

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 240

[RELEASE NO. 34-60218; File No. S7-12-09]

RIN 3235-AK31

SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION OF TARP RECIPIENTS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to the proxy rules under the Securities Exchange Act of 1934 to set forth certain requirements for U.S. registrants subject to Section 111(e) of the Emergency Economic Stabilization Act of 2008. Section 111(e) of the Emergency Economic Stabilization Act of 2008 requires companies that have received financial assistance under the Troubled Asset Relief Program (“TARP”) 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 proposed amendments are intended to help implement this requirement by specifying and clarifying it in the context of the federal proxy rules.

DATES: Comments should be received on or before September 8, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-12-09 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-12-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Harrington, Attorney-Adviser, or N. Sean Harrison, Special Counsel, Division of Corporation Finance, at (202) 551-3430, or Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are proposing a new Rule 14a-20 and amendments to Schedule 14A¹ under the Securities Exchange Act of 1934 ("Exchange Act").²

¹ 17 CFR 240.14a-101.

I. BACKGROUND

The American Recovery and Reinvestment Act of 2009 (“ARRA”) was enacted on February 17, 2009.³ Section 7001 of the ARRA amended the executive compensation and corporate governance provisions of Section 111 of the Emergency Economic Stabilization Act of 2008 (“EESA”).⁴ Section 111(e) of the EESA,⁵ as amended, requires any entity that has received or will receive financial assistance under the Troubled Asset Relief Program (“TARP”) to “permit a separate shareholder vote 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).”⁶ Companies that have received financial assistance under the TARP are required to provide this

² 15 U.S.C. 78a *et seq.*

³ Pub. L. No. 111-5, Title II, 110 Stat. (2009).

⁴ 12 U.S.C. 5221.

⁵ Section 111(e) of the EESA, as amended, states—

(1) ANNUAL SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION - Any proxy or consent or authorization for an annual or other meeting of the shareholders of any TARP recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding shall permit a separate shareholder vote 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).

(2) NONBINDING VOTE - A shareholder vote described in paragraph (1) 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.

(3) DEADLINE FOR RULEMAKING - Not later than 1 year after the date of enactment of the American Recovery and Reinvestment Act of 2009, the Commission shall issue any final rules and regulations required by this subsection.

⁶ We do not believe this provision changes the Commission’s rules for a smaller reporting company that is a TARP recipient under the EESA with respect to the compensation discussion and analysis (“CD&A”) disclosure. Our compensation disclosure rules, as set forth in Item 402 of Regulation S-K [17 CFR 229.402], permit smaller reporting companies to provide scaled disclosure that does not include CD&A.

separate shareholder vote during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.⁷ The shareholder vote required by Section 111(e) of the EESA is not binding on the board of directors of a TARP recipient, and such vote will not be construed as overruling a board decision or as creating or implying any additional fiduciary duty by the board.⁸ The vote also will not be construed to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.⁹

II. DISCUSSION OF THE PROPOSED AMENDMENTS

We are proposing new Rule 14a-20 under the Exchange Act to help implement the requirement under Section 111(e)(1) of the EESA that “TARP recipients” under Section 111(a)(3) of the EESA¹⁰ provide a separate shareholder vote to approve the compensation of the company’s executives.¹¹ Under proposed Rule 14a-20, registrants that are TARP recipients would be required to provide this separate shareholder vote in proxies solicited during the period

⁷ Section 111 of the EESA defines this period to not include any period during which the Federal Government “only holds warrants to purchase common stock of the TARP recipient.” See 12 U.S.C. 5221(a)(5).

⁸ Section 111(e)(2) of the EESA [12 U.S.C. 5221(e)(2)].

