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Executive Compensation and TARP Recipients: Senator Dodd's Letter on "Say on Pay" Voting and CEO/CFO Certifications

New York
February 22, 2009

On February 20, 2009, Senator Christopher Dodd, Chairperson of the Committee on Banking, Housing and Urban Affairs, sent a letter to Mary Schapiro, Chairperson of the Securities and Exchange Commission (the "SEC"), stating his views on the effective date of the requirements of Section 111(e) "Shareholder Approval of Executive Compensation" and Section 111(b)(4) "Certification on Compliance" of the Emergency Economic Stabilization Act of 2008 ("EESA"), as revised by the American Recovery and Reinvestment Act of 2009 ("ARRA"). The legislation and other authorities cited in this memorandum are attached and may be reviewed in electronic form by clicking the links provided in this memorandum or the tabs to the left of the page.

This memorandum summarizes Senator Dodd's statements on the intended effective dates of Section 111(e) and Section 111(b)(4) of EESA, and outlines the issues that TARP recipients now need to address. The text of the executive compensation provisions of ARRA is contained in Division B – Title VII of ARRA.

- "Say on Pay" Voting. EESA Section 111(e) requires that any TARP recipient "during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding shall permit a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the [SEC] (which disclosure shall include the compensation discussion and analysis, the compensation tables, and any related material)." Senator Dodd stated that this provision "would not apply to preliminary (and the related definitive proxy even if filed after February 17) or definitive proxy statements filed with the [SEC] on or before February 17, 2009, but would apply to proxies filed after."
  - Senator Dodd stated that nothing in EESA Section 111(e)(1) modifies the substantive executive compensation disclosure requirements under SEC Rules, and therefore those rules will continue to apply. Nonetheless, we believe that the SEC likely will issue additional guidance promptly to address the shareholder approval and CEO and CFO certification provisions in EESA.
  - EESA Section 111(e)(2) makes clear that the "Say on Pay" vote will not be binding on the board of directors of a TARP recipient, that it may not be construed as overruling a board decision or as creating or implying any additional fiduciary duty by the board and that it may not be construed to restrict or limit the ability of

shareholders to make proposals for inclusion in the proxy statement related to executive compensation.

- The following issues should be considered in connection with the implementation of "Say on Pay" proposals:

  - Is a TARP recipient required to file a preliminary proxy statement with the SEC as a result of the inclusion of a "Say on Pay" vote? Normally, SEC Rule 14a-6 under the Securities Exchange Act of 1934 (the "Exchange Act") requires a preliminary proxy statement to be filed unless the only proposals to be addressed are: the election of directors; the election, approval or ratification of accountant(s); a security holder proposal included pursuant to Rule 14a-8 under the Exchange Act; and the approval or ratification of an employee benefit plan.

  - What standard of approval is required for a favorable vote? Absent contrary guidance from the SEC, the standard for approval would be determined by state corporate law and the constituent documents of the TARP recipient. Companies may consider altering their voting standards for this issue, as many companies have done in regard to majority voting standards for directors.

  - Under NYSE Member Rule 452, with respect to non-routine matters, brokers may only vote shares held on behalf of a client if they receive voting instructions from the client. If they do not receive such instructions, they may not vote the shares ("broker non-votes"). Depending upon a company's voting standards, broker non-votes may have the impact of a vote against or may have no impact at all. Rule 452 does not specifically include "Say on Pay" as one of the enumerated items to which the broker non-votes rule applies. We expect the New York Stock Exchange will issue guidance on this matter.

  - What is the precise wording of the proposal on which shareholders should be asked to vote? As noted in the attached summary, phrasing of the resolution is a key consideration in implementing a "Say on Pay" vote. EESA Section 111(e)(1) provides for a "separate shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the [SEC] (which disclosure shall include the compensation discussion and analysis, the compensation tables, and any related material)." Any deviation from this formulation may be problematic. Companies that desire to comment on the formulation may consider doing so through a supporting statement, as described in the immediate following paragraph.

  - Should a supporting statement be included? No such statement is required. Consideration should be given as to whether a supporting statement by management, the compensation committee or the board of directors would be beneficial.

- What steps should be taken and when to solicit favorable votes from key shareholders?
- What statements should be made to shareholders, if any, as to the effect of a negative vote? EESA Section 111(e)(2) provides that the shareholder vote will "not be binding on the board of directors." Although a "Say on Pay" vote is technically not a shareholder proposal, we note that the RiskMetrics Group's proxy voting guidelines advise institutional investors to vote against or withhold from all nominees of the board of directors, on a case-by-case basis, where the board of directors failed to act on a shareholder proposal that received (i) approval by a majority of the shares outstanding the previous year or (ii) approval by a majority of the shares cast for the previous two consecutive years.

○ In total, six companies held "Say on Pay" votes in 2008. The companies and the results of those votes are set forth below. The actual proxy statement disclosures of the six companies may be reviewed in electronic form by clicking on the company names or the tabs at the left side of the page.

	In Favor	Against	Abstentions	% in Favor
Aflac Inc.	646,140,973	17,278,269	30,538,691	93.11%
H&R Block, Inc.	255,215,990	2,683,216	27,010,669	89.58%
Jackson Hewitt Tax Service Inc.	14,744,442	8,854,269	3,901,921	53.61%
Littlefield Corp				
CEO Compensation	6,608,064	178,243	38,341	96.83%
Director Compensation	6,631,305	179,803	13,540	97.17%
RiskMetrics Group, Inc.				
Compensation Philosophy	50,641,672	3,173,596		94.10%
2007 Compensation Decisions	50,712,533	3,122,140		94.20%
2008 Performance Objectives	50,645,018	3,170,250		94.11%
Zale Corp.	27,629,359	362,511	1,456,880	93.82%

○ Attached to this memorandum is a summary of the three approaches to "Say on Pay" voting that have been used to date, each in 2008. These three approaches are illustrated by Aflac Inc., Littlefield Corp. and RiskMetrics Group, Inc.

- This attached summary also describes actions taken recently by companies as alternatives to the implementation of "Say on Pay" voting. These may be of interest, for corporate governance reasons, to TARP recipients as supplements, rather than alternatives, to the required "Say on Pay" vote. When used to supplement "Say on Pay," the alternatives may provide a more effective means of getting feedback from shareholders on pay practices and could be instrumental in convincing shareholders to vote favorably.

- Although the "Say on Pay" voting requirement ceases to apply once the obligations (excluding the stock warrants) arising from financial assistance provided under the TARP are no longer outstanding, eliminating the advisory vote may present significant shareholder relations issues for many TARP recipients.

- CEO and CFO Certifications. EESA Section 111(b)(4) requires that the CEO and CFO of each TARP recipient provide a written certification of compliance with the new executive compensation provisions to the SEC in the TARP recipient's annual filings. Senator Dodd stated that because 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 [his] view that this [certification] 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 that have yet to be established."

  - In October 2008, the Department of Treasury (the "Treasury") issued the October Interim Final Rule relating to the TARP Capital Purchase Program (the "CPP"). These rules, which remain in effect, require the *compensation committee* to certify that it has reviewed compensation arrangements for certain executives, and if necessary, modified such arrangements to ensure they do not encourage excessive and unnecessary risk taking. In January 2009, the Treasury then issued additional certification requirements in the January Interim Final Rule. The January Interim Final Rule required a CPP participant's *CEO* to certify to the chief compliance officer of TARP as to compliance with the executive compensation requirements of the CPP. (On February 4, 2009, the Treasury issued new guidelines on executive compensation of TARP recipients, including a CEO certification provision echoing the requirement in the January Interim Final Rule.) Arguably, ARRA superseded the January Interim Final Rule's CEO certification requirement. However, that argument is weakened given Senator Dodd's statements that delay the effective date of the certification requirement. Alternatively, without regard to the passage of ARRA, there has been confusion and conflicting informal guidance as to the effectiveness of the January Interim Final Rule containing the CEO certification given the change in administration.

Senator Dodd requested that the SEC provide guidance, as soon as possible, on how to comply with the requirements set forth in Section 111(e) and Section 111(b)(4) of EESA and we expect that the SEC will provide that guidance promptly.

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Please feel free to call A. Richard Susko, Arthur H. Kohn or Mary E. Alcock, or any other of your regular contacts at the firm, for further information about the matters discussed above.

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United States Senate

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

WASHINGTON, DC 20510–6075

February 20, 2009

The Honorable Mary Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Ms. Schapiro:

On February 17, 2009, the President signed into law the American Recovery and Reinvestment Act of 2009, which contains executive compensation provisions in Title VII that I authored. I write to share my views on the intent and application of the provisions on "Shareholder Approval of Executive Compensation" and the "Certification of Compliance" on which the Commission has substantial duties, and to ask that the Commission staff provide guidance to public companies for complying with this new legislative requirement as soon as practicable.

The law's subsection captioned "Annual Shareholder Approval of Executive Compensation" requires that "TARP recipients during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding shall permit a separate [nonbinding] shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the Commission." This provision of the law became effective on February 17, 2009. It is my view that this provision would not apply to preliminary (and the related definitive proxy even if filed after February 17) or definitive proxy statements filed with the Securities and Exchange Commission on or before February 17, 2009, but would apply to proxies filed after.

The law is intended to require a yearly vote by shareholders. That vote can be held either at the annual meeting of shareholders at which directors are elected or at a special or other meeting which is held in lieu of the annual meeting.

I point out that nothing in subsection 111(e)(1) changes the substantive executive compensation disclosure requirements under Commission rules. Finally, although the Commission will determine whether it will need to amend its rules to address the provisions of the Act, any such determination does not affect the effective date of this provision.

Title VII also requires the CEO and CFO of each TARP recipient to provide a written certification of compliance with the requirements of the new Section 111 of the Emergency Economic Stabilization Act. 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.

Firms that are now subject to complying with the new law would benefit from prompt and clear guidance from the Commission staff on how to comply with its requirements. I hope that you will provide such guidance as soon as possible. I look forward to working with you on this and other matters so that we may oversee a smooth transition to the new corporate governance policies implemented by the Act.

Sincerely,

Chris Dodd

CHRISTOPHER J. DODD

One Hundred Eleventh Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the sixth day of January, two thousand and nine

An Act

Making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "American Recovery and Reinvestment Act of 2009".

(2) The national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal. The plan shall also include—

(A) an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States;

(B) a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public;

(C) an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section; and

(D) a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.

(3) In developing the plan, the Commission shall have access to data provided to other Government agencies under the Broadband Data Improvement Act (47 U.S.C. 1301 note).

(l) The Assistant Secretary shall develop and maintain a comprehensive nationwide inventory map of existing broadband service capability and availability in the United States that depicts the geographic extent to which broadband service capability is deployed and available from a commercial provider or public provider throughout each State. Not later than 2 years after the date of the enactment of this Act, the Assistant Secretary shall make the broadband inventory map developed and maintained pursuant to this section accessible by the public on a World Wide Web site of the National Telecommunications and Information Administration in a form that is interactive and searchable.

(m) The Assistant Secretary shall have the authority to prescribe such rules as are necessary to carry out the purposes of this section.

TITLE VII—LIMITS ON EXECUTIVE COMPENSATION

SEC. 7000. TABLE OF CONTENTS.

The table of contents of this title is as follows:

SEC. 7001. EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE.

Section 111 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221) is amended to read as follows:

"SEC. 111. EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE.

"(a) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

"(1) SENIOR EXECUTIVE OFFICER.—The term 'senior executive officer' means an individual who is 1 of the top 5 most highly paid executives of a public company, whose compensation is required to be disclosed pursuant to the Securities Exchange Act of 1934, and any regulations issued thereunder, and non-public company counterparts.

"(2) GOLDEN PARACHUTE PAYMENT.—The term 'golden parachute payment' means any payment to a senior executive officer for departure from a company for any reason, except for payments for services performed or benefits accrued.

"(3) TARP RECIPIENT.—The term 'TARP recipient' means any entity that has received or will receive financial assistance under the financial assistance provided under the TARP.

"(4) COMMISSION.—The term 'Commission' means the Securities and Exchange Commission.

"(5) PERIOD IN WHICH OBLIGATION IS OUTSTANDING; RULE OF CONSTRUCTION.—For purposes of this section, the period in which any obligation arising from financial assistance provided under the TARP remains outstanding does not include any period during which the Federal Government only holds warrants to purchase common stock of the TARP recipient.

"(b) EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE.—

"(1) ESTABLISHMENT OF STANDARDS.—During the period in which any obligation arising from financial assistance provided under the TARP remains outstanding, each TARP recipient shall be subject to—

"(A) the standards established by the Secretary under this section; and

"(B) the provisions of section 162(m)(5) of the Internal Revenue Code of 1986, as applicable.

"(2) STANDARDS REQUIRED.—The Secretary shall require each TARP recipient to meet appropriate standards for executive compensation and corporate governance.

"(3) SPECIFIC REQUIREMENTS.—The standards established under paragraph (2) shall include the following:

"(A) Limits on compensation that exclude incentives for senior executive officers of the TARP recipient to take unnecessary and excessive risks that threaten the value of such recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.

"(B) A provision for the recovery by such TARP recipient of any bonus, retention award, or incentive compensation paid to a senior executive officer and any of the next 20 most highly-compensated employees of the TARP recipient based on statements of earnings, revenues, gains, or other criteria that are later found to be materially inaccurate.

"(C) A prohibition on such TARP recipient making any golden parachute payment to a senior executive officer or any of the next 5 most highly-compensated employees of the TARP recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding.

"(D)(i) A prohibition on such TARP recipient paying or accruing any bonus, retention award, or incentive compensation during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding, except that any prohibition developed under this paragraph shall not apply to the payment of long-term restricted stock by such TARP recipient, provided that such long-term restricted stock—

"(I) does not fully vest during the period in which any obligation arising from financial assistance provided to that TARP recipient remains outstanding;

"(II) has a value in an amount that is not greater than ⅓ of the total amount of annual compensation of the employee receiving the stock; and

"(III) is subject to such other terms and conditions as the Secretary may determine is in the public interest.

"(ii) The prohibition required under clause (i) shall apply as follows:

"(I) For any financial institution that received financial assistance provided under the TARP equal to less than $25,000,000, the prohibition shall apply only to the most highly compensated employee of the financial institution.

"(II) For any financial institution that received financial assistance provided under the TARP equal to at least $25,000,000, but less than $250,000,000, the prohibition shall apply to at least the 5 most highly-compensated employees of the financial institution, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

"(III) For any financial institution that received financial assistance provided under the TARP equal to at least$250,000,000, but less than $500,000,000, the prohibition shall apply to the senior executive officers and at least the 10 next most highly-compensated employees, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

"(IV) For any financial institution that received financial assistance provided under the TARP equal to $500,000,000 or more, the prohibition shall apply to the senior executive officers and at least the 20 next most highly-compensated employees, or such higher number as the Secretary may determine is in the public interest with respect to any TARP recipient.

