

August 14, 2009

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

VIA EMAIL

Re: Proposed Rule Regarding Shareholder Approval of Executive Compensation of TARP Recipients (Release No. 34-60218; File No. S7-12-09)

Dear Ms. Murphy:

We are responding to the request of the Securities and Exchange Commission (the “Commission”) for comments on the Commission’s proposed Rule 14a-20 (the “Proposed Rule”) regarding shareholder approval of executive compensation of TARP recipients (a “Say on Pay Vote”) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), set forth in Release No. 34-60218 (the “Proposal”). We appreciate the opportunity to comment on the Proposal.

We write to address one aspect of the Proposal. We believe that the preliminary filing requirement for proxy statements that include a Say on Pay Vote, as mandated by section 111(e)(1) of the Emergency Economic Stabilization Act of 2008 (the “EESA”) and proposed Rule 14a-20, is unnecessary and unduly burdensome.

In proposing to require a preliminary filing, the Commission asserts that the “early stage of the development of disclosures under these requirements and the special policy considerations relating to this shareholder vote for TARP recipients” makes the opportunity for review and comment on the disclosure by Commission staff (the “Staff”) appropriate. While Staff comments are often helpful in improving compliance with the Commission’s rules, for the reasons set forth below, we believe that the Commission’s concern is misplaced in this case and that the additional burdens of a preliminary filing far outweigh any potential benefit of prior Staff review. We therefore urge the Commission, as part of any final rulemaking with respect to the Proposal, to amend Rule 14a-6(a) so that inclusion of a Say on Pay Vote does not trigger a preliminary filing requirement.

- The 2006 revisions to the Commission’s executive compensation disclosure rules require all publicly-held companies, including TARP recipients, to provide extensive disclosure about the pay practices that are the underlying focus of any Say on Pay Vote. Despite the breadth of the new disclosures and its lengthy consideration of their expected operation, the Commission did not judge it necessary to impose a preliminary filing requirement in adopting those rules. It is difficult to understand why the proposed amendment to Item 20 of Schedule 14A (“Revised Item 20”) warrants a change in the Commission’s

perspective. Revised Item 20 entails a very modest change in disclosure – a statement that the registrant is providing a separate shareholder vote pursuant to a requirement of the EESA and a brief explanation of the general effect of the vote. The few simple sentences responsive to Revised Item 20 are both highly likely to be substantially identical among affected registrants and highly unlikely to require Staff intervention to assure compliance. Indeed, the disclosure by TARP recipients about Say on Pay Votes in the 2009 proxy season supports this conclusion.

- Rule 14a-6 does not now require a preliminary filing for proxy statements that include a *binding* shareholder vote to approve certain employee benefit plans. Nor does it require a preliminary filing where shareholders are voting on the election of directors despite the Commission’s statement that, “[p]articularly with respect to the proxy statement for the annual meeting at which directors are elected, this improved disclosure [about executive compensation] would provide better information to shareholders for purposes of evaluating the actions of the board of directors in fulfilling its responsibilities to the company and its shareholders.” It is surprising that the Commission would find a preliminary filing necessary in the case of an advisory Say on Pay Vote, when it has reached the contrary conclusion in the case of other more consequential shareholder votes, for which the disclosure requirements are both more complex and more likely to vary among registrants.
- According to its report entitled “Staff Observations in the Review of Executive Compensation Disclosure,” the Division of Corporation Finance undertook a sweeping review of the executive compensation disclosure of 350 registrants from a broad range of industries. The purpose of the review was to “evaluate compliance with the revised rules and provide guidance on how those companies could improve their disclosure,” as well as to assist the companies in “enhancing the overall disclosure in their filings.” Many companies whose disclosure was reviewed as part of this initiative are TARP recipients that would be subject to a preliminary filing requirement. The modest change in disclosure to be effected by Revised Item 20 does not seem to warrant a further comprehensive review of disclosures by TARP recipients so soon after the report and particularly in light of the Staff’s ongoing review of public company disclosures on a three-year cycle.
- Requiring preliminary filings as proposed would result in either registrant and Staff focus on the relatively minor additional disclosure relating to the advisory Say on Pay Vote, which will not provide benefits that justify the burden discussed below, or registrant and Staff focus in a compressed 10-day timeframe on broader executive compensation and related disclosure, including the Compensation Discussion and Analysis (“CD&A”). The latter would prove burdensome for the Staff and for registrant and indeed would prove unworkable in at least some cases, where the iterative nature of the comment process would stretch beyond 10 days and threaten to delay annual meetings. (The tightness of scheduling around annual meetings is far more pronounced than the scheduling requirements generally applicable for other shareholder meetings, as the Commission and Staff know well from the Rule 14a-8 no-action process.) Moreover, if the intent of the Proposed Rule is to permit focus on CD&A, the Commission, investors and registrants would all be better served by continuing the current comment process, which allows time

