

# ClientAlert

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## SEC Proposes Say-on-Pay Rules for TARP Recipients; Treasury Proposes Broader Legislation

Under the Emergency Economic Stabilization Act of 2008, as amended (“EESA”), public companies that participate in the Troubled Asset Relief Program (“TARP”) are required to provide for a separate shareholder advisory vote on executive compensation, commonly referred to as a “say-on-pay” proposal, in their annual meeting proxy statements. On July 1, 2009, the Securities and Exchange Commission released proposed amendments to the proxy rules to implement this EESA say-on-pay requirement.

Proposed Rule 14a-20 under the Securities Exchange Act requires TARP recipients to ask their stockholders to vote on the approval of executive compensation, including the compensation discussion and analysis, the compensation tables, and any related material. The shareholder vote would only be required in connection with proxies solicited for annual meetings (or special meetings in lieu of an annual meeting) at which directors will be elected. While under EESA the shareholder vote is not required to be binding, companies would be required to disclose in the proxy statement that the vote is required by EESA and include a brief explanation of the general effect of the vote, including whether the vote is non-binding.

Smaller reporting companies would not be required to provide a compensation discussion and analysis in their proxy statements (consistent with their current exemption from such requirement) to comply with the new rules.

No specific language or form of resolution for the say-on-pay vote is provided for in the proposed rules. However, the vote must be to approve

compensation of executives (as outlined in EESA) and the proposing release notes that a vote on a different subject matter, such as a vote to approve only compensation policies and procedures, would not satisfy the EESA requirement or proposed Rule 14a-20.

Unless current rules are amended, proxy statements that include a shareholder vote on executive compensation pursuant to the proposed rules would be required to be filed in preliminary form with the SEC. The SEC believes it is appropriate to provide an opportunity for SEC staff to comment on the disclosure before final proxy materials are filed. In the proposing release, the SEC is seeking comments on whether existing Rule 14a-6 should be amended so that a preliminary proxy statement would not be required as a consequence of providing the separate shareholder vote on executive compensation.

On July 16, 2009, the Treasury Department announced proposed legislation that would require a non-binding annual shareholder vote on executive compensation for all public companies, not just those participating in TARP. Under the proposed legislation, non-binding shareholder votes to approve golden parachute payments in the case of a merger or acquisition would also be required. While the House is expected to take up the legislation quickly (Chairman Barney Frank circulated a “discussion draft” of the executive compensation bill to members of the House Financial Services Committee on July 17, 2009), the timetable for Senate action is unclear. These requirements are expected to be implemented through further SEC rulemaking. As such, the

SEC's proposed rules for TARP recipients discussed above may help provide guidance to public companies on required disclosure and other issues should they too be required to institute say-on-pay proposals.

Comments on the proposed rule changes may be submitted to the SEC until September 8, 2009. A complete copy of the SEC Release can be found at <http://sec.gov/rules/proposed/2009/34-60218.pdf>.

**Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:**

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