"(iii) The prohibition required under clause (i) shall not be construed to prohibit any bonus payment required to be paid pursuant to a written employment contract executed on or before February 11, 2009, as such valid employment contracts are determined by the Secretary or the designee of the Secretary.

"(E) A prohibition on any compensation plan that would encourage manipulation of the reported earnings of such

TARP recipient to enhance the compensation of any of its employees.

"(F) A requirement for the establishment of a Board Compensation Committee that meets the requirements of subsection (c).

"(4) CERTIFICATION OF COMPLIANCE.—The chief executive officer and chief financial officer (or the equivalents thereof) of each TARP recipient shall provide a written certification of compliance by the TARP recipient with the requirements of this section—

"(A) in the case of a TARP recipient, the securities of which are publicly traded, to the Securities and Exchange Commission, together with annual filings required under the securities laws; and

"(B) in the case of a TARP recipient that is not a publicly traded company, to the Secretary.

"(c) BOARD COMPENSATION COMMITTEE.—

"(1) ESTABLISHMENT OF BOARD REQUIRED.—Each TARP recipient shall establish a Board Compensation Committee, comprised entirely of independent directors, for the purpose of reviewing employee compensation plans.

"(2) MEETINGS.—The Board Compensation Committee of each TARP recipient shall meet at least semiannually to discuss and evaluate employee compensation plans in light of an assessment of any risk posed to the TARP recipient from such plans.

"(3) COMPLIANCE BY NON-SEC REGISTRANTS.—In the case of any TARP recipient, the common or preferred stock of which is not registered pursuant to the Securities Exchange Act of 1934, and that has received $25,000,000 or less of TARP assistance, the duties of the Board Compensation Committee under this subsection shall be carried out by the board of directors of such TARP recipient.

"(d) LIMITATION ON LUXURY EXPENDITURES.—The board of directors of any TARP recipient shall have in place a company-wide policy regarding excessive or luxury expenditures, as identified by the Secretary, which may include excessive expenditures on—

"(1) entertainment or events;

"(2) office and facility renovations;

"(3) aviation or other transportation services; or

"(4) other activities or events that are not reasonable expenditures for staff development, reasonable performance incentives, or other similar measures conducted in the normal course of the business operations of the TARP recipient.

"(e) SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION.—

"(1) ANNUAL SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION.—Any proxy or consent or authorization for an annual or other meeting of the shareholders of any TARP recipient during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding shall permit a separate shareholder vote to approve 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).

"(2) NONBINDING VOTE.—A shareholder vote described in paragraph (1) shall not be binding on the board of directors of a TARP recipient, and may not be construed as overruling a decision by such board, nor to create or imply any additional fiduciary duty by such board, nor shall such vote be construed to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.

"(3) DEADLINE FOR RULEMAKING.—Not later than 1 year after the date of enactment of the American Recovery and Reinvestment Act of 2009, the Commission shall issue any final rules and regulations required by this subsection.

"(f) REVIEW OF PRIOR PAYMENTS TO EXECUTIVES.—

"(1) IN GENERAL.—The Secretary shall review bonuses, retention awards, and other compensation paid to the senior executive officers and the next 20 most highly-compensated employees of each entity receiving TARP assistance before the date of enactment of the American Recovery and Reinvestment Act of 2009, to determine whether any such payments were inconsistent with the purposes of this section or the TARP or were otherwise contrary to the public interest.

"(2) NEGOTIATIONS FOR REIMBURSEMENT.—If the Secretary makes a determination described in paragraph (1), the Secretary shall seek to negotiate with the TARP recipient and the subject employee for appropriate reimbursements to the Federal Government with respect to compensation or bonuses.

"(g) NO IMPEDIMENT TO WITHDRAWAL BY TARP RECIPIENTS.—Subject to consultation with the appropriate Federal banking agency (as that term is defined in section 3 of the Federal Deposit Insurance Act), if any, the Secretary shall permit a TARP recipient to repay any assistance previously provided under the TARP to such financial institution, without regard to whether the financial institution has replaced such funds from any other source or to any waiting period, and when such assistance is repaid, the Secretary shall liquidate warrants associated with such assistance at the current market price.

"(h) REGULATIONS.—The Secretary shall promulgate regulations to implement this section.".

SEC. 7002. APPLICABILITY WITH RESPECT TO LOAN MODIFICATIONS.

Section 109(a) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5219(a)) is amended—

(1) by striking "To the extent" and inserting the following: "(1) IN GENERAL.—To the extent"; and

(2) by adding at the end the following:

"(2) WAIVER OF CERTAIN PROVISIONS IN CONNECTION WITH LOAN MODIFICATIONS.—The Secretary shall not be required to apply executive compensation restrictions under section 111, or to receive warrants or debt instruments under section 113, solely in connection with any loan modification under this section.".

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

SEC Rule 14a-6 -- Filing Requirements

a. *Preliminary proxy statement.* Five preliminary copies of the proxy statement and form of proxy shall be filed with the Commission at least 10 calendar days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause thereunder. A registrant, however, shall not file with the Commission a preliminary proxy statement, form of proxy or other soliciting material to be furnished to security holders concurrently therewith if the solicitation relates to an annual (or special meeting in lieu of the annual) meeting, or for an investment company registered under the Investment Company Act of 1940 or a business development company, if the solicitation relates to any meeting of security holders at which the only matters to be acted upon are:

   1. The election of directors;

   2. The election, approval or ratification of accountant(s);

   3. A security holder proposal included pursuant to Rule 14a-8;

   4. The approval or ratification of a plan as defined in paragraph (a)(6)(ii) of Item 402 of Regulation S-K or amendments to such a plan;
   5. With respect to an investment company registered under the Investment Company Act of 1940 or a business development company, a proposal to continue, without change, any advisory or other contract or agreement that previously has been the subject of a proxy solicitation for which proxy material was filed with the Commission pursuant to this section; and/or

   6. With respect to an open-end investment company registered under the Investment Company Act of 1940, a proposal to increase the number of shares authorized to be issued.

   This exclusion from filing preliminary proxy material does not apply if the registrant comments upon or refers to a solicitation in opposition in connection with the meeting in its proxy material.

   Note 1:

   The filing of revised material does not recommence the ten day time period unless the revised material contains material revisions or material new proposal(s) that constitute a fundamental change in the proxy material.

   Note 2:

   The official responsible for the preparation of the proxy material should make every effort to verify the accuracy and completeness of the information required by the applicable rules. The preliminary material should be filed with the Commission at the earliest practicable date.

   Note 3: Solicitation in Opposition.

   For purposes of the exclusion from filing preliminary proxy material, a "solicitation in opposition" includes:

   g. Any solicitation opposing a proposal supported by the registrant; and

h. any solicitation supporting a proposal that the registrant does not expressly support, other than a security holder proposal included in the registrant's proxy material pursuant to Rule14a-8. The inclusion of a security holder proposal in the registrant's proxy material pursuant to Rule 14a-8 does not constitute a "solicitation in opposition," even if the registrant opposes the proposal and/or includes a statement in opposition to the proposal.

Note 4:

A registrant that is filing proxy material in preliminary form only because the registrant has commented on or referred to a solicitation in opposition should indicate that fact in a transmittal letter when filing the preliminary material with the Commission.

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b. *Definitive proxy statement and other soliciting material.* Eight definitive copies of the proxy statement, form of proxy and all other soliciting materials, in the same form as the materials sent to security holders, must be filed with the Commission no later than the date they are first sent or given to security holders. Three copies of these materials also must be filed with, or mailed for filing to, each national securities exchange on which the registrant has a class of securities listed and registered.

c. *Personal solicitation materials.* If part or all of the solicitation involves personal solicitation, then eight copies of all written instructions or other materials that discuss, review or comment on the merits of any matter to be acted on, that are furnished to persons making the actual solicitation for their use directly or indirectly in connection with the solicitation, must be filed with the Commission no later than the date the materials are first sent or given to these persons.

d. *Release dates.* All preliminary proxy statements and forms of proxy filed pursuant to paragraph (a) of this section shall be accompanied by a statement of the date on which definitive copies thereof filed pursuant to paragraph (b) of this section are intended to be released to security holders. All definitive material filed pursuant to paragraph (b) of this section shall be accompanied by a statement of the date on which copies of such material were released to security holders, or, if not released, the date on which copies thereof are intended to be released. All material filed pursuant to paragraph (c) of this section shall be accompanied by a statement of the date on which copies thereof were released to the individual who will make the actual solicitation or if not released, the date on which copies thereof are intended to be released.

e.

0. *Public availability of information.* All copies of preliminary proxy statements and forms of proxy filed pursuant to paragraph (a) of this section shall be clearly marked "Preliminary Copies," and shall be deemed immediately available for public inspection unless confidential treatment is obtained pursuant to paragraph (e)(2) of this section.

1. Confidential treatment. If action will be taken on any matter specified in Item 14 of Schedule 14A, all copies of the preliminary proxy statement and form of proxy filed under paragraph (a) of this section will be for the information of the Commission only and will not be deemed available for public inspection until filed with the Commission in definitive form so long as:

   i. The proxy statement does not relate to a matter or proposal subject to Rule 13e-3 or a roll-up transaction as defined in Item 901(c) of Regulation S-K;

   ii. Neither the parties to the transaction nor any persons authorized to act on their behalf have made any public communications relating to the transaction except for statements where the content is limited to the information specified in Rule 135; and

iii. The materials are filed in paper and marked "Confidential, For Use of the Commission Only." In all cases, the materials may be disclosed to any department or agency of the United States Government and to the Congress, and the Commission may make any inquiries or investigation into the materials as may be necessary to conduct an adequate review by the Commission.

Instruction to paragraph (e)(2): If communications are made publicly that go beyond the information specified in Rule 135, the preliminary proxy materials must be re-filed promptly with the Commission as public materials.

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f. *Communications not required to be filed.* Copies of replies to inquiries from security holders requesting further information and copies of communications which do no more than request that forms of proxy theretofore solicited be signed and returned need not be filed pursuant to this section.

g. *Solicitations subject to Rule 14a-2(b)(1)*

0. Any person who:

   i. Engages in a solicitation pursuant to Rule 14a-2(b)(1), and

   ii. At the commencement of that solicitation owns beneficially securities of the class which is the subject of the solicitation with a market value of over $5 million,

   shall furnish or mail to the Commission, not later than three days after the date the written solicitation is first sent or given to any security holder, five copies of a statement containing the information specified in the Notice of Exempt Solicitation (Rule 14a-103) which statement shall attach as an exhibit all written soliciting materials. Five copies of an amendment to such statement shall be furnished or mailed to the Commission, in connection with dissemination of any additional communications, not later than three days after the date the additional material is first sent or given to any security holder. Three copies of the Notice of Exempt Solicitation and amendments thereto shall, at the same time the materials are furnished or mailed to the Commission, be furnished or mailed to each national securities exchange upon which any class of securities of the registrant is listed and registered.

1. Notwithstanding paragraph (g)(1) of this section, no such submission need be made with respect to oral solicitations (other than with respect to scripts used in connection with such oral solicitations), speeches delivered in a public forum, press releases, published or broadcast opinions, statements, and advertisements appearing in a broadcast media, or a newspaper, magazine or other bona fide publication disseminated on a regular basis.

h. *Revised material.* Where any proxy statement, form of proxy or other material filed pursuant to this section is amended or revised, two of the copies of such amended or revised material filed pursuant to this section (or in the case of investment companies registered under the Investment Company Act of 1940, three of such copies) shall be marked to indicate clearly and precisely the changes effected therein. If the amendment or revision alters the text of the material the changes in such text shall be indicated by means of underscoring or in some other appropriate manner.

i. *Fees.* At the time of filing the proxy solicitation material, the persons upon whose behalf the solicitation is made, other than investment companies registered under the Investment Company Act of 1940, shall pay to the Commission the following applicable fee:

   0. For preliminary proxy material involving acquisitions, mergers, spinoffs, consolidations or proposed sales or other dispositions of substantially all the assets of the company, a fee established in accordance with Rule 0-11 shall be paid. No refund shall be given.

   1. For all other proxy submissions and submissions made pursuant to Rule 14a-6(g), no fee shall be required.

j. Merger proxy materials.

   0. Any proxy statement, form of proxy or other soliciting material required to be filed by this section that also is either

      i. Included in a registration statement filed under the Securities Act of 1933 on Forms S-4, F-4 or N-14; or

      ii. Filed under Rule 424, Rule 425 or Rule 497 is required to be filed only under the Securities Act, and is deemed filed under this section.

   1. Under paragraph (j)(1) of this section, the fee required by paragraph (i) of this section need not be paid.

k. *Computing time periods.* In computing time periods beginning with the filing date specified in Regulation 14A , the filing date shall be counted as the first day of the time period and midnight of the last day shall constitute the end of the specified time period.

l. *Roll-up transactions.* If a transaction is a roll-up transaction as defined in Item 901(c) of Regulation S-K and is registered (or authorized to be registered) on Form S-4 or Form F-4, the proxy statement of the sponsor or the general partner as defined in Item 901(d) and Item 901(a), respectively, of Regulation S-K must be distributed to security holders no later than the lesser of 60 calendar days prior to the date on which the meeting of security holders is held or action is taken, or the maximum number of days permitted for giving notice under applicable state law.

m. *Cover page.* Proxy materials filed with the Commission shall include a cover page in the form set forth in Schedule 14A. The cover page required by this paragraph need not be distributed to security holders.

n. *Solicitations subject to Rule 14a-2(b)(4).* Any person who:

   0. Engages in a solicitation pursuant to Rule 14a-2(b)(4); and

   1. At the commencement of that solicitation both owns five percent 5% or more of the outstanding securities of a class that is the subject of the proposed roll-up transaction, and engages in the business of buying and selling limited partnership interests in the secondary market, shall furnish or mail to the Commission, not later than three days after the date an oral or written solicitation by that person is first made, sent or provided to any security holder, five copies of a statement containing the information specified in the Notice of Exempt Preliminary Roll-up Communication (Rule 14a-104). Five copies of any amendment to such statement shall be furnished or mailed to the Commission not later than three days after a communication containing revised material is first made, sent or provided to any security holder.

o. *Solicitations before furnishing a definitive proxy statement.* Solicitations that are published, sent or given to security holders before they have been furnished a definitive proxy statement must be made in accordance with Rule 14a-12 unless there is an exemption available under Rule 14a-2.