for thoughtful consideration on both sides of the comment process and would, we predict, produce better outcomes. The report described above is evidence of the correctness of this prediction; compressing the underlying reviews into 10 days would not have produced the improvements in disclosure that have been achieved through following the normal comment process since the 2006 amendments to the Commission's compensation disclosure rules.

- In the Proposal, the Commission estimates that “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.” This estimate does not take into account the burden on a company, which could be significant, resulting from the need to add at least 10 days to a registrant's schedule for preparing the proxy statement. This additional period increases the already significant pressure that registrants face in compiling information to complete their annual filings on time. We question whether this result is appropriate in light of the limited additional disclosure requirements of Revised Item 20.
- A preliminary filing requirement could interfere with a registrant's ability to rely on the Commission's “notice and access” model for proxy statement delivery. That model requires registrants to post their proxy materials on the Internet and send a Notice of Internet Availability of Proxy Materials to shareholders at least 40 days in advance of the shareholder meeting, further reducing the time that registrants have to prepare their proxy statements. Should the Proposal be adopted in its current form, we believe that some TARP recipients will be unable to meet this deadline and would therefore forgo the cost and other benefits of the Commission's “notice and access” rules.
- Review of preliminary proxy statements that include a Say on Pay Vote would be a drain on Staff resources without the prospect of any concomitant benefit to investors. In the Proposal, the Commission estimates that there are “approximately 275 registrants that are TARP recipients with outstanding obligations that would be subject to our proposed amendments.” We question whether the administrative burden entailed by a review of 275 preliminary proxy statements is warranted in light of the limited disclosure obligation that would trigger those filings and the very limited likelihood that any significant Staff comments would result.
- As you know, there is serious consideration of extending advisory Say on Pay Votes to U.S. public companies generally, and indeed the House of Representatives has already passed legislation to this effect. We respectfully submit that in these circumstances the Commission should consider the desirability of a preliminary filing requirement in this larger context. The consequences and burdens for U.S. public companies, the burdens on the Staff, the potential for delayed annual meetings and the overall unworkability brought on by filing and review of preliminary proxy materials for several thousand companies would replicate the circumstances (including inadequate benefits to justify the burdens) that led to the abandonment of a general preliminary filing requirement in the first place. We do not perceive any particular policy reason that should lead to disparate treatment of U.S. public companies and TARP recipients. We believe that the Commission should not take the first step down what we believe would be an unfortunate path for all.

For the foregoing reasons, we respectfully urge the Commission to amend Rule 14a-6(a) to allow registrants that are TARP recipients to include a Say on Pay Vote without having to file a preliminary proxy statement. Should the Commission choose not to do so, we hope that the Commission will consider our arguments against the necessity of a preliminary proxy filing in the event that a Say on Pay Vote becomes mandatory for all U.S. registrants.

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We thank you for the opportunity to submit this comment letter. We would be happy to discuss with you any of the comments described above or any other matters you feel would be helpful in your review of the Proposal and the comments you receive. Please do not hesitate to contact Mary E. Alcock, Alan L. Beller, Janet L. Fisher or Arthur H. Kohn (212-225-2000) if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTlieb STEEN & HAMILTON LLP