American Recovery and Reinvestment Act of 2009

Updated: February 26, 2009

These Compliance and Disclosure Interpretations comprise the Division's interpretations of Section 7001 of the American Recovery and Reinvestment Act of 2009 (the "Act"), which amended Section 111(e) of the Emergency Economic Stabilization Act (the "EESA"). The bracketed date following each C&DI is the latest date of publication or revision.

Section 7001 of the Act amends EESA Section 111(e) to require any TARP recipient to "permit a separate shareholder 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 Act does not specify an effective date for this provision. In his letter dated February 20, 2009 to Chairman Schapiro, Chairman Dodd stated his view that this provision became effective on February 17, 2009 and applies to preliminary or definitive proxy statements (other than definitive proxy statements which relate to preliminary proxy statements filed on or before February 17, 2009) filed with the Commission after February 17, 2009.

Section 7001 of the Act also amends EESA Section 111(e) to require the CEO and CFO of each TARP recipient to provide a written certification of compliance by the TARP recipient with the requirements of Section 111(e), as amended. In his February 20, 2009 letter, Chairman Dodd stated that, "As this certification requirement relates to compliance with executive compensation and corporate governance standards that have yet to be established by the Secretary of the Treasury, it is my view that this requirement is not yet effective and therefore CEOs and CFOs will not be required to certify as to their company's compliance with such standards until they have been established."

The Division staff is following the views expressed in Chairman Dodd's letter to Chairman Schapiro.

Question 1

Question: EESA Section 111(e)(1), as amended, is titled "Annual shareholder approval of executive compensation" and provides that any proxy or consent or authorization for "an annual or other meeting of the shareholders of any TARP recipient" shall permit a separate shareholder vote on executive compensation. Is a separate shareholder vote on executive compensation required for any meeting other than the 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?

Answer: No. [Feb. 24, 2009]

Question 2

Question: EESA Section 111(e)(1), as amended, refers to 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)." Smaller reporting companies are not required to provide compensation discussion and analysis under Item 402 of Regulation S-K. If a smaller reporting company is subject to the Act's say-on-pay provision, must the smaller reporting company provide compensation discussion and analysis disclosure?

Answer: No. [Feb. 24, 2009]

Question 3

Question: A company that determines to comply with EESA Section 111(e)(1), as amended, by including its own proposal to have shareholders approve executive compensation will be required to file a preliminary proxy statement pursuant to Exchange Act Rule 14a-6(a). If the company faces special circumstances and would like to request acceleration of Rule 14a-6(a)'s ten-day review period, how should it proceed?

Answer: The company should contact the Assistant Director of the office that reviews the company's filings to discuss the special circumstances the company faces and how the ten-day review period could be accelerated. [Feb. 24, 2009]

Question 4

Question: EESA Section 111(e)(1), as amended, states that the TARP recipient "shall permit a separate shareholder vote to approve the compensation of executives." Does this mean that the TARP recipient only needs to permit a shareholder vote if it receives a shareholder proposal on approving executive compensation?

Answer: No. The statute does not condition the requirement for a vote on the receipt of a shareholder proposal on approving executive compensation. Senator Dodd stated in his letter to Chairman Schapiro, "The law is intended to require a yearly vote by shareholders." [Feb. 26, 2009]

Question 5

Question: Can EESA Section 111(e)(1), as amended, be satisfied by a TARP recipient if it includes a shareholder proposal on "say on pay" in its proxy statement?

Answer: This provision calls for a shareholder vote on executive compensation as disclosed pursuant to the Commission's compensation disclosure rules. A shareholder proposal on "say on pay" that only asks the company to adopt a policy providing for annual shareholder votes on executive compensation in the future would not satisfy this requirement. The statute instead requires an actual, non-binding vote by the shareholders to approve executive compensation. [Feb. 26, 2009]

http://www.sec.gov/divisions/corpfin/guidance/arrainterp.htm