Regulatory History

17 FR 11432, Dec. 18, 1952, as amended at 21 FR 578, Jan. 26, 1956; 26 FR 3810, May 3, 1961; 30 FR 4753, April 14, 1965; 32 FR 1036, Jan. 28, 1967; 32 FR 20963, Dec. 29, 1967; 45 FR 76980, Nov. 21, 1980; 51 FR 2477, Jan. 17, 1986; 51 FR 42061, Nov. 20, 1986; 52 FR 21936, June 10, 1987; 52 FR 48982, Dec. 29, 1987; 56 FR 57254, Nov. 8, 1991; 57 FR 48291, Oct. 22, 1992; 58 FR 14683, March 18, 1993; 58 FR 69226, Dec. 30, 1993; 59 FR 52696, Oct. 19, 1994; 59 FR 63684, Dec. 8, 1994; 59 FR 67764, Dec. 30, 1994; 61 FR 49957, 49959, Sept. 24, 1996; 64 FR 61408, 61456, Nov. 10, 1999; 71 FR 53158, 53261, Sept. 8, 2006.

NYSE Member Rule 452. Giving Proxies by Member Organization

A member organization shall give or authorize the giving of a proxy for stock registered in its name, or in the name of its nominee, at the direction of the beneficial owner. If the stock is not in the control or possession of the member organization, satisfactory proof of the beneficial ownership as of the record date may be required.

Voting member organization holdings as executor, etc.

A member organization may give or authorize the giving of a proxy to vote any stock registered in its name, or in the name of its nominee, if such member organization holds such stock as executor, administrator, guardian, trustee, or in a similar representative or fiduciary capacity with authority to vote.

Voting procedure without instructions

A member organization which has transmitted proxy soliciting material to the beneficial owner of stock or to an investment adviser, registered either under the Investment Advisers Act of 1940 or under the laws of a state, who exercises investment discretion pursuant to an advisory contract for the beneficial owner and has been designated in writing by the beneficial owner of such stock (hereinafter "designated investment adviser") to receive soliciting material in lieu of the beneficial owner and solicited voting instructions in accordance with the provisions of Rule 451 [¶2451], and which has not received instructions from the beneficial owner or from the beneficial owner's designated investment adviser by the date specified in the statement accompanying such material, may give or authorize the giving of a proxy to voted such stock, provided the person in the member organization giving or authorizing the giving of the proxy has no knowledge of any contest as to the action to be taken at the meeting and provided such action is adequately disclosed to stockholders and does not include authorization for a merger, consolidation or any other matter which may affect substantially the rights or privileges of such stock.

Instructions on stock in names of other member organizations

A member organization which has in its possession or control stock registered in the name of another member organization, and which has solicited voting instructions in accordance with the provisions of Rule 451(b)(1) [¶2451], shall

(1) Forward to the second member organization any voting instructions received from the beneficial owner, or

(2) if the proxy-soliciting material has been transmitted to the beneficial owner of the stock in accordance with Rule 451 [¶2451] and no instructions have been received by the date specified in the statement accompanying such material, notify the second member organization of such fact in order that such member organization may give the proxy as provided in the third paragraph of this rule.

Signed proxies for stock in names of other member organizations

A member organization which has in its possession or control stock registered in the name of another member organization, and which desires to transmit signed proxies pursuant to the provisions of Rule 451(b)(2) [¶2451], shall obtain the requisite number of signed proxies from such holder of record.

Amendments.

January 11, 1968.
August 25, 1994.
March 6, 2003 (NYSE-2002-50).

• • • ***Supplementary Material:*** ------------------

Giving a Proxy To Vote Stock

.10 When member organization may vote without customer instructions.— Rule 452, above, provides that a member organization may give a proxy to vote stock provided that:
(1) It has transmitted proxy soliciting material to the beneficial owner of stock or to the beneficial owner's designated investment adviser in accordance with Rule 451 [¶2451], and
(2) it has not received voting instructions from the beneficial owner or from the beneficial owner's designated investment adviser, by the date specified in the statement accompanying such material, and
(3) the person in the member organization giving or authorizing the giving of the proxy has no knowledge of any contest as to the action to be taken at the meeting and provided such action is adequately disclosed to stockholders and does not include authorization for a merger, consolidation of any matter which may affect substantially the rights or privileges of such stock.
Amendments.
January 11, 1968.
August 25, 1994.
.11 When member organization may not vote without customer instructions.—In the list of meetings of stockholders appearing in the Weekly Bulletin, after proxy material has been reviewed by the Exchange, each meeting will be designated by an appropriate symbol to indicate either (a) that members may vote a proxy without instructions of beneficial owners, (b) that members may not vote specific matters on the proxy, or (c) that members may not vote the entire proxy.
Generally speaking, a member organization may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon:
(1) is not submitted to stockholders by means of a proxy statement comparable to that specified in Schedule 14-A of the Securities and Exchange Commission;
(2) is the subject of a counter-solicitation, or is part of a proposal made by a stockholder which is being opposed by management (i.e., a contest);
(3) relates to a merger or consolidation (except when the company's proposal is to merge with its own wholly owned subsidiary, provided its shareholders dissenting thereto do not have rights of appraisal);
(4) involves right of appraisal;
(5) authorizes mortgaging of property;
(6) authorizes or creates indebtedness or increases the authorized amount of indebtedness;
(7) authorizes or creates a preferred stock or increases the authorized amount of an existing preferred stock;
(8) alters the terms or conditions of existing stock or indebtedness;
(9) involves waiver or modification of preemptive rights (except when the company's proposal is to waive such rights with respect to shares being offered pursuant to stock option or purchase plans involving the additional issuance of not more than 5% of the company's outstanding common shares (see Item 12));
(10) changes existing quorum requirements with respect to stockholder meetings;
(11) alters voting provisions or the proportionate voting power of a stock, or the number of its votes per share (except where cumulative voting provisions govern the number of votes per share for election of directors and the company's proposal involves a change in the number of its directors by not more than 10% or not more than one);
(12) authorizes the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan (whether or not stockholder approval of such plan is required by subsection 8 of Section 303A of the Exchange's Listed Company Manual);
(13) authorizes

- a. a new profit-sharing or special remuneration plan, or a new retirement plan, the annual cost of which will amount to more than 10% of average annual income before taxes for the preceding five years, or
- b. the amendment of an existing plan which would bring its cost above 10% of such average annual income before taxes.

Exceptions may be made in cases of

- a. retirement plans based on agreement or negotiations with labor unions (or which have been or are to be approved by such unions); and
- b. any related retirement plan for benefit of non-union employees having terms substantially equivalent to the terms of such union-negotiated plan, which is submitted for action of stockholders concurrently with such union-negotiated plan;

(14) changes the purposes or powers of a company to an extent which would permit it to change to a materially different line of business and it is the company's stated intention to make such a change;
(15) authorizes the acquisition of property, assets, or a company, where the consideration to be given has a fair value approximating 20% or more of the market value of the previously outstanding shares;
(16) authorizes the sale or other disposition of assets or earning power approximating 20% or more of those existing prior to the transaction.
(17) authorizes a transaction not in the ordinary course of business in which an officer, director or substantial security holder has a direct or indirect interest;
(18) reduces earned surplus by 51% or more, or reduces earned surplus to an amount less than the aggregate of three years' common stock dividends computed at the current dividend rate.

Amendment.

January 11, 1968.
June 30, 2003 (NYSE-2002-46).

.12 Proportionate voting for auction rate preferred securities.—

Notwithstanding any other provision of Rule 452, a member organization may vote auction rate preferred securities * with auction reset periods of one year or less in proportion to the voting instructions received from holders of the same class (or of the same series where the item must be voted upon separately by each series), in accordance with the provisions established below:
(1) It has transmitted proxy soliciting material to the beneficial owner of the auction rate preferred securities or to the beneficial owner's designated investment adviser in accordance with Rule 451 [¶2451], and
(2) It has not received voting instructions from the beneficial owner or from the beneficial owner's designated investment adviser, by the date specified in the statement accompanying such material, and
(3) A minimum of 30% of the outstanding shares of the same class or series (where a series vote may be required) has been voted by preferred security holders, and
(4) Less than 10% of the outstanding shares of the same class or series (where a series vote may be required) voted against the proposal, and
(5) For any proposal as to which both the common and preferred holders vote as a single class. Proportional voting will not be allowed unless common shareholders approve the proposal, and
(6) A majority of the independent directors of the issuer's board of directors approved the matter, and
(7) Adequate disclosure of proportional voting has been provided to beneficial holders.

.13 Discretionary and non-discretionary proposals in one proxy form.—In some cases, a proxy form may contain proposals, some of which may be acted upon at the discretion of the member organization in the absence of instructions, and others which may be voted only in accordance with the directions of the beneficial owner. This should be indicated in the letter of transmittal. In such cases, the member organization may vote the proxy in the absence of instructions if it physically crosses out those portions where it does not have discretion.

.14 Cancellation of discretionary proxy where counter-solicitation develops.—Where a discretionary proxy has been given in good faith under the rules and counter-solicitation develops at a later date, thereby creating a "contest," the question as to whether or not the discretionary proxy should then be cancelled is a matter which each member organization must decide for itself. After a contest has developed no further proxies should be given except at the direction of beneficial owners.

.15 Subsequent proxy.—Where a member organization gives a subsequent proxy, it should clearly indicate whether the proxy is in addition to, in substitution for or in revocation of any prior proxy.

.16 Signing and dating a proxy—designating shares covered.—All proxies should be dated and should show the number of shares voted. Since manual signatures are sometimes illegible, a member organization should also either type or rubber-stamp its name on such proxy.

.17 Proxy records.—Records covering the solicitation of proxies shall show the following:
(1) The date of receipt of the proxy material from the issuer or other person soliciting the proxies;
(2) names of customers to whom the material is sent together with date of mailing;
(3) all voting instructions showing whether verbal or written; and
(4) a summary of all proxies voted by the member organization clearly setting forth total shares voted for or against or not voted for each proposal to be acted upon at the meeting.

Verbal voting instructions may be accepted provided a record is kept of the instructions of the beneficial owner and the instructions are retained by the member organization. The record shall also indicate the date of the receipt of the instructions and the name of the recipient.

Instructions from beneficial owners may also be accepted by member organizations or their agents through the use of an automated telephone voting system, which has been approved by the Exchange. Such a system shall utilize an identification code for beneficial owners and provide an opportunity for beneficial owners to validate votes to ensure that they were received correctly. Records of voting including the date of receipt of instructions and the name of the recipient must be retained by the member organization or their agent.

.20 Retention of records.—All proxy solicitation records, originals of all communications received and copies of all communications sent relating to such solicitation, shall be retained for a period of not less than three years, the first two years in an easily accessible place.

Amendments.

July 31, 1995.

March 22, 1996.

U.S. Proxy Voting Guidelines Concise Summary

(Digest of Selected Key Guidelines)

January 15, 2009

The policies contained herein are a sampling of select, key proxy voting guidelines and are not exhaustive. A full listing of RiskMetrics 2009 proxy voting guidelines can be found in the Jan. 15, 2009, edition of the *U.S. Proxy Voting Manual*.

1. Operational Items:

Auditor Ratification

Vote FOR proposals to ratify auditors, unless any of the following apply:

- An auditor has a financial interest in or association with the company, and is therefore not independent;
- There is reason to believe that the independent auditor has rendered an opinion which is neither accurate nor indicative of the company's financial position;
- Poor accounting practices are identified that rise to a serious level of concern, such as: fraud; misapplication of GAAP; and material weaknesses identified in Section 404 disclosures; or
- Fees for non-audit services ("Other" fees) are excessive.

Non-audit fees are excessive if:

- Non-audit ("other") fees exceed audit fees + audit-related fees + tax compliance/preparation fees

Vote CASE-BY-CASE on shareholder proposals asking companies to prohibit or limit their auditors from engaging in non-audit services.

Vote CASE-BY-CASE on shareholder proposals asking for audit firm rotation, taking into account:

- The tenure of the audit firm;
- The length of rotation specified in the proposal;
- Any significant audit-related issues at the company;
- The number of Audit Committee meetings held each year;
- The number of financial experts serving on the committee; and
- Whether the company has a periodic renewal process where the auditor is evaluated for both audit quality and competitive price.

2. Board of Directors:

Voting on Director[1] Nominees in Uncontested Elections

Vote on director nominees should be determined on a CASE-BY-CASE basis.

Vote AGAINST or WITHHOLD[2] from individual directors who:

- Attend less than 75 percent of the board and committee meetings without a valid excuse, such as illness, service to the nation, work on behalf of the company, or funeral obligations. If the company provides meaningful public or private disclosure explaining the director's absences, evaluate the information on a CASE-BY-CASE basis taking into account the following factors:
    - Degree to which absences were due to an unavoidable conflict;

[1] RiskMetrics' classification of directors can be found in *U.S. Proxy Voting Guidelines Summary*.
[2] In general, companies with a plurality vote standard use "Withhold" as the valid opposition vote option in director elections; companies with a majority vote standard use "Against". However, it will vary by company and the proxy must be checked to determine the valid opposition vote for the particular company.

- Pattern of absenteeism; and
- Other extraordinary circumstances underlying the director's absence;

- Sit on more than six public company boards;
- Are CEOs of public companies who sit on the boards of more than two public companies besides their own-- withhold only at their outside boards.

Vote AGAINST or WITHHOLD from all nominees of the board of directors, (except from new nominees, who should be considered on a CASE-BY-CASE basis) if:

- The company's proxy indicates that not all directors attended 75% of the aggregate of their board and committee meetings, but fails to provide the required disclosure of the names of the directors involved. If this information cannot be obtained, vote against/withhold from all incumbent directors;
- The company's poison pill has a dead-hand or modified dead-hand feature. Vote against/withhold every year until this feature is removed;
- The board adopts or renews a poison pill without shareholder approval, does not commit to putting it to shareholder vote within 12 months of adoption (or in the case of an newly public company, does not commit to put the pill to a shareholder vote within 12 months following the IPO), or reneges on a commitment to put the pill to a vote, and has not yet received a withhold/against recommendation for this issue;
- The board failed to act on a shareholder proposal that received approval by a majority of the shares outstanding the previous year (a management proposal with other than a FOR recommendation by management will not be considered as sufficient action taken);
- The board failed to act on a shareholder proposal that received approval of the majority of shares cast for the previous two consecutive years (a management proposal with other than a FOR recommendation by management will not be considered as sufficient action taken);
- The board failed to act on takeover offers where the majority of the shareholders tendered their shares;
- At the previous board election, any director received more than 50 percent withhold/against votes of the shares cast and the company has failed to address the underlying issue(s) that caused the high withhold/against vote;
- The board is classified, and a continuing director responsible for a problematic governance issue at the board/committee level that would warrant a withhold/against vote recommendation is not up for election- any or all appropriate nominees (except new) may be held accountable;
- The board lacks accountability and oversight, coupled with sustained poor performance relative to peers. Sustained poor performance is measured by one- and three-year total shareholder returns in the bottom half of a company's four-digit GICS industry group (Russell 3000 companies only).