⁹ Rule 14a-8 under the Exchange Act will continue to apply to shareholder proposals that relate to executive compensation. Rule 14a-8 provides shareholders with an opportunity to place a proposal in a company’s proxy materials for a vote at an annual or special meeting of shareholders. Under this rule, a company generally is required to include the proposal unless the shareholder has not complied with the rule’s procedural requirements or the proposal falls within one of the rule’s 13 substantive bases for exclusion. To date, the staff of the Division of Corporation Finance has considered two requests in which TARP recipients requested the staff’s concurrence that, given the shareholder advisory vote provision in Section 111(e) of the EESA, the companies could rely on Rule 14a-8(i)(9) [17 CFR 240.14a-8(i)(9)] or Rule 14a-8(i)(10) [17 CFR 240.14a-8(i)(10)] to exclude from their proxy materials shareholder proposals that requested policies of holding annual shareholder advisory votes on executive compensation. The staff of the Division of Corporation Finance declined to concur with either request. See Bank of America Corp. (Mar. 11, 2009); CoBiz Financial Inc. (Mar. 25, 2009) (available at http://www.sec.gov/divisions/corpfin/cf-noaction/2009_14a-8.shtml).

¹⁰ Section 111(a)(3) of the EESA defines TARP recipient as “any entity that has received or will receive financial assistance under the financial assistance provided under the TARP.” See 12 U.S.C. 5221(a)(3).

¹¹ Section 111(e)(3) of the EESA requires the Commission to issue any final rules required by Section 111(e) within one year after the enactment of the ARRA. See 12 U.S.C. 5221(e)(3).

in which any obligation arising from financial assistance provided under the TARP remains outstanding. Proposed Rule 14a-20 would clarify that the separate shareholder vote required by Section 111(e)(1) of the EESA would only be required on a proxy solicited for 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.¹² We are proposing an instruction to 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-20.¹³

We are also proposing an amendment to Item 20 of Schedule 14A that would be applicable to registrants that 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. Pursuant to this amendment, such registrants 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.¹⁴ Under our current disclosure rules, a

¹² The Commission agrees with the view previously expressed by the Division of Corporation Finance that a separate shareholder vote on executive compensation is required only with respect to an annual meeting of shareholders for which proxies will be solicited for the election of directors or a special meeting in lieu of such annual meeting. See Compliance and Disclosure Interpretations: American Recovery and Reinvestment Act of 2009 (Updated February 26, 2009), Question 1, available at <http://www.sec.gov/divisions/corpfin/guidance/arrainterp.htm>. Although Section 111(e)(1) of the EESA refers to an annual “or other meeting of the shareholders,” the subsection is titled “Annual Shareholder Approval of Executive Compensation.” Proposed Rule 14a-20 is intended to result in TARP recipients conducting the required advisory vote annually in connection with the election of directors, in which case our rules call for disclosure of executive compensation.

¹³ See note 6 above.

¹⁴ We are not proposing to require registrants to use any specific language or form of resolution. However, as stated in Section 111(e)(1) of the EESA, 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).” We believe 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.

company is required to report the results of the vote in its periodic report for the period in which the vote is taken.¹⁵ This includes the results of the vote required under the EESA and proposed Rule 14a-20. We are proposing in a separate release also considered by the Commission today 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.¹⁶ If that proposal is adopted, it would apply to reporting results of the vote required by Rule 14a-20.¹⁷

It is our intent that the proposed Rule 14a-20 and the proposed amendments to Schedule 14A afford registrants that are TARP recipients adequate flexibility to meet their obligations under Section 111(e) of the EESA. At the same time, we believe that the proposed amendments, by helping to implement the requirements of Section 111(e) of the EESA in our proxy rules, would provide clarity for registrants that are TARP recipients regarding how they must comply with their obligations under Section 111(e) of the EESA. We also believe that a discussion of the reason why the registrant is providing a separate shareholder vote on the compensation of executives and an explanation of the effect of that vote would provide investors with information that would help them to make informed voting decisions.

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

Likewise, a shareholder proposal that asks the company to adopt a policy providing for periodic, non-binding shareholder votes on executive compensation in the future would not satisfy the requirement of Section 111(e) of the EESA or proposed Rule 14a-20. Section 111(e) requires a vote to approve the compensation of executives. A vote to request a voting policy that would apply at future meetings would not satisfy the EESA or proposed Rule 14a-20.

¹⁵ See Item 4 of Part II of Exchange Act Form 10-Q [17 CFR 249.308a] and Item 4 of Part I of Exchange Act Form 10-K [17 CFR 249.310].

¹⁶ 17 CFR 249.308.

¹⁷ 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.

shareholders, unless the items included for a shareholder vote in the proxy statement are limited to specified matters.¹⁸ During the time before final proxy materials are filed, our staff has the opportunity to comment on the disclosures and registrants are able to incorporate the staff's comments in their final proxy materials. The 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.

