SEC ISSUES GUIDANCE ON "SAY-ON-PAY" VOTE FOR TARP RECIPIENTS

On July 1, 2009, the Securities and Exchange Commission (the "SEC") approved several new proposed rules governing the disclosure of compensation and other corporate governance matters. Included among the new proposed rules is guidance on implementing the new "say-on-pay" requirements for companies that have received financial assistance under the Troubled Asset Relief Program ("TARP").

The American Recovery and Reinvestment Act of 2009, signed into law on February 17, 2009, amended the Emergency Economic Stabilization Act of 2008 ("EESA"), in part, to require TARP recipients to provide a non-binding shareholder vote on the TARP company's executive compensation programs. Without any formal guidance going into the 2009 proxy season, many TARP companies wondered how the requirement applied and when it was effective. In February of 2009, the SEC published and subsequently updated Compliance and Disclosure Interpretations providing preliminary guidance on the required vote and indicating that the say-on-pay requirement applied to preliminary and definitive proxy statements filed after February 17, 2009, other than definitive proxy statements that relate to preliminary proxy statements filed on or before February 17, 2009. This left open some questions of how the requirement was to be implemented. The new proposed guidance approved by the SEC in the form of new Proposed Rule 14a-20 and an amendment to Item 20 of Schedule 14A purports to fill this gap and codify the SEC's position on the requirement.

New Proposed Rule 14a-20 would require TARP recipients to provide a separate shareholder vote in proxies solicited during the period in which any obligation arising from financial assistance provided under TARP remains outstanding. The requirement will be for a single non-binding vote to approve the compensation of executives, as disclosed in the TARP recipient's compensation discussion and analysis, compensation tables and related disclosure. No specific language, form of resolution or method of presentation is being proposed, leaving TARP recipients flexibility to tailor the presentation in a manner they deem appropriate to satisfy their obligations under EESA. The say-on-pay vote will be required only in a proxy solicited for an annual meeting (or special meeting in lieu of an annual meeting) at which directors are to be elected. The amendment to Item 20 of Schedule 14A would require TARP recipients to disclose in the proxy statement that they are providing a separate shareholder vote on executive compensation pursuant to the requirements of EESA and to briefly explain the general effect of the vote, indicating whether or not the vote is non-binding.

The SEC confirmed that, as proposed, the say-on-pay vote requirement would mean that TARP recipients would have to file preliminary proxy materials, as the new vote requirement would not fall within the exemptions from preliminary filing enumerated in Rule 14a-6.

Separate from the say-on-pay proposed rules, the SEC also proposed to shorten the time period for reporting the results of shareholder votes, including the say-on-pay vote. Current rules require that results of shareholder votes be reported in the periodic report covering the period during which the vote is taken (typically 10-Q or 10-K for domestic issuers). The proposal would require reporting of the outcome of the vote on Form 8-K within four days after the end of the meeting at which the vote was taken.

The new rules are proposed for comment. Comments must be received by the SEC no later than September 8, 2009. Among other issues, the SEC specifically requested comment on whether the say-on-pay vote should be listed among the enumerated exemptions from the requirement to file preliminary proxy materials and whether the proposed rule should include more specific requirements regarding the manner in which the shareholder vote should be presented.

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If you have any questions concerning the foregoing or would like additional information, please contact David E. Rubinsky (212-728-8635, drubinsky@willkie.com), J. Pasco Struhs (212-728-8109, pstruhs@willkie.com), or the Willkie attorney with whom you regularly work.

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