Vote AGAINST or WITHHOLD from Inside Directors and Affiliated Outside Directors (per the Classification of Directors below) when:

- The inside or affiliated outside director serves on any of the three key committees: audit, compensation, or nominating;
- The company lacks an audit, compensation, or nominating committee so that the full board functions as that committee;
- The company lacks a formal nominating committee, even if board attests that the independent directors fulfill the functions of such a committee;
- The full board is less than majority independent.

Vote AGAINST or WITHHOLD from the members of the Audit Committee if:

- The non-audit fees paid to the auditor are excessive;

- The company receives an adverse opinion on the company's financial statements from its auditor; or
- There is persuasive evidence that the audit committee entered into an inappropriate indemnification agreement with its auditor that limits the ability of the company, or its shareholders, to pursue legitimate legal recourse against the audit firm.

Vote CASE-by-CASE on members of the Audit Committee and/or the full board if poor accounting practices, which rise to a level of serious concern are indentified, such as: fraud; misapplication of GAAP; and material weaknesses identified in Section 404 disclosures.

Examine the severity, breadth, chronological sequence and duration, as well as the company's efforts at remediation or corrective actions in determining whether negative vote recommendations are warranted against the members of the Audit Committee who are responsible for the poor accounting practices, or the entire board.

Vote AGAINST or WITHHOLD from the members of the Compensation Committee if:

- There is a negative correlation between the chief executive's pay and company performance (see discussion under Equity Compensation Plans);
- The company reprices underwater options for stock, cash or other consideration without prior shareholder approval, even if allowed in their equity plan;
- The company fails to submit one-time transfers of stock options to a shareholder vote;
- The company fails to fulfill the terms of a burn rate commitment they made to shareholders;
- The company has backdated options (see "Options Backdating" policy);

The company has poor compensation practices (see "Poor Pay Practices" policy). Poor pay practices may warrant withholding votes from the CEO and potentially the entire board as well.

Vote AGAINST or WITHHOLD from directors, individually or the entire board, for egregious actions or failure to replace management as appropriate.

Independent Chair (Separate Chair/CEO)

Generally vote FOR shareholder proposals requiring that the chairman's position be filled by an independent director, unless the company satisfies *all* of the following criteria:

The company maintains the following counterbalancing features:

- Designated lead director, elected by and from the independent board members with clearly delineated and comprehensive duties. (The role may alternatively reside with a presiding director, vice chairman, or rotating lead director; however the director must serve a minimum of one year in order to qualify as a lead director.) The duties should include, but are not limited to, the following:
  - presides at all meetings of the board at which the chairman is not present, including executive sessions of the independent directors;
  - serves as liaison between the chairman and the independent directors;
  - approves information sent to the board;
  - approves meeting agendas for the board;
  - approves meeting schedules to assure that there is sufficient time for discussion of all agenda items;
  - has the authority to call meetings of the independent directors;
  - if requested by major shareholders, ensures that he is available for consultation and direct communication;
- Two-thirds independent board;

- All independent key committees;
- Established governance guidelines;
- A company in the Russell 3000 universe must not have exhibited sustained poor total shareholder return (TSR) performance, defined as one- and three-year TSR in the bottom half of the company's four-digit GICS industry group within the Russell 3000 only), unless there has been a change in the Chairman/CEO position within that time;
- The company does not have any problematic governance or management issues, examples of which include, but are not limited to:
  - Egregious compensation practices;
  - Multiple related-party transactions or other issues putting director independence at risk;
  - Corporate and/or management scandals;
  - Excessive problematic corporate governance provisions; or
  - Flagrant board or management actions with potential or realized negative impact on shareholders.

Majority Vote Shareholder Proposals

Generally vote FOR precatory and binding resolutions requesting that the board change the company's bylaws to stipulate that directors need to be elected with an affirmative majority of votes cast, provided it does not conflict with the state law where the company is incorporated. Binding resolutions need to allow for a carve-out for a plurality vote standard when there are more nominees than board seats.

Companies are strongly encouraged to also adopt a post-election policy (also know as a director resignation policy) that provides guidelines so that the company will promptly address the situation of a holdover director.

Performance/Governance Evaluation for Directors

Vote WITHHOLD/AGAINST on all director nominees if the board lacks accountability and oversight, coupled with sustained poor performance relative to peers, measured by one- and three-year total shareholder returns in the bottom half of a company's four-digit GICS industry group (Russell 3000 companies only).

Evaluate board accountability and oversight at companies that demonstrate sustained poor performance. Problematic provisions include but are not limited to:

- a classified board structure;
- a supermajority vote requirement;
- majority vote standard for director elections with no carve out for contested elections;
- the inability of shareholders to call special meetings;
- the inability of shareholders to act by written consent;
- a dual-class structure; and/or
- a non-shareholder approved poison pill.

If a company exhibits sustained poor performance coupled with a lack of board accountability and oversight, also take into consideration the company's five-year total shareholder return and five-year operational metrics in the evaluation.

3. Proxy Contests

Voting for Director Nominees in Contested Elections

Vote CASE-BY-CASE on the election of directors in contested elections, considering the following factors:

- Long-term financial performance of the target company relative to its industry;

- Management's track record;
- Background to the proxy contest;
- Qualifications of director nominees (both slates);
- Strategic plan of dissident slate and quality of critique against management;
- Likelihood that the proposed goals and objectives can be achieved (both slates);
- Stock ownership positions.

Reimbursing Proxy Solicitation Expenses

Vote CASE-BY-CASE on proposals to reimburse proxy solicitation expenses. When voting in conjunction with support of a dissident slate, vote FOR the reimbursement of all appropriate proxy solicitation expenses associated with the election.

Generally vote FOR shareholder proposals calling for the reimbursement of reasonable costs incurred in connection with nominating one or more candidates in a contested election where the following apply:

- The election of fewer than 50% of the directors to be elected is contested in the election;
- One or more of the dissident's candidates is elected;
- Shareholders are not permitted to cumulate their votes for directors; and
- The election occurred, and the expenses were incurred, after the adoption of this bylaw.

4. Antitakeover Defenses and Voting Related Issues

Advance Notice Requirements for Shareholder Proposals/Nominations

Vote CASE-BY-CASE on advance notice proposals, giving support to proposals that allow shareholders to submit proposals/nominations reasonably close to the meeting date and within the broadest window possible, recognizing the need to allow sufficient notice for company, regulatory and shareholder review.

To be reasonable, the company's deadline for shareholder notice of a proposal/ nominations must not be more than 60 days prior to the meeting, with a submittal window of at least 30 days prior to the deadline.

In general, support additional efforts by companies to ensure full disclosure in regard to a proponent's economic and voting position in the company so long as the informational requirements are reasonable and aimed at providing shareholders with the necessary information to review such proposal.

Poison Pills

Vote FOR shareholder proposals requesting that the company submit its poison pill to a shareholder vote or redeem it UNLESS the company has: (1) A shareholder approved poison pill in place; or (2) The company has adopted a policy concerning the adoption of a pill in the future specifying that the board will only adopt a shareholder rights plan if either:

- Shareholders have approved the adoption of the plan; or
- The board, in exercising its fiduciary responsibilities, determines that it is in the best interest of shareholders under the circumstances to adopt a pill without the delay that would result from seeking stockholder approval (i.e., the "fiduciary out" provision). A poison pill adopted under this "fiduciary out" will be put to a shareholder ratification vote within 12 months of adoption or expire. If the pill is not approved by a majority of the votes cast on this issue, the plan will immediately terminate.

Vote FOR shareholder proposals calling for poison pills to be put to a vote within a time period of less than one year after adoption. If the company has no non-shareholder approved poison pill in place and has adopted a policy with the provisions outlined above, vote AGAINST the proposal. If these conditions are not met, vote FOR the proposal, but with the caveat that a vote within 12 months would be considered sufficient.

Vote CASE-by-CASE on management proposals on poison pill ratification, focusing on the features of the shareholder rights plan. Rights plans should contain the following attributes:

- No lower than a 20% trigger, flip-in or flip-over;
- A term of no more than three years;
- No dead-hand, slow-hand, no-hand or similar feature that limits the ability of a future board to redeem the pill;
- Shareholder redemption feature (qualifying offer clause); if the board refuses to redeem the pill 90 days after a qualifying offer is announced, 10 percent of the shares may call a special meeting or seek a written consent to vote on rescinding the pill.

In addition, the rationale for adopting the pill should be thoroughly explained by the company. In examining the request for the pill, take into consideration the company's existing governance structure, including: board independence, existing takeover defenses, and any problematic governance concerns.

For management proposals to adopt a poison pill for the stated purpose of preserving a company's net operating losses ("NOL pills"), the following factors should be considered:

- the trigger (NOL pills generally have a trigger slightly below 5%);
- the value of the NOLs;
- the term;
- shareholder protection mechanisms (sunset provision, causing expiration of the pill upon exhaustion or expiration of NOLs); and
- other factors that may be applicable.

In addition, vote WITHHOLD/AGAINST the entire board of directors, (except new nominees, who should be considered on a CASE-by-CASE basis) if the board adopts or renews a poison pill without shareholder approval, does not commit to putting it to a shareholder vote within 12 months of adoption (or in the case of a newly public company, does not commit to put the pill to a shareholder vote within 12 months following the IPO), or reneges on a commitment to put the pill to a vote, and has not yet received a withhold recommendation for this issue.

5. Mergers and Corporate Restructurings

Overall Approach

For mergers and acquisitions, review and evaluate the merits and drawbacks of the proposed transaction, balancing various and sometimes countervailing factors including:

- *Valuation* - Is the value to be received by the target shareholders (or paid by the acquirer) reasonable? While the fairness opinion may provide an initial starting point for assessing valuation reasonableness, emphasis is placed on the offer premium, market reaction and strategic rationale.
- *Market reaction* - How has the market responded to the proposed deal? A negative market reaction should cause closer scrutiny of a deal.
- *Strategic rationale* - Does the deal make sense strategically? From where is the value derived? Cost and revenue synergies should not be overly aggressive or optimistic, but reasonably achievable. Management should also have a favorable track record of successful integration of historical acquisitions.
- *Negotiations and process* - Were the terms of the transaction negotiated at arm's-length? Was the process fair and equitable? A fair process helps to ensure the best price for shareholders. Significant negotiation "wins" can also signify the deal makers' competency. The comprehensiveness of the sales process (e.g., full auction, partial auction, no auction) can also affect shareholder value.

- *Conflicts of interest* - Are insiders benefiting from the transaction disproportionately and inappropriately as compared to non-insider shareholders? As the result of potential conflicts, the directors and officers of the company may be more likely to vote to approve a merger than if they did not hold these interests. Consider whether these interests may have influenced these directors and officers to support or recommend the merger. The change-in-control figure presented in the "RMG Transaction Summary" section of this report is an aggregate figure that can in certain cases be a misleading indicator of the true value transfer from shareholders to insiders. Where such figure appears to be excessive, analyze the underlying assumptions to determine whether a potential conflict exists.
- *Governance* - Will the combined company have a better or worse governance profile than the current governance profiles of the respective parties to the transaction? If the governance profile is to change for the worse, the burden is on the company to prove that other issues (such as valuation) outweigh any deterioration in governance.

6. State of Incorporation

Reincorporation Proposals

Evaluate management or shareholder proposals to change a company's state of incorporation on a CASE-BY-CASE basis, giving consideration to both financial and corporate governance concerns including the following:

- Reasons for reincorporation;
- Comparison of company's governance practices and provisions prior to and following the reincorporation; and
- Comparison of corporation laws of original state and destination state

Vote FOR reincorporation when the economic factors outweigh any neutral or negative governance changes.

7. Capital Structure

Common Stock Authorization

Vote CASE-BY-CASE on proposals to increase the number of shares of common stock authorized for issuance. Take into account company-specific factors which include, at a minimum, the following:

- Specific reasons/ rationale for the proposed increase;
- The dilutive impact of the request as determined through an allowable cap generated by RiskMetrics' quantitative model;
- The board's governance structure and practices; and
- Risks to shareholders of not approving the request.

Vote FOR proposals to approve increases beyond the allowable cap when a company's shares are in danger of being delisted or if a company's ability to continue to operate as a going concern is uncertain.

Preferred Stock

Vote CASE-BY-CASE on proposals to increase the number of shares of preferred stock authorized for issuance. Take into account company-specific factors which include, at a minimum, the following:

- Specific reasons/ rationale for the proposed increase;
- The dilutive impact of the request as determined through an allowable cap generated by RiskMetrics' quantitative model;
- The board's governance structure and practices; and
- Risks to shareholders of not approving the request.

Vote AGAINST proposals authorizing the creation of new classes of preferred stock with unspecified voting, conversion, dividend distribution, and other rights ("blank check" preferred stock).

Vote FOR proposals to create "declawed" blank check preferred stock (stock that cannot be used as a takeover defense).

Vote FOR proposals to authorize preferred stock in cases where the company specifies the voting, dividend, conversion, and other rights of such stock and the terms of the preferred stock appear reasonable.

Vote AGAINST proposals to increase the number of blank check preferred stock authorized for issuance when no shares have been issued or reserved for a specific purpose.

8. Executive and Director Compensation

Equity Compensation Plans

Vote CASE-BY-CASE on equity-based compensation plans. Vote AGAINST the equity plan if any of the following factors apply:

- The total cost of the company's equity plans is unreasonable;
- The plan expressly permits the repricing of stock options/stock appreciation rights (SARs) without prior shareholder approval;
- The CEO is a participant in the proposed equity-based compensation plan and there is a disconnect between CEO pay and the company's performance where over 50 percent of the year-over-year increase is attributed to equity awards;
- The company's three year burn rate exceeds the greater of 2% and the mean plus one standard deviation of its industry group;
- The plan provides for the acceleration of vesting of equity awards even though an actual change in control may not occur (e.g., upon shareholder approval of a transaction or the announcement of a tender offer); or
- The plan is a vehicle for poor pay practices.

Poor Pay Practices

Vote AGAINST or WITHHOLD from compensation committee members, CEO, and potentially the entire board, if the company has poor compensation practices. Vote AGAINST equity plans if the plan is a vehicle for poor compensation practices.