Absent an amendment to Rule 14a-6, a proxy statement that includes the vote on executive compensation required by Section 111(e) of EESA and proposed Rule 14a-20 must be filed in preliminary form. We are not proposing to amend Rule 14a-6 at this time to add the vote required for TARP recipients to the list of items that do not trigger a preliminary filing. In light of the early stage of the development of disclosures under these requirements and the special policy considerations relating to this shareholder vote for TARP recipients, we believe it is appropriate to provide our staff the opportunity to comment on the disclosure before final proxy materials are filed. However, as indicated below, we are requesting comment on this issue.

Request for Comment

We request and encourage any interested person to submit comments regarding the proposed amendments described above. In particular, we solicit comment on the following questions:

- 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

¹⁸ 17 CFR 240.14a-6(a).

recipients to frame the shareholder vote to approve executive compensation in the form of a resolution?

- 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?
- 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?
- 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?
- 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?
- 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 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?

III. PAPERWORK REDUCTION ACT

A. Background

The proposed amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).¹⁹ We are submitting the proposed amendments to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.²⁰ The title for the collection of information is:

“Schedule 14A” (OMB Control No. 3235-0059).

Schedule 14A was adopted under the Exchange Act and sets forth the disclosure requirements for proxy statements filed by U.S. issuers to help shareholders make informed voting decisions. The hours and costs associated with preparing, filing and sending the form constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the proposed amendments by affected U.S. issuers would be mandatory. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the information disclosed.

As discussed in more detail above, we are proposing a new Rule 14a-20 under the Exchange Act and an amendment to Item 20 of Schedule 14A. Rule 14a-20 would help implement the requirement under Section 111(e)(1) of the EESA to provide a separate shareholder vote to approve the compensation of executives. Pursuant to the proposed amendment to Item 20 of Schedule 14A, registrants required to provide a separate shareholder

¹⁹ 44 U.S.C. 3501 *et seq.*

²⁰ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

vote pursuant to new Rule 14a-20 would be required to disclose the EESA requirement to provide such a vote and the general effect of the vote.

B. Burden and Cost Estimates Related to the Proposed Amendments

We believe that the proposed Rule 14a-20 and amendments to Schedule 14A will result in only a modest increase in the burden and cost of preparing and filing a Schedule 14A because they will not cause TARP recipients to collect or disclose any significant additional information. Section 111(e) of the EESA already increased the burdens and costs for registrants that are TARP recipients by requiring a separate shareholder vote on executive compensation and already applied during the 2009 proxy season. Our proposed amendments address the EESA requirement in the context of the federal proxy rules, thereby creating only an incremental increase in the burdens and costs for such registrants. We believe the proposed amendments will remove uncertainty while still providing registrants that are TARP recipients adequate flexibility to comply with Section 111(e) of the EESA.

For purposes of this analysis, we estimate the burden of disclosing the general effect of the vote and otherwise ensuring conformity with the federal proxy rules when complying with Section 111(e)(1) of the EESA will increase by one hour per registrant that is a TARP recipient. We estimate there are approximately 275 registrants that are TARP recipients with outstanding obligations that would be subject to our proposed amendments.²¹ Therefore, the total annual PRA burden attributable to the proposed rules is 275 hours. For proxy statements, consistent with our customary assumptions, we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden is carried by outside professionals retained by

²¹ Our staff made this estimate from publicly-available information about TARP recipients. The estimate is based on the number of TARP recipients that are subject to our proxy rules and that have not repaid their TARP obligations.

the company to review corporate disclosure at an average cost of \$400 per hour.²² The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. Based on the foregoing, we calculated the additional annual compliance burdens resulting from the proposed amendments at 206.5 hours (this is 75% of the total 275 hours in increased burden carried by the company internally) and \$27,500 (this is 25% of the total increased hourly burden carried by outside professionals and reflected as a cost). The current total annual burden hours and cost of Schedule 14A approved by the OMB is 555,683 hours and \$63,709,987. Giving effect to the incremental increases in burden hours and costs as a result of the proposed amendments, the total annual burden hours and cost of Schedule 14A would be 555,889.5 hours and \$63,737,487.

