Paul | Weiss

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1 212 373 3000

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1 202 223 7300

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44 20 7367 1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81 3 3597 8101

BEIJING
Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86 10 5828 6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852 2846 0300

July 1, 2009

SEC Proposes Rules Implementing "Say-On-Pay" Requirement for TARP Recipients

On July 1, 2009, the Securities and Exchange Commission unanimously voted to propose for public comment changes to the proxy rules to comply with the provisions of the Emergency Economic Stabilization Act of 2008, as amended by the American Reinvestment and Recovery Act of 2009 ("EESA"), requiring registrants receiving financial assistance under the Troubled Asset Relief Program ("TARP") to hold non-binding shareholder advisory votes on executive compensation (the so-called "say-on-pay" requirement). The proposal is consistent with, and does not go further than, the SEC's Compliance and Disclosure Interpretation, released on February 26, 2009, http://www.sec.gov/divisions/corpfin/guidance/arrainterp.htm, relating to the say-on-pay requirement.

The proposal calls for a new Rule 14a-20 under the Securities Exchange Act of 1934 and an amendment to Item 20 to Schedule 14A that would include the following provisions:

- Consistent with EESA Section 111(e)(1), the proposal would require TARP recipients to permit a separate shareholder vote to approve named executive officer compensation.
- The vote would be required for solicitations only during the period when financial assistance to the registrant under TARP remains outstanding.
- The vote would only be required of solicitations for annual meetings (and special meetings in lieu of annual meetings) at which director elections are held.
- The proxy soliciting the vote would need to explain that the vote is being solicited pursuant to the requirements of the EESA, and would need to explain the general impact of the vote.

SEC staff members stated in response to Commissioner questions that the vote would be precatory – a failure of the vote to pass would not necessitate a change to executive compensation. The staff members noted that the proposal would not modify the substantive executive compensation disclosure requirements contained in Item 402 of Regulation S-K (for example, small reporting companies would not be required to expand their executive compensation disclosure beyond what is now required (i.e., disclosing compensation for only three named executive officers and no requirement to include a Compensation Discussion and Analysis)). They confirmed that a shareholder proposal that only asks the company to adopt a policy providing for annual shareholder votes on executive compensation in the future would not satisfy the new proposed rule; an actual, non-binding vote by the shareholders would be required.

One Commissioner noted that this proposal does not reflect a policy judgment of the Commission on say-on-pay, as the proposal merely implements the requirement under EESA that the Commission publish final rules relating to say-on-pay for TARP recipients not later than February 17, 2010. In this regard, the SEC staff members noted that they are not proposing detailed disclosure requirements as to how registrants should comply with the say-on-pay requirement so as to give companies maximum flexibility in complying with the EESA requirement, and, in light of the early stage of the SEC's experience with advisory shareholder votes on executive compensation, to leave room for later development based on public comments (including, in particular, views on whether it would be more helpful to have specific language for say-on-pay votes promulgated under the proxy rules).

The proposal will include a period for public comments. Statements by staff members and commissioners indicated that the goal is for the proposal to be effective for the 2010 proxy season.

*   *   *

The above summary is based on oral discussions at today's SEC open meeting. The exact wording of the rule proposal will not be known until it is published. This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Any questions concerning the issues addressed in this memorandum may be directed to Mark S. Bergman (+44 207 367 1601), Lawrence I. Witdorchic (212-373-3237) and Erin Murphy (212-373-3106).