The following practices, while not exhaustive, are examples of poor compensation practices that may warrant withhold vote recommendations:

- Egregious employment contracts - Contracts containing multi-year guarantees for salary increases, bonuses and equity compensation;
- Excessive perks/tax reimbursements:
    - Overly generous perquisites, which may include, but are not limited to the following: personal use of corporate aircraft, personal security system maintenance and/or installation, car allowances;
    - Reimbursement of income taxes on executive perquisites or other payments;
    - Perquisites for former executives, such as car allowances, personal use of corporate aircraft or other inappropriate arrangements;

Abnormally large bonus payouts without justifiable performance linkage or proper disclosure - Performance metrics that are changed, canceled or replaced during the performance period without adequate explanation of the action and the link to performance;

- Egregious pension/SERP (supplemental executive retirement plan) payouts:
  - Inclusion of additional years of service not worked that result in significant payouts;
  - Inclusion of performance-based equity awards in the pension calculation;
- New CEO with overly generous new hire package:
  - Excessive “make whole” provisions;
  - Any of the poor pay practices listed in this policy;
- Excessive severance and/or change in control provisions:
  - Inclusion of excessive change in control or severance payments, especially those with a multiple in excess of 3X cash pay;
  - Payments upon an executive's termination in connection with performance failure;
  - Change in control payouts without loss of job or substantial diminution of job duties (single-triggered);
  - New or materially amended employment or severance agreements that provide for modified single triggers, under which an executive may voluntarily leave for any reason and still receive the change-in-control severance package;
  - Liberal change in control definition in individual contracts or equity plans which could result in payments to executives without an actual change in control occurring;
  - New or materially amended employment or severance agreements that provide for an excise tax gross-up. Modified gross-ups would be treated in the same manner as full gross-ups;
  - Perquisites for former executives such as car allowances, personal use of corporate aircraft or other inappropriate arrangements;
- Dividends or dividend equivalents paid on unvested performance shares or units;
- Poor disclosure practices:
  - Unclear explanation of how the CEO is involved in the pay setting process;
  - Retrospective performance targets and methodology not discussed;
  - Methodology for benchmarking practices and/or peer group not disclosed and explained;
- Internal Pay Disparity:
  - Excessive differential between CEO total pay and that of next highest paid named executive officer (NEO);
- Options backdating (covered in a separate policy);
- Other excessive compensation payouts or poor pay practices at the company.

Other Compensation Proposals and Policies

Advisory Vote on Executive Compensation (Say-on-Pay) Management Proposals

Vote CASE-BY-CASE on management proposals for an advisory vote on executive compensation. Vote AGAINST these resolutions in cases where boards have failed to demonstrate good stewardship of investors' interests regarding executive compensation practices.

For U.S. companies, consider the following factors in the context of each company's specific circumstances and the board's disclosed rationale for its practices:

Relative Considerations:

- Assessment of performance metrics relative to business strategy, as discussed and explained in the CD&A;
- Evaluation of peer groups used to set target pay or award opportunities;
- Alignment of company performance and executive pay trends over time (e.g., performance down: pay down);
- Assessment of disparity between total pay of the CEO and other Named Executive Officers (NEOs).

Design Considerations:

- Balance of fixed versus performance-driven pay;
- Assessment of excessive practices with respect to perks, severance packages, supplemental executive pension plans, and burn rates.

Communication Considerations:

- Evaluation of information and board rationale provided in CD&A about how compensation is determined (e.g., why certain elements and pay targets are used, and specific incentive plan goals, especially retrospective goals);
- Assessment of board's responsiveness to investor input and engagement on compensation issues (e.g., in responding to majority-supported shareholder proposals on executive pay topics).

Employee Stock Purchase Plans-- Non-Qualified Plans

Vote CASE-by-CASE on nonqualified employee stock purchase plans. Vote FOR nonqualified employee stock purchase plans with all the following features:

- Broad-based participation (i.e., all employees of the company with the exclusion of individuals with 5 percent or more of beneficial ownership of the company);
- Limits on employee contribution, which may be a fixed dollar amount or expressed as a percent of base salary;
- Company matching contribution up to 25 percent of employee's contribution, which is effectively a discount of 20 percent from market value;
- No discount on the stock price on the date of purchase since there is a company matching contribution.

Vote AGAINST nonqualified employee stock purchase plans when any of the plan features do not meet the above criteria. If the company matching contribution exceeds 25 percent of employee's contribution, evaluate the cost of the plan against its allowable cap.

Option Exchange Programs/Repricing Options

Vote CASE-by-CASE on management proposals seeking approval to exchange/reprice options, taking into consideration:

- Historic trading patterns--the stock price should not be so volatile that the options are likely to be back "in-the-money" over the near term;
- Rationale for the re-pricing--was the stock price decline beyond management's control?
- Is this a value-for-value exchange?
- Are surrendered stock options added back to the plan reserve?
- Option vesting--does the new option vest immediately or is there a black-out period?
- Term of the option--the term should remain the same as that of the replaced option;
- Exercise price--should be set at fair market or a premium to market;
- Participants--executive officers and directors should be excluded.

If the surrendered options are added back to the equity plans for re-issuance, then also take into consideration the company's total cost of equity plans and its three-year average burn rate.

In addition to the above considerations, evaluate the intent, rationale, and timing of the repricing proposal. The proposal should clearly articulate why the board is choosing to conduct an exchange program at this point in time. Repricing underwater options after a recent precipitous drop in the company's stock price demonstrates poor timing. Repricing after a recent decline in stock price triggers additional scrutiny and a potential AGAINST vote on the proposal. At a minimum, the decline should not have happened within the past year. Also, consider the terms of the surrendered options, such as the grant date, exercise price and vesting schedule. Grant dates of surrendered options should be far enough back (two to three years) so as not to suggest that repricings are being done to take advantage of short-term downward price movements. Similarly, the exercise price of surrendered options should be above the 52-week high for the stock price.

Vote FOR shareholder proposals to put option repricings to a shareholder vote.

Other Shareholder Proposals on Compensation

Advisory Vote on Executive Compensation (Say-on-Pay)

Generally, vote FOR shareholder proposals that call for non-binding shareholder ratification of the compensation of the Named Executive Officers and the accompanying narrative disclosure of material factors provided to understand the Summary Compensation Table.

Golden Coffins/Executive Death Benefits

Generally vote FOR proposals calling on companies to adopt a policy of obtaining shareholder approval for any future agreements and corporate policies that could oblige the company to make payments or awards following the death of a senior executive in the form of unearned salary or bonuses, accelerated vesting or the continuation in force of unvested equity grants, perquisites and other payments or awards made in lieu of compensation. This would not apply to any benefit programs or equity plan proposals for which the broad-based employee population is eligible.

Share Buyback Holding Periods

Generally vote AGAINST shareholder proposals prohibiting executives from selling shares of company stock during periods in which the company has announced that it may or will be repurchasing shares of its stock. Vote FOR the proposal when there is a pattern of abuse by executives exercising options or selling shares during periods of share buybacks.

Stock Ownership or Holding Period Guidelines

Generally vote AGAINST shareholder proposals that mandate a minimum amount of stock that directors must own in order to qualify as a director or to remain on the board. While RMG favors stock ownership on the part of directors, the company should determine the appropriate ownership requirement.

Vote on a CASE-BY-CASE on shareholder proposals asking companies to adopt policies requiring Named Executive Officers to retain 75% of the shares acquired through compensation plans while employed and/or for two years following the termination of their employment, and to report to shareholders regarding this policy. The following factors will be taken into account:

- Whether the company has any holding period, retention ratio, or officer ownership requirements in place. These should consist of:
  - Rigorous stock ownership guidelines, or
  - A holding period requirement coupled with a significant long-term ownership requirement, or
  - A meaningful retention ratio,
- Actual officer stock ownership and the degree to which it meets or exceeds the proponent's suggested holding period/retention ratio or the company's own stock ownership or retention requirements.
- Problematic pay practices, current and past, which may promote a short-term versus a long-term focus.

Tax Gross-Up Proposals

Generally vote FOR proposals asking companies to adopt a policy of not providing tax gross-up payments to executives, except where gross-ups are provided pursuant to a plan, policy, or arrangement applicable to management employees of the company, such as a relocation or expatriate tax equalization policy.

9. Corporate Social Responsibility (CSR) Issues

Overall Approach

When evaluating social and environmental shareholder proposals, RMG considers the following factors:

- Whether adoption of the proposal is likely to enhance or protect shareholder value;
- Whether the information requested concerns business issues that relate to a meaningful percentage of the company's business as measured by sales, assets, and earnings;
- The degree to which the company's stated position on the issues raised in the proposal could affect its reputation or sales, or leave it vulnerable to a boycott or selective purchasing;
- Whether the issues presented are more appropriately/effectively dealt with through governmental or company-specific action;
- Whether the company has already responded in some appropriate manner to the request embodied in the proposal;
- Whether the company's analysis and voting recommendation to shareholders are persuasive;
- What other companies have done in response to the issue addressed in the proposal;
- Whether the proposal itself is well framed and the cost of preparing the report is reasonable;
- Whether implementation of the proposal's request would achieve the proposal's objectives;
- Whether the subject of the proposal is best left to the discretion of the board;
- Whether the requested information is available to shareholders either from the company or from a publicly available source; and
- Whether providing this information would reveal proprietary or confidential information that would place the company at a competitive disadvantage.

Genetically Modified Ingredients

Generally vote AGAINST proposals asking suppliers, genetic research companies, restaurants and food retail companies to voluntarily label genetically engineered (GE) ingredients in their products and/or eliminate GE ingredients. The cost of labeling and/or phasing out the use of GE ingredients may not be commensurate with the benefits to shareholders and is an issue better left to regulators.

Vote CASE-BY-CASE on proposals asking for a report on the feasibility of labeling products containing GE ingredients taking into account:

- The company's business and the proportion of it affected by the resolution;
- The quality of the company's disclosure on GE product labeling, related voluntary initiatives, and how this disclosure compares with industry peer disclosure; and
- Company's current disclosure on the feasibility of GE product labeling, including information on the related costs.

Generally vote AGAINST proposals seeking a report on the social, health, and environmental effects of genetically modified organisms (GMOs). Studies of this sort are better undertaken by regulators and the scientific community.

Generally vote AGAINST proposals to completely phase out GE ingredients from the company's products or proposals asking for reports outlining the steps necessary to eliminate GE ingredients from the company's products. Such resolutions presuppose that there are proven health risks to GE ingredients (an issue better left to regulators) that may outweigh the economic benefits derived from biotechnology.

Pharmaceutical Pricing, Access to Medicines, and Product Reimportation

Generally vote AGAINST proposals requesting that companies implement specific price restraints on pharmaceutical products unless the company fails to adhere to legislative guidelines or industry norms in its product pricing.

Vote CASE-BY-CASE on proposals requesting that the company report on their product pricing policies or their access to medicine policies, considering:

- The nature of the company's business and the potential for reputational and market risk exposure;
- The existing disclosure of relevant policies;
- Deviation from established industry norms;
- The company's existing, relevant initiatives to provide research and/or products to disadvantaged consumers;
- Whether the proposal focuses on specific products or geographic regions; and
- The potential cost and scope of the requested report.

Generally vote FOR proposals requesting that companies report on the financial and legal impact of their prescription drug reimportation policies unless such information is already publicly disclosed.

Generally vote AGAINST proposals requesting that companies adopt specific policies to encourage or constrain prescription drug reimportation. Such matters are more appropriately the province of legislative activity and may place the company at a competitive disadvantage relative to its peers.

Gender Identity, Sexual Orientation, and Domestic Partner Benefits

Generally vote FOR proposals seeking to amend a company's EEO statement or diversity policies to prohibit discrimination based on sexual orientation and/or gender identity, unless the change would result in excessive costs for the company.

Generally vote AGAINST proposals to extend company benefits to, or eliminate benefits from domestic partners. Decisions regarding benefits should be left to the discretion of the company.

Climate Change

Generally vote FOR resolutions requesting that a company disclose information on the impact of climate change on the company's operations and investments considering whether:

- The company already provides current, publicly-available information on the impacts that climate change may have on the company as well as associated company policies and procedures to address related risks and/or opportunities;
- The company's level of disclosure is at least comparable to that of industry peers; and
- There are no significant, controversies, fines, penalties, or litigation associated with the company's environmental performance.

Lobbying Expenditures/Initiatives

Vote CASE-BY-CASE on proposals requesting information on a company's lobbying initiatives, considering:

- Significant controversies, fines, or litigation surrounding a company's public policy activities,
- The company's current level of disclosure on lobbying strategy, and
- The impact that the policy issue may have on the company's business operations.

Political Contributions and Trade Association Spending

Generally vote AGAINST proposals asking the company to affirm political nonpartisanship in the workplace so long as:

- There are no recent, significant controversies, fines or litigation regarding the company's political contributions or trade association spending; and
- The company has procedures in place to ensure that employee contributions to company-sponsored political action committees (PACs) are strictly voluntary and prohibits coercion.

Vote AGAINST proposals to publish in newspapers and public media the company's political contributions. Such publications could present significant cost to the company without providing commensurate value to shareholders.

Vote CASE-BY-CASE on proposals to improve the disclosure of a company's political contributions and trade association spending, considering:

- Recent significant controversy or litigation related to the company's political contributions or governmental affairs; and
- The public availability of a company policy on political contributions and trade association spending including information on the types of organizations supported, the business rationale for supporting these organizations, and the oversight and compliance procedures related to such expenditures of corporate assets.

Vote AGAINST proposals barring the company from making political contributions. Businesses are affected by legislation at the federal, state, and local level and barring political contributions can put the company at a competitive disadvantage.

Vote AGAINST proposals asking for a list of company executives, directors, consultants, legal counsels, lobbyists, or investment bankers that have prior government service and whether such service had a bearing on the business of the company. Such a list would be burdensome to prepare without providing any meaningful information to shareholders.

Labor and Human Rights Standards

Generally vote FOR proposals requesting a report on company or company supplier labor and/or human rights standards and policies unless such information is already publicly disclosed.

Vote CASE-BY-CASE on proposals to implement company or company supplier labor and/or human rights standards and policies, considering:

- The degree to which existing relevant policies and practices are disclosed;

- Whether or not existing relevant policies are consistent with internationally recognized standards;
- Whether company facilities and those of its suppliers are monitored and how;
- Company participation in fair labor organizations or other internationally recognized human rights initiatives;
- Scope and nature of business conducted in markets known to have higher risk of workplace labor/human rights abuse;
- Recent, significant company controversies, fines, or litigation regarding human rights at the company or its suppliers;
- The scope of the request; and
- Deviation from industry sector peer company standards and practices.