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- evaluate the accuracy of our estimate of the burden of the proposed collections of information;
- determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;

²² We estimate an hourly cost of \$400 per hour for the service of outside professionals based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing proxy statements and related disclosures with the Commission.

- evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-12-09. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7-12-09 and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE, Washington, DC 20549-0213. Because OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if OMB receives them within 30 days of publication.

IV. COST-BENEFIT ANALYSIS

We are sensitive to the costs and benefits of the proposed amendments. In this section, we examine the benefits and costs of our proposed amendments. We request that commenters provide views and supporting information as to the benefits and costs associated with the

proposals. We seek estimates of these costs and benefits, as well as any costs and benefits not already identified.²³

A. Benefits

We are proposing amendments to the federal proxy rules to help implement the requirement in Section 111(e)(1) of the EESA that TARP recipients provide a separate shareholder vote to approve the compensation of executives. Under the proposed amendments, this separate shareholder vote would be required when registrants that are TARP recipients solicit proxies during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding, and the solicitation relates to an annual meeting (or a special meeting in lieu of an annual meeting) for which proxies will be solicited for the election of directors. Companies required to provide such a separate shareholder vote would also be required to disclose in their proxy statements the EESA requirement to provide such a vote, and to briefly explain the general effect of the vote.

We believe the proposed amendments will benefit registrants that are TARP recipients by clarifying how they must comply with the requirements of Section 111(e)(1) of the EESA in the context of the federal proxy rules. The proposed amendments eliminate uncertainty that may exist among TARP recipients and other market participants regarding what is necessary under the Commission's proxy rules when conducting a shareholder vote required under Section 111(e) of the EESA. In addition to these benefits, we believe the proposed amendments allow TARP recipients adequate flexibility under the proxy rules to comply with the requirements of the

²³ The cost-benefit analysis in this section addresses the costs and benefits of the proposed amendments. The analysis does not, however, address the costs and benefits of the requirement in Section 111(e)(1) of the EESA that TARP recipients conduct a separate shareholder vote on executive compensation. While the proposed amendments set forth the manner in which registrants that are TARP recipients would implement this requirement when complying with the federal proxy rules, such registrants are already subject to the provisions of Section 111(e)(1) of the EESA and thus we are only addressing the incremental costs and benefits of the proposed amendments.

EESA. By providing clarity while maintaining adequate flexibility, we believe the proposed amendments could reduce the amount of management time and legal expenses necessary to ensure that registrants that are TARP recipients comply with their obligations under both the EESA and the federal proxy rules. This would benefit TARP recipients and their shareholders.

We believe the proposed amendments will benefit investors by resulting in clear disclosure about the requirements of Section 111(e)(1) of the EESA as applied to Exchange Act registrants. When a separate shareholder vote on the compensation of executives is required by the EESA, proposed Rule 14a-20 would specify and clarify that requirement in the context of the federal proxy rules. By doing so, we believe Rule 14a-20 would promote better compliance with the requirements of Section 111(e)(1) of the EESA when registrants that are TARP recipients conduct solicitations subject to our proxy rules. The proposed amendments to Schedule 14A would require disclosure about the EESA requirement to provide a separate shareholder vote and the general effects of such a vote. Together, the proposed amendments are intended to provide useful, comparable and consistent information to assist an informed voting decision when registrants that are TARP recipients present to investors the advisory vote on executive compensation required pursuant to Section 111(e)(1) of the EESA. The specification and clarification of the requirement in our proposed rule would also help provide certainty about the nature of the TARP recipient's responsibility to hold the advisory vote, making it easier for companies to comply.

B. Costs

We believe the proposed amendments would not add any significant costs to those already created by the requirements of Section 111(e)(1) of the EESA and our proxy rules. The proposed amendments are intended to help implement the existing substantive EESA

requirement in the context of the federal proxy rules. While our proposed amendments to Schedule 14A would require certain disclosures not explicitly required by EESA, we believe any incremental costs imposed by our proposed amendments would be minimal. For purposes of the PRA, we estimate the total annual incremental cost of the amendments to be 275 hours. We request comment on the amount of any additional costs issuers may incur as a result of the proposed amendments.

V. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or “SBREFA,”²⁴ we solicit data to determine whether the proposals constitute a “major” rule.

Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendments on the U.S. economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views if possible.

²⁴ 5 U.S.C. 603.

VI. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 23(a)(2) of the Exchange Act²⁵ also requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 3(f)²⁶ of the Exchange Act requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

We believe the proposed amendments would benefit registrants that are TARP recipients and their shareholders by providing certainty regarding how registrants that are TARP recipients must comply with the EESA requirement to hold an advisory vote on executive compensation in the context of the federal proxy rules, while maintaining adequate flexibility to comply with this requirement. The certainty should promote efficiency. The proposed amendments also would help ensure that shareholders receive disclosure regarding the required vote and the nature of a registrant's responsibilities to hold the vote under the EESA. As discussed in greater detail above, we believe these benefits would be achieved without imposing any significant additional burdens on registrants that are TARP recipients. We do not anticipate any effect on competition or capital formation. We do believe the rules will make compliance with EESA more efficient.

²⁵ 15 U.S.C. 78w(a).

²⁶ 15 U.S.C. 78c(f).

We request comment on whether the proposed amendments, if adopted, would impose a burden on competition. We also request comment on whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VII. REGULATORY FLEXIBILITY ACT CERTIFICATION

The Commission hereby certifies pursuant to 5 U.S.C. 605(b), that the amendments contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. Rule 0-10 under the Exchange Act defines small entities for these purposes as those with total assets of \$5 million or less on the last day of their most recent fiscal year.²⁷ The proposed amendments would only impact TARP recipients with a class of securities registered pursuant to Section 12 of the Exchange Act and thus subject to the federal proxy rules.²⁸ We believe no TARP recipients that are required to comply with our proxy rules are small entities. In addition, if any small entities become subject to our proposed amendments, we do not believe the proposed amendments would have a significant economic impact on them. Any small entity subject to our proposed amendments would already be subject to the requirements of Section 111(e)(1) of the EESA. Further, we do not believe the EESA requires “smaller reporting companies” to provide a compensation discussion and analysis. As discussed in greater detail above, we do not believe our proposed rules impose a significant additional cost. For these reasons, the proposed amendments should not have a significant economic impact on a substantial number of small entities.

²⁷ 17 CFR 240.0-10.

²⁸ See 17 CFR 240.14a-2.

We solicit written comments regarding this certification. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

VIII. STATUTORY AUTHORITY AND TEXT OF THE PROPOSED AMENDMENTS

The amendments described in this release are being proposed under the authority set forth in Section 111(e) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221(e)) and Sections 14(a) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(a) and 78w(a)).

List of Subjects

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

TEXT OF THE PROPOSED AMENDMENTS

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq., 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

2. Add §240.14a-20 to read as follows:

§240.14a-20 Shareholder Approval of Executive Compensation of TARP Recipients.

If a solicitation is made by a registrant that is a TARP recipient, as defined in section 111(a)(3) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221(a)(3)), during the period in which any obligation arising from financial assistance provided under the TARP, as defined in section 3(8) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5202(8)), 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 Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221(e)(1)), the registrant shall provide a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K (§ 229.402 of this chapter), including the compensation discussion and analysis, the compensation tables, and any related material.

Note to §240.14a-20: TARP recipients that are smaller reporting companies entitled to provide scaled disclosure pursuant to Item 402(l) of Regulation S-K are not required to include a compensation discussion and analysis in their proxy statements in order to comply with this section. In the case of these smaller reporting companies, the required vote must be to approve the compensation of executives as disclosed pursuant to Item 402(m) through (r) of Regulation S-K.

3. Amend §240.14a-101 to add a sentence at the end of Item 20 to read as follows:

§240.14a-101 Schedule 14A. Information Required in Proxy Statement.

SCHEDULE 14A INFORMATION

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Item 20. Other proposed action. * * * Registrants required to provide a separate shareholder vote pursuant to section 111(e)(1) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221(e)(1)) and §240.14a-20 shall disclose that they are providing such a vote as required pursuant to the Emergency Economic Stabilization Act of 2008, and briefly explain the general effect of the vote.

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By the Commission.

Elizabeth M. Murphy
Secretary

July 1, 2009