrase “briefly explain the general effect of the [Advisory Vote ]” is not amplified by a reference to the non-binding nature of the Advisory Vote. Without this specific reference, the requirements of Item 20 of Schedule 14A are more difficult to understand. We suggest that the Commission clarify the requirement to “briefly explain the general effect of the [Advisory Vote ]” in Item 20 of Schedule 14A by including the language “such as whether the vote is non-binding.”

3. *The Commission should take an expansive view when considering whether shareholder proposals requesting shareholder advisory votes on executive compensation may be excluded under Rule 14a-8(i) from the proxy materials of registrants implementing the Advisory Vote.*

We agree with the objective of the Proposal that the Advisory Vote “not be construed to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.” However, to the extent a shareholder proposal also requests the adoption of a shareholder advisory vote on executive compensation, we urge the Commission to take an expansive view when considering whether such a shareholder proposal may be excluded under Rule 14a-8(i) from the proxy materials of registrants implementing the Advisory Vote.

The inclusion of both the Advisory Vote and a shareholder proposal requesting the adoption of a shareholder advisory vote on executive compensation in a single proxy statement is confusing to shareholders. The Commission has structured the Proposed Rules so that registrants will provide their shareholders with clear information to help them make informed voting decisions. Presenting shareholders with both an Advisory Vote and a similar shareholder proposal asking for such a vote is difficult to distinguish for most shareholders, would erode the shareholders’ understanding of the information provided under the Proposed Rules and would detract from their ability to make informed voting decisions. Moreover, we believe that allowing those companies required to include the Advisory Vote to exclude shareholder proposals requesting the adoption of a shareholder advisory vote on executive compensation will in no way impede or obstruct the continuing effort by the governance community to pursue the institution of such advisory votes at other companies as a general practice through the shareholder proposal process.

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We appreciate the opportunity to participate in this process, and would be pleased to discuss our comments or any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to Ning Chiu, Kyoko Takahashi Lin or Barbara Nims at 212-450-4000.

Very truly yours,

DAVIS POLK & WARDWELL LLP