Sustainability Reporting

Generally vote FOR proposals requesting the company to report on its policies, initiatives, and oversight mechanisms related to social, economic, and environmental sustainability, unless:

- The company already discloses similar information through existing reports or policies such as an Environment, Health, and Safety (EHS) report; a comprehensive Code of Corporate Conduct; and/or a Diversity Report; or
- The company has formally committed to the implementation of a reporting program based on Global Reporting Initiative (GRI) guidelines or a similar standard within a specified time frame

AFLAC INC.

Excerpt from proxy statement dated March 18, 2008

**THE BOARD OF DIRECTORS RECOMMENDS UNANIMOUSLY A VOTE "FOR"
APPROVAL OF THE AMENDED AND RESTATED MANAGEMENT INCENTIVE PLAN**

4. ADVISORY VOTE ON EXECUTIVE PAY-FOR-PERFORMANCE COMPENSATION

In November 2006, an interest was expressed by a shareholder in casting a non-binding advisory vote on the overall executive pay-for-performance compensation policies and procedures employed by the Company, as described in the CD&A and the tabular disclosure regarding named executive officer compensation (together with the accompanying narrative disclosure) in this Proxy Statement. We believe that our compensation policies and procedures are centered on a pay-for-performance culture and are strongly aligned with the long-term interests of our shareholders.

We also believe that both the Company and shareholders benefit from responsive corporate governance policies and constructive and consistent dialogue. Thus, with Board approval, the Company announced in February 2007 that the Company would voluntarily provide shareholders with the right to cast an advisory vote on our compensation program at the annual meeting of shareholders in 2009 when our disclosure could reflect three years of compensation data under the newly adopted SEC disclosure guidelines.

Subsequently, we concluded that the expanded disclosure of compensation information to be provided in this Proxy Statement would already provide our shareholders the information they need to make an informed decision as they weigh the pay of our executive officers in relation to the Company's performance. As a result, on November 14, 2007, the Company announced that its Board of Directors accelerated to 2008 an advisory shareholder vote on the Company's executive compensation disclosures. This proposal, commonly known as a **"**Say-on-Pay**"** proposal, gives you as a shareholder the opportunity to endorse or not endorse our executive pay program and policies through the following resolution:

> **"Resolved, that the shareholders approve the overall executive pay-for-performance compensation policies and procedures employed by the Company, as described in the Compensation Discussion and Analysis and the tabular disclosure regarding named executive officer compensation (together with the accompanying narrative disclosure) in this Proxy Statement. "**

Because your vote is advisory, it will not be binding upon the Board. However, the Compensation Committee will take into account the outcome of the vote when considering future executive compensation arrangements.

While we believe this **"**Say-on-Pay**"** proposal demonstrates our commitment to our shareholders, that commitment extends beyond adopting innovative corporate governance practices. We also are committed to achieving a high level of total return for our shareholders.

Since August 1990, when Mr. Daniel Amos was appointed as our Chief Executive Officer through December 2007, our Company's total return to shareholders, including reinvested cash dividends, has exceeded 3,867% compared with 660% for the Dow Jones Industrial Average and 549% for the S&P 500. During the same period, the company's market capitalization has grown from $1.2 billion to over $30 billion.

**THE BOARD OF DIRECTORS UNANIMOUSLY RECOMMENDS A VOTE "FOR"
APPROVAL OF THE PAY-FOR-PERFORMANCE COMPENSATION POLICIES AND PROCEDURES EMPLOYED BY THE COMPENSATION COMMITTEE, AS DESCRIBED IN THE COMPENSATION DISCUSSION AND ANALYSIS, AND THE TABULAR DISCLOSURE REGARDING NAMED EXECUTIVE OFFICER COMPENSATION (TOGETHER WITH THE ACCOMPANYING NARRATIVE DISCLOSURE) IN THIS PROXY STATEMENT.**

5. RATIFICATION OF APPOINTMENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

In February 2008, the Audit Committee voted to appoint KPMG LLP, an independent registered public accounting firm, to perform the annual audit of the Company's consolidated financial statements for the fiscal year 2008, subject to ratification by the shareholders.

Representatives of KPMG LLP are expected to be present at the 2008 Annual Meeting of Shareholders with the opportunity to make a statement if they so desire. Such representatives are expected to be available to respond to appropriate questions.

The aggregate fees for professional services rendered to the Company by KPMG LLP for the years ended December 31, were as follows:

	2007	2006
Audit fees — Audit of the Company's consolidated financial statements for the years ended December 31*	$3,993,446	$3,855,618
Audit related fees (audits of subsidiaries and employee benefit plans)	114,644	109,854

Tax fees	1,500	1,300
All other fees	35,000	30,000
Total fees:	$4,144,590	$3,996,772

(*) The audit fees for 2007 and 2006 include $1,822,861 and $1,758,578, respectively for the services rendered for the attestation with respect to, and related reviews of, the Company's internal control over financial reporting as required under Section 404 of the Sarbanes-Oxley Act of 2002.

The Audit Committee of the Board of Directors has considered whether the provision of the non-audit professional services is compatible with maintaining KPMG LLP's independence and has concluded that it is. The Audit Committee pre-approves all audit and non-audit services provided by KPMG LLP.

THE BOARD OF DIRECTORS RECOMMENDS UNANIMOUSLY A VOTE "FOR" RATIFICATION OF THE SELECTION OF KPMG LLP AS THE COMPANY'S INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM.

Shareholder Proposals

For a shareholder's proposal to be included in the Company's Proxy Statement for the 2009 Annual Meeting of Shareholders, the shareholder must follow the procedures of Rule 14a-8 under the Exchange Act, and the proposal must be received by the Secretary of the Company by November 24, 2008. To be timely, shareholder proposals submitted outside the processes of Rule 14a-8 must be received by the Secretary of the Company after January 7, 2009, and before February 6, 2009.

H&R BLOCK, INC.

Excerpt from proxy statement filed July 23, 2008

ITEM 6 –

THE APPROVAL OF AN ADVISORY PROPOSAL ON THE COMPANY'S EXECUTIVE PAY-FOR-PERFORMANCE COMPENSATION POLICIES AND PROCEDURES –

We believe that our compensation policies and procedures are centered on a pay-for-performance culture and are strongly aligned with the long-term interests of our shareholders. We also believe that both the Company and shareholders benefit from responsive corporate governance policies and constructive and consistent dialogue. Thus, with Board approval, the Company announced on June 17, 2008 that the Company would voluntarily provide shareholders with the right to cast an advisory vote on our compensation program at the annual meeting of shareholders, beginning with the 2008 Annual Meeting.

This proposal, commonly known as a "Say on Pay" proposal, gives you as a shareholder the opportunity to endorse or not endorse our executive pay program through the following resolution:

"Resolved, that the shareholders approve the overall executive pay-for-performance compensation policies and procedures employed by the Company, as described in the Compensation Discussion and Analysis and the tabular disclosure regarding named executive officer compensation (together with the accompanying narrative disclosure) in this Proxy Statement."

Because your vote is advisory, it will not be binding upon the Board. However, the Compensation Committee will take into account the outcome of the vote when considering future executive compensation arrangements.

THE BOARD OF DIRECTORS UNANIMOUSLY RECOMMENDS A VOTE "FOR" APPROVAL OF THE PAY-FOR-PERFORMANCE COMPENSATION POLICIES AND PROCEDURES EMPLOYED BY THE COMPENSATION COMMITTEE, AS DESCRIBED IN THE COMPENSATION DISCUSSION AND ANALYSIS, AND THE TABULAR DISCLOSURE REGARDING NAMED EXECUTIVE OFFICER COMPENSATION (TOGETHER WITH THE ACCOMPANYING NARRATIVE DISCLOSURE) IN THIS PROXY STATEMENT, AND PROXIES SOLICITED BY THE BOARD OF DIRECTORS WILL BE SO VOTED IN THE ABSENCE OF INSTRUCTIONS TO THE CONTRARY.

ITEM 7 –

THE APPROVAL OF THE 2008 DEFERRED STOCK UNIT PLAN FOR OUTSIDE DIRECTORS TO REPLACE THE 1989 STOCK OPTION FOR OUTSIDE DIRECTORS –

Shareholders are asked to vote to approve the H&R Block, Inc. 2008 Deferred Stock Unit Plan for Outside Directors (the "2008 Stock Unit Plan"). The 2008 Stock Unit Plan was approved by the Governance and Nominating Committee and the Board of Directors on June 11, 2008, subject to shareholder approval.

The following summary of major features of the 2008 Stock Unit Plan is subject to the specific provisions in the full text of the 2008 Stock Unit Plan as set forth as Appendix K to this proxy statement.

JACKSON HEWITT TAX SERVICE INC.

Excerpt from proxy statement filed August 14, 2008

ADVISORY (NON-BINDING) VOTE ON EXECUTIVE COMPENSATION
PROPOSAL NO. 3

As described above under "Executive Compensation—Compensation Discussion and Analysis—Executive Officer Compensation Philosophy," the Company's executive officer compensation philosophy is to deliver compensation in ways that support the following three primary business objectives:

- aligning the interests of executive officers with the long-term interests of stockholders;
- providing competitive levels of compensation which are conditioned on the attainment of specified performance targets; and
- attracting, motivating and retaining the highest level of executive officer talent for the benefit of stockholders.

The Company believes that both the Company and stockholders benefit from responsive corporate governance policies and constructive and consistent dialogue. In furtherance of these goals, the Board of Directors, in consultation with the Corporate Governance Committee, has determined that the Company should voluntarily provide stockholders with the right to cast an advisory (non-binding) vote on the Company's compensation programs.

The Board of Directors has determined that the best way to allow stockholders to endorse or not endorse the Company's executive pay programs and policies is through the following resolution:

> RESOLVED, that the stockholders approve the overall compensation policies and procedures employed by the Company, as described in the Compensation Discussion and Analysis and the tabular disclosure regarding named executive officer compensation (together with the accompanying narrative disclosure) in this Proxy Statement.

Because your vote is advisory, it will not be binding on the Board of Directors. However, the Compensation Committee will take into account the outcome of the vote when considering future executive compensation arrangements.

THE BOARD OF DIRECTORS RECOMMENDS A VOTE "FOR" THIS PROPOSAL. UNLESS MARKED TO THE CONTRARY, PROXIES RECEIVED BY THE COMPANY WILL BE VOTED "FOR" THIS PROPOSAL.

LITTLEFIELD CORP.

Excerpt from proxy statement filed April 21, 2008

ADVISORY VOTE REGARDING COMPENSATION

The Board of Directors seeks your views on the compensation of its President and CEO and its Directors. The Board has determined compensation amounts based upon comparisons of companies giving consideration to company size and responsibility. This is an advisory vote only, and neither the Company nor the Board of Directors will be bound to take action based upon the outcome. The Board will consider the vote of the shareholders on these questions when deciding its future course of action.

The President's compensation in 2007 was $342,227 as set forth in the *Summary Compensation Table* and is more fully explained in the Section: *Employment Contracts, Termination of Employment and Change in Control Arrangements.*

The Director compensation is $20,000 per Director. This is comprised of a $2,000 retainer and a $4,500 per quarter payment, with an anticipated number of four meetings during the year. We reimburse the Directors for travel expenses incurred in connection with attending meetings of the Board and committees. They may also be reimbursed an hourly fee for special projects. The Board has not made a recommendation to the shareholders on how to vote on this question.

PLEASE INDICATE YOUR VOTE TO AGREE OR DISAGREE WITH THE FOLLOWING STATEMENTS ON THE PROXY CARD, OR TO ABSTAIN FROM VOTING:

A. The President & CEO's total compensation is within 20% of an acceptable amount.

B. The Director total compensation is within 20% of an acceptable amount.

STOCKHOLDER PROPOSALS

No stockholder proposals were submitted for presentation to the stockholders at the upcoming meeting.

Stockholder proposals intended to be presented at the 2009 Annual Meeting of Stockholders and included in our Proxy Statement and form of proxy for that meeting must be received by us in writing by no later than December 31, 2008. Any stockholder who intends to present a proposal at the 2009 Annual Meeting of Stockholders to be voted on at that meeting, which proposal is not included in our Proxy Statement, must deliver written notice of such proposal to us by no later than sixty days prior to the meeting date or, if less than seventy days' notice of the meeting date is given, ten days after notice of the meeting date is given by public disclosure. If the proposing stockholder fails to deliver written notice of such proposal to us by such date, then the person or persons designated as proxies in connection with our solicitation of proxies shall have the discretionary voting authority to vote the shares of our common stock represented by the proxy cards returned to us in accordance with their judgment on such matters when such proposals are presented at the 2009 Annual Meeting. Any such notice of a stockholder proposal must be made in writing addressed to Secretary, Littlefield Corporation, 2501 North Lamar Boulevard, Austin, Texas 78705.

RISKMETRICS GROUP, INC.

Excerpt from proxy statement filed April 23, 2008

Item 3 – Advisory (Non-Binding) Votes on Executive Compensation

The Board's Corporate Governance Principles and Guidelines provide that the Company's shareholders will be given the opportunity to vote on an advisory (nonbinding) resolution at each annual meeting to approve the Company's Compensation Discussion and Analysis as outlined in the annual proxy statement.

The Board, after consulting with its Nominating and Corporate Governance Committee, has determined that the best way to implement this principle – giving shareholders as much opportunity to comment as possible – is to accord shareholders THREE votes. First, shareholders may indicate their position (by a yes or no vote) with regard to the Company's overall executive compensation philosophy, policies and procedures. These are described above in the Compensation Discussion and Analysis, Sections I and II. Second, shareholders may indicate their position (again by a yes or no vote) with regard to whether the Board executed these principles appropriately in making its 2007 compensation decisions. These decisions are described above in the Compensation Discussion and Analysis, Sections III and IV. Finally, shareholders may indicate their position (yes or no) with regard to the Board's application of its compensation philosophy, policies and procedures to the 2008 objectives. These objectives are described in the Compensation Discussion and Analysis, Section V.

The Board recommends that shareholders approve, in an advisory vote, each of the following three resolutions:

A. RESOLVED that the shareholders approve the Company's overall executive compensation philosophy, policies and procedures, as described in the Compensation Discussion and Analysis (Sections I and II) in this Proxy Statement.

B. RESOLVED that the shareholders approve the compensation decisions made by the Board with regard to NEO performance for 2007, as described in the Compensation Discussion and Analysis (Sections III and IV) in this Proxy Statement.

C. RESOLVED that the shareholders approve the application of the Company's compensation philosophy, policies and procedures to evaluate the 2008 performance of, and award compensation based on, certain key objectives, as described in the Compensation Discussion and Analysis (Section V) in this Proxy Statement.

Because your vote is advisory, it will not be binding upon the Board. However, the Human Resources and Compensation Committee will take into account the outcome of the vote when considering future executive compensation arrangements.

THE BOARD RECOMMENDS A VOTE FOR EACH OF THESE PROPOSALS.

ZALE CORP.

Excerpt from proxy statement filed October 14, 2008

PROPOSAL NO. 3:

APPROVAL OF AN ADVISORY PROPOSAL ON THE COMPANY'S PAY-FOR-PERFORMANCE POLICIES AND PROCEDURES

The Board of Directors believes that the Company's compensation policies and procedures are centered on a pay-for-performance culture and are strongly aligned with the long-term interests of shareholders. The Board of Directors also believes that both the Company and shareholders benefit from responsive corporate governance policies and constructive and consistent dialogue. Thus, the Board of Directors has decided to voluntarily provide shareholders with the right to cast an advisory vote on the Company's compensation program at the Annual Meeting.

This proposal, commonly known as a "say-on-pay" proposal, gives you as a shareholder the opportunity to endorse or not endorse our executive pay program through the following resolution:

> **"Resolved, that the shareholders approve the overall executive pay-for-performance compensation policies and procedures employed by the Company (together with the accompanying narrative disclosure), as described in the Compensation Discussion and Analysis and the tabular disclosure contained in the Company's Proxy Statement for its 2008 Annual Meeting regarding named executive officer compensation."**

Because your vote is advisory, it will not be binding upon the Board. However, the Compensation Committee will take into account the outcome of the vote when considering future executive compensation arrangements.

The Board of Directors recommends a vote **"FOR"** approval of this resolution.

SAY-ON-PAY SHAREHOLDER PROPOSALS: SUMMARY OF ALTERNATIVES

This chart summarizes alternative approaches to say-on-pay shareholder proposals to date, including considerations raised by each of them.[1] The considerations noted reflect three key predicates. First, shareholders will continue to pursue say-on-pay proposals. There are no ready means to exclude them or "show stopper" arguments against them. Second, the political and financial environment, including the new Democratic administration and the compensation provisions of the recent bailout legislation,[2] make future Congressional initiatives in this area significantly more likely to succeed (and some believe that passage of a "say on pay" bill in some form in 2009 is all but certain). Third, while the relative advantages and disadvantages of the mechanic for shareholder input may be debated, it is difficult to reject the principle that such input could be a useful part of a dialogue between shareholders and directors. In its crudest form, even an "up or down" advisory vote signals how well shareholders judge the board to be fulfilling its responsibilities with respect to compensation – that is, whether the board developed a compensation program that is well linked to business strategy, performance and value creation and whether it "made the case" for the program in the Compensation Discussion and Analysis ("CD&A"), recognizing that CD&A is a management disclosure.

ALTERNATIVE	EXAMPLES	COMMENTS	DISADVANTAGES	ADVANTAGES
1. "Up or down" advisory vote approving or disapproving overall program as described in CD&A and tabular disclosure.	**Aflac:** Shareholders vote to approve the overall executive pay-for-performance compensation policies and procedures employed by the Company, as described in the Compensation Discussion and Analysis and the tabular disclosure regarding named executive officer compensation (together with the accompanying narrative disclosure).	• Phrasing of the resolution is the key consideration. While discussion in the media and elsewhere of say-on-pay tends to take a monolithic view of advisory votes, in fact the identification of what shareholders are voting on can make the difference between inviting shareholders to "micromanage" specific business decisions about compensation, on the one hand, and providing them with a useful governance tool, on the other. • We would recommend resolution that includes CD&A and compensation tables (not limited to the summary compensation table) plus the accompanying explanatory disclosure. • The language of the proposal does not need to be consistent from year to year, but can be tailored to address specific issues raised by the company's compensation program and business circumstances in the particular year. allowing directors to ask a question such as "In light of the recent market developments, do you feel that the adjustments we have made to our compensation program going forward are appropriate."	• Board may be uncomfortable with a vote (and the risk of a "no" vote).[3] • A single resolution does not permit differentiation among aspects of program and, therefore, may be too crude to provide meaningful input.	• An advisory vote of some kind may be required by legislation, regulation and/or listing standards in the near to medium term, in which case early adoption could have advantages.[4] • Proxy process provides a ready-made framework for implementation. • Voting on a single resolution may be the simplest, least intrusive approach.

[1] Proposals appeared on 68 ballots in 2008 proxy season, with 10 gaining majority of votes cast. Four other companies (Aflac, RiskMetrics, Jackson Hewitt and Zale) included management say-on-pay proposals. Companies that have adopted the resolution are: H&R Block, Verizon, Blockbuster, Tech Data, Par Pharmaceuticals, RiskMetrics, Littlefield, MBIA, Ingersoll-Rand, Jackson Hewitt and Zale. The most recent vote was at SunMicro Systems, where a say-on-pay proposal received 67% support, the best showing yet and indicating that shareholder interest in this area remains strong.

[2] The Emergency Economic Stabilization Act, or "EESA."

[3] We note that, under New York Stock Exchange ("NYSE") rules, a shareholder proposal to adopt an annual resolution process that is opposed by management would be a non-routine matter on which brokers holding shares in street name would not be permitted to vote without instructions from the beneficial owner (although those shares would be

ALTERNATIVE	EXAMPLES	COMMENTS	DISADVANTAGES	ADVANTAGES
2. Multi-part advisory vote, entitling shareholders to vote different ways on different aspects of compensation program, philosophy and/or practices.	**RiskMetrics:** Shareholders vote whether to approve (i) the Company's overall executive compensation philosophy, policies and procedures; (ii) the board's execution of the principles in compensation decisions in the previous year; and (iii) the board's application of the principles in compensation objectives for the following year (all as described in CD&A).	• The RiskMetrics resolution is a variation on the Aflac resolution, but it allows shareholders to provide somewhat more granular feedback. A shareholder who thinks the company's overall compensation philosophy is appropriate but disagrees with the way it was implemented can reflect that in his or her vote.[5] • By contrast, the Littlefield resolution is a referendum on specific dollar amounts. This is arguably more properly the purview of management and the compensation committee in light of the company's particular circumstances and it probably is less useful input for the compensation committee. It risks micromanagement, as compared to being a referendum on whether the board has achieved a compensation program that is well linked to strategy performance and value creation.	• A multi-part resolution is more complicated and makes more demands on the attention and analytical resources of shareholders, which are already heavily taxed in proxy season. • As with a single resolution, there may be discomfort with the possibility of a negative vote. • If the resolution includes reference to following year's compensation program, it may entail pressure to disclose performance targets for following year that otherwise are not required to be disclosed.	• Provides opportunity for more nuanced feedback. • Depending on the design of the questions, can function effectively in the same manner as a survey (since proposals are non-binding), but at minimal incremental cost.[6]

counted as present and entitled to vote). Depending on voting provisions in the company's by-laws and/or certificate of incorporation as well as applicable corporate law, these matters may be decided by majority vote of the shares entitled to vote on the subject matter and present or the majority of shares outstanding. Accordingly, there could be a relatively high degree of difficulty for shareholders to win a contested vote to adopt a resolution (if a majority is required to pass the proposal and if it is likely that a large number of shareholders would not provide voting instructions to their brokers). Conversely, a management proposal that is not contested would appear to be a routine matter under the NYSE rules (and the NYSE classified the Aflac management proposal as routine), thus allowing shares held in street name to be voted by the broker without instructions from the beneficial owner. Accordingly, a management-sponsored proposal would be almost certain to pass except in the most extreme circumstances.

[4] Examples may include (i) positive perception of the company as a corporate governance leader; (ii) opportunity for the board and other constituencies to become accustomed to implementation of this approach; and (iii) the potential to influence by example the shape of any ultimate legislated or otherwise mandated mechanism, if the company adopts an approach that works well and garners respect.

[5] Such a vote might seem unlikely in practice. However, the prospect of an annual vote on all three parts of the RiskMetrics resolution would be conducive to meaningful dialogue between the company and shareholders prior to each year's vote on each of the points covered by the resolution, whereas a straight "up or down" vote might tend to focus discussion more on blanket approval or disapproval of the compensation program as a whole.

ALTERNATIVE	EXAMPLES	COMMENTS	DISADVANTAGES	ADVANTAGES
	Littlefield: Shareholders vote to agree or disagree with the following (or abstain): A. The President and CEO's compensation is within 20% of an acceptable amount. B. The Director total compensation is within 20% of an acceptable amount.		• In the case of a vote on specific amounts (such as Littlefield resolution), shareholders generally lack sufficient information to make the judgment in light of all relevant contextual factors (succession planning, pay at competitors / peers, etc.) and do not want to devote the resources to gathering and analyzing the information.	
3. Mechanisms for shareholder input other than advisory votes	**Survey:** Schering-Plough shareholder survey on executive pay to be mailed with proxy materials. Details of questions not finalized.	• Compared to shareholder votes as described in alternatives 1 and 2, potential for detailed and tailored input. • Schering-Plough is a member of the Working Group on Advisory Votes, whose other members include Prudential, EMT, Intel, TIAA-CREF, AFSCME, Walden Asset Management and the pension funds of Connecticut, Wisconsin and Pennsylvania.	• Additional expense – for example, in the case of a survey, expense of process that is not part of proxy voting; and in the case of shareholder e-forum, cost associated with structuring a meaningful forum and	• Presents more opportunity than a vote to obtain very detailed and nuanced input from shareholders based on their view of the compensation program and philosophy as described in the CD&A

[6] If a company intends to use a multi-part advisory vote in a manner similar to a survey, it will be important to communicate effectively that it intends to use the information provided by the vote in this manner. In addition, if the intention is to solicit shareholder views on different options in a manner similar to a survey, on at least some questions it may be advisable for management not to make a recommendation on how to vote, so as to canvass shareholders in a neutral manner and maintain the integrity of the results. This can also minimize the risk associated with a "no" vote, in that there may actually be proposals seeking such a response.

ALTERNATIVE	EXAMPLES	COMMENTS	DISADVANTAGES	ADVANTAGES
	Meetings with Large Shareholders: Pfizer meetings between board and institutional investors to provide comments and perspective on governance policies and practices, including executive compensation.	• Pfizer held its first meeting in fall 2007 with representatives of its largest institutional investors, who in the aggregate owned 35% of Pfizer shares, and has announced its intention to hold regular meetings going forward. • Pfizer is also a member of the Working Group on Advisory Votes. • Occidental Petroleum holds a similar meeting on an annual basis (which last year included the chairman of the compensation committee).	monitoring commentary. • Practical issues exacerbated for companies with large retail ownership. • Not likely to satisfy activists seeking the publicity of a vote or forestall future proposals, which would likely not be able to be excluded from proxy statement on policy grounds. • A survey approach (as compared to consultation with large shareholders) could be difficult to abandon, once implemented, since risks making shareholders full "partners" in compensation process. • Risks moving closer to shareholder micromanagement of board-level matters.	and other disclosure; also offers scope for discussion of significant governance issues that are not squarely in the realm of compensation plan design and implementation (such as succession planning). • Could be interim measure pending greater visibility about Congressional action and obviate pressure to adopt advisory vote in the short term. • Board and company may be less troubled by the possibility of a negative result.
	Shareholder E-Forum: A Verizon e-forum was set up in 2007 and sponsored by BellTel retirees to address executive compensation matters at a time when Verizon was under significant pressure on compensation matters.	• Management was invited to participate in the Verizon e-forum. The forum involved a multi-step process, starting with a workshop on issues and ending with a written report, and had the benefit of an advisory panel of significant shareholders. • Other companies that have hosted forums on particular topics include Amerco (on proxy matters generally), Dell (an IR forum on strategy and business performance) and Royal Dutch Shell (matters relating to issues facing the energy industry).		

ALTERNATIVE	EXAMPLES	COMMENTS	DISADVANTAGES	ADVANTAGES

4. Request period to continue review of issue in light of potential legislative action and evolution of implementation	**Cisco:** After a proposal for a shareholder advisory vote on executive compensation (submitted by Christian Brothers Investment Services) received 48% support in 2007, Cisco announced this year that it had negotiated withdrawal of the proposal on certain conditions, including agreement between shareholders and members of Cisco's management and the chair of the compensation committee to discuss shareholder input on executive compensation, and a review by Cisco of industry "best practices" on executive compensation. Cisco also agreed to provide an e-mail address in its proxy statement that shareholders can use to communicate with the compensation committee.	• Emphasis on consideration at Board level in light of other developments (including the risk analysis suggested by EESA), with a view to taking action, but only once new administration has opportunity to act.
		
		• Couple with discussion of specific pay practices to which proponent objects and initiative to seek solutions to those.
		
		• Could couple with more website FAQ about compensation program that may be more accessible to shareholders and describe some details that the CD&A may not address and that have attracted shareholder / activist attention.
		  ○ Chart showing how company lines up with benchmark group.
		  ○ Investor FAQ about policies such as gross-ups; 10b5-1 plans, use of consultant, clawback, etc.
		  ○ Consider including a manner for investors to provide feedback via email.
		
		• Proponent may be open to this position if goal is leadership by the company, rather than specific objection to a particular aspect of company's program.
		
		• Even within say-on-pay movement, dissent exists, as some large investors consider vote as potential means to cut off dialogue with large shareholders, or that may chill appropriate pay practices, increase investor dependence on proxy advisory firms or force one-size-fits-all "best practices."
			• Will likely only allow for one additional year of consideration, as implicitly commits company to taking some action.
			• Proponents are less likely to accept this response if the proposal has been submitted in previous years.
				• Allows for further consideration of right approach, once determination is made to implement.
				
				• Avoids risk of implementing approach only to be undone by specific legislative action.
				
				• Allows time to view implementation by other companies, particularly when they receive a "no" vote.

by $40 at end of the year 5 (the net of the $100 tax exempt income from the excluded COD applied to reduce attributes and the $60 noncapital, nondeductible expense from the reduction of S's portion of the CNOL)).* * *

* * * * *

(d) * * *

(3) * * *

(i) * * *

(B) S's aggregate inside loss (as defined in paragraph (d)(3)(iii) of this section).

* * * * *

(5) * * *

(ii) * * * S's attribute reduction amount is allocated proportionately (by basis) between (among) the non-stock Category D asset and S's deemed single share(s) of subsidiary stock. (See paragraphs (d)(4)(ii)(B)(*2*) and (d)(4)(ii)(C) of this section regarding the portion of S's attribute reduction amount allocated to the Category D assets other than lower-tier subsidiary stock.) For allocation purposes, S's basis in each deemed single share of S1 stock is its deemed basis (determined under paragraphs (d)(5)(i)(B) and (d)(5)(i)(C) of this section), reduced by—

* * * * *

(8) * * *

Example 6. * * *

(ii) * * *

(B) * * * However, S's gain recognized on the transfer of Share E is computed and immediately adjusts members' bases in subsidiary stock under § 1.1502–32 (because M and S are not members of the same group immediately after the transaction, the sale is not an intercompany transaction subject to § 1.1502–13).

* * * * *

(D) * * *

(3) * * * See paragraph (d)(5)(v)(A) of this section.* * *

* * * * *

Example 8. * * *

(F) * * * Under § 1.1502–32(c)(1)(ii)(A)(*1*) this $90 expense is allocated to the transferred loss shares of S stock in proportion to the loss in the shares, or $.90 per share.* * *

* * * * *

(ii) * * *

(E) * * * The facts are the same as in paragraph (ii)(A) of this *Example 8*, except that P elects under paragraph (d)(6) of this section to reduce M's basis in the S shares by the full attribute reduction amount of $22, in lieu of S reducing its attributes.* * *

(F) * * * The facts are the same as in paragraph (ii)(A) of this *Example 8*.***

Example 9. * * *

(ii) * * * However, S1's gain recognized on the transfer of the S2 share is computed and immediately adjusts members' bases in subsidiary stock under § 1.1502–32.

* * * * *

(g) * * *

(2) * * *

Example 5. * * *

(i) * * * S owns Asset 1 with a basis of $100 and a value of $20.* * *

(iii) * * * However, because all the shares are transferred, the group's income is clearly reflected. * * *

* * * * *

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

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BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 30

Tarp Capital Purchase Program

AGENCY: Domestic Finance, Treasury.

ACTION: Interim final rule.

SUMMARY: This interim rule, promulgated pursuant to sections 101(a)(1), 101(c)(5), and 111(b) of the Emergency Economic Stabilization Act of 2008, Division A of Public Law 110–343 (EESA), provides guidance on the executive compensation provisions applicable to participants in the Troubled Assets Relief Program (TARP) Capital Purchase Program (CPP). Section 111(b) of EESA requires financial institutions from which the Department of the Treasury (Treasury) is purchasing troubled assets through direct purchases to meet appropriate standards for executive compensation and corporate governance. This interim final rule includes the following standards for purposes of the CPP: (a) Limits on compensation that exclude incentives for senior executive officers (SEOs) of financial institutions to take unnecessary and excessive risks that threaten the value of the financial institution; (b) required recovery of any bonus or incentive compensation paid to a SEO based on statements of earnings, gains, or other criteria that are later proven to be materially inaccurate; (c) prohibition on the financial institution from making any golden parachute payment to any SEO; and (d) agreement to limit a claim to a federal income tax deduction for certain executive remuneration. These rules generally affect financial institutions that participate in the CPP, certain employers related to those financial institutions, and their officers.

DATES: *Effective Date:* These regulations are effective on October 20, 2008. *Comment due date:* November 19, 2008.

ADDRESSES: The Treasury requests comments on the topics addressed in this interim rule. Comments may be submitted to the Treasury by any of the following methods: Submit electronic comments through the federal government e-rulemaking portal, *http://www.regulations.gov* or by e-mail to *executivecompensationcomments@do.treas.gov* or send paper comments in triplicate to Executive Compensation Comments, Office of Financial Institutions Policy, Room 1418, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

In general, the Treasury will post all comments to *http://www.regulations.gov* without change, including any business or personal information provided such as names, addresses, e-mail addresses, or telephone numbers. The Treasury will also make such comments available for public inspection and copying in the Treasury's Library, Room 1428, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect comments by telephoning (202) 622–0990. All comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: For further information regarding this interim rule, contact the Office of Domestic Finance, the Treasury, at (202) 927–6618.

SUPPLEMENTARY INFORMATION:

I. Background

This document adds 31 CFR Part 30 under section 111(b) of the Emergency Economic Stabilization Act of 2008, Div. A of Public Law No. 110–343 (EESA) with respect to the Troubled Assets Relief Program (TARP) Capital Purchase Program (CPP) established by the Department of the Treasury (Treasury) under EESA. Section 101(a) of EESA authorizes the Secretary of the Treasury to establish a TARP to ''purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and policies and procedures developed and published by the Secretary.'' Section 120 of EESA provides that the TARP authorities generally terminate on December 31, 2009, unless extended upon certification by the Secretary of the Treasury to Congress, but in no event later than two years from the date of enactment of EESA (October 3, 2008) (the TARP authorities period). Thus, the TARP authorities period is the period from October 3, 2008 to December 31, 2009 or, if extended, the period from October 3, 2008 to the date so extended, but not later than October 3, 2010.

Section 111 of EESA provides that certain financial institutions that sell assets to the Treasury may be subject to specified executive compensation standards. In the case of auction purchases from a financial institution that has sold assets in an amount that exceeds $300 million in the aggregate (including direct purchases), the financial institution is prohibited under section 111(c) of EESA from entering into any new employment contract with a senior executive officer (SEO) that provides a golden parachute to the SEO in the event of the SEO's involuntary termination, or in connection with the financial institution's bankruptcy filing, insolvency, or receivership. This prohibition applies during the TARP authorities period. The Treasury has issued separate guidance on this provision (Notice 2008–TAAP).

In addition, for auction purchases, section 302 of EESA includes tax provisions as amendments to sections 162(m) and 280G of the Internal Revenue Code (26 U.S.C. 162(m) and 280G) that address compensation paid to certain executive officers employed by financial institutions that sell assets under TARP. Section 302(a) of EESA amended 26 U.S.C. 162(m) to add a new paragraph (m)(5), which reduces the deduction limit to $500,000 in the case of ''executive remuneration'' and ''deferred deduction executive remuneration.'' This limit applies only to certain employers participating in an auction purchase and only for certain taxable years. Employers covered under 26 U.S.C. 162(m)(5) are not limited to publicly held corporations (nor even to corporations). The exception for performance-based compensation and certain other exceptions do not apply in the case of executive compensation covered under 26 U.S.C. 162(m)(5). The Treasury and the Internal Revenue Service have issued guidance on these provisions (I.R.S. Notice 2008–94).

In the case of direct purchases, section 111(b)(1) of EESA requires financial institutions to meet appropriate standards for executive compensation and corporate governance as set forth by the Secretary of the Treasury. These standards apply to the SEOs of the financial institutions while the Treasury holds an equity or debt position in the financial institution acquired under the CPP. Section 111(b)(2) of EESA requires that at least three criteria be satisfied by financial institutions from which the Treasury directly purchases troubled assets and takes a meaningful equity or debt position. The following describes these criteria.

Section 111(b)(2)(A) of EESA requires ''limits on compensation that exclude incentives for senior executive officers of a financial institution to take unnecessary and excessive risks that threaten the value of the financial institution during the period that the Secretary holds an equity or debt position in the financial institution.''

Section 111(b)(2)(B) of EESA requires ''a provision for the recovery by the financial institution of any bonus or incentive compensation paid to a senior executive officer based on statements of earnings, gains, or other criteria that are later proven to be materially inaccurate.''

Section 111(b)(2)(C) of EESA requires ''a prohibition on the financial institution making any golden parachute payment to its senior executive officer during the period that the Secretary holds an equity or debt position in the financial institution.''

Treasury Notice 2008–PSSFI addresses these provisions under section 111(b) of EESA as they apply to financial institutions participating in programs for systemically significant failing institutions. Further guidance will be issued for any additional programs.

These regulations are being issued as interim final regulations to implement the purpose of EESA, which is to provide immediately authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States. Thus, to encourage financial institutions to choose to participate in the CPP, these regulations provide those institutions with information with respect to the applicable executive compensation and corporate governance rules that will apply under the CPP.

II. This Interim Rule

These interim final regulations provide guidance on the executive compensation and corporate governance provisions of section 111(b) of EESA with respect to the CPP. They are written in question and answer format.

The regulations clarify that the requirements of section 111(b) of EESA apply not only to the financial institution that participates in the CPP, but also to any other entity in its controlled group. For this purpose, the controlled group rules in section 414(b) and (c) of the Internal Revenue Code (26 U.S.C. 414(b) and (c)) apply, but only taking into account parent-subsidiary relationships, not brother-sister relationships. These tax rules generally base control on an 80-percent ownership basis. Thus, these interim regulations apply to controlled groups in a manner similar to the executive compensation provisions of section 302(a) of EESA, which added 26 U.S.C. 162(m)(5) and 26 U.S.C. 280G(e) to the Internal Revenue Code, providing special tax treatment for executive compensation for employers participating in the TARP. See 26 U.S.C. 162(m)(5)(B)(iii) and 26 U.S.C. 280G(e)(2)(A).

The requirements in section 111(b) apply with respect to certain executive officers identified in § 30.2 (Q–2) of the regulations. The determination of these executive officers is made based on rules similar to those set forth in the federal securities laws and generally apply to the chief executive officer, the chief financial officer, and the three mostly highly compensated executive officers. The three most highly compensated executive officers are determined according to the requirements in Item 402 of Regulation S–K under the federal securities law (17 CFR 229.402) by reference to the total compensation for the last completed fiscal year. Until the compensation data for the current fiscal year are available, the financial institution should make its best efforts to identify the three most highly compensated executive officers for the current fiscal year. Analogous rules apply to financial institutions that do not have securities registered with the Securities and Exchange Commission (SEC) pursuant to the federal securities laws.

With respect to section 111(b)(2)(A) for purposes of participation in the CPP, the interim final regulations require the financial institution's compensation committee to identify the features in the financial institution's SEO incentive compensation arrangements that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the financial institution. The regulations require that the compensation committee review the SEO incentive compensation arrangements with the financial institution's senior risk officers, or other personnel acting in a similar capacity, to ensure that SEOs are not encouraged to take such risks. The regulations require such review promptly, and in no case more than 90 days, after the purchase under the CPP.

The regulations also require that the compensation committee meet at least annually with the financial institution's senior risk officers to discuss and review the relationship between the financial institution's risk management policies and practices and the SEO incentive compensation arrangements.

In addition, the regulations require the compensation committee to certify that it has completed the reviews of the SEO incentive compensation arrangements as outlined above. Financial institutions with securities registered with the SEC pursuant to the federal securities laws should provide these certifications in the Compensation Discussion and Analysis required pursuant to Item 402(b) of Regulation S–K under the federal securities laws (17 CFR 229.402). Those financial institutions that do not have securities registered with the SEC pursuant to the federal securities laws are required to provide the certifications to their primary regulatory agency.

With respect to section 111(b)(2)(B) of EESA for purposes of participation in the CPP, the interim final regulations provide that the SEO bonus and incentive compensation paid during the period that the Treasury holds an equity or debt position acquired under the CPP must be subject to recovery or ''clawback'' by the financial institution if the payments were based on materially inaccurate financial statements and any other materially inaccurate performance metric criteria. The regulations include a comparison of this requirement to section 304 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (Pub. L. 107–204).

With respect to section 111(b)(2)(C) of EESA for purposes of participation in the CPP, the interim final regulations prohibit a financial institution from making any golden parachute payment to a SEO during the period the Treasury holds an equity or debt position acquired under the CPP. The regulations define a golden parachute payment in the same way as under 26 U.S.C. 280G as applied with respect to new paragraph (e) of 26 U.S.C. 280G, added by section 302(a) of EESA relating to golden parachute payments. Thus, a golden parachute payment means any payment in the nature of compensation to (or for the benefit of) a SEO made on account of an applicable severance from employment to the extent the aggregate present value of such payments equals or exceeds an amount equal to three times the SEO's base amount. The term ''base amount'' for a SEO has the meaning set forth in 26 U.S.C. 280G(b)(3) and 26 CFR 1.280G–1, Q&A–34 (except that references to ''change in ownership or control'' are treated as referring to an ''applicable severance from employment'').

The regulations define an applicable severance from employment as any SEO's severance from employment with the financial institution (i) by reason of involuntary termination of employment with the financial institution or with an entity that is treated as the same employer as the financial institution under the controlled group rules or (ii) in connection with any bankruptcy filing, insolvency, or receivership of the financial institution or of an entity that is treated as the same employer as the financial institution under the controlled group rules. The regulations define an involuntary termination of employment and set forth rules for determining when a payment on account of an applicable severance from employment occurs. These rules are substantially the same as the standards in IRS Notice 2008–94 regarding new paragraph (e) of 26 U.S.C. 280G, and are also generally similar to the pre-existing standards under 26 U.S.C. 280G (see 26 CFR 1.280G–1, Q&A–22(a)).

The regulations include a special rule for cases in which a financial institution (target) that has sold troubled assets to the Treasury through the CPP is acquired by an entity (acquirer) in an acquisition of any form. Under this rule, acquirer does not become subject to section 111(b) of EESA merely as a result of the acquisition. The rule applies only if the acquirer is not related to target and treats target as related if stock or other interests of target are treated (under 26 U.S.C. 318(a) other than paragraph (4) thereof) as owned by acquirer. With respect to target, any employees of target who are SEOs prior to the acquisition will be subject to section 111(b) of EESA until after the first anniversary following the acquisition.

The regulations set forth an additional standard for executive compensation and corporate governance under section 111(b)(1) of EESA. Under this standard, the financial institution must agree, as a condition to participate in the CPP, that no deduction will be claimed for federal income tax purposes for remuneration that would not be deductible if 26 U.S.C. 162(m)(5) were to apply to the financial institution. For this purpose, during the period that the Treasury holds an equity or debt position in the financial institution acquired under the CPP: (i) The financial institution (including entities in its controlled group) is treated as an ''applicable employer,'' (ii) its SEOs are treated as ''covered executives,'' and (iii) any taxable year that includes any portion of that period is treated as an ''applicable taxable year,'' each as defined in 26 U.S.C. 162(m)(5), except that the dollar limitation and the remuneration for the taxable year are prorated for the portion of the taxable year that the Treasury holds an equity or debt position in the financial institution under the CPP. The Secretary has determined that this is an appropriate standard for executive compensation for the CPP. This rule only applies for taxable years that include the period that the Treasury holds an equity or debt position in the financial institution acquired under the CPP. This standard applies even though the financial institution is not subject to 26 U.S.C. 162(m)(5) and only limits the amount of the deduction that may be claimed. Thus, no deduction may be claimed for remuneration during a taxable year for compensation in excess of $500,000 for a SEO, and the special rules relating to deferred deduction executive remuneration would also apply. See I.R.S. Notice 2008–94 for additional information regarding the deduction limit under 26 U.S.C. 162(m)(5).

III. Procedural Requirements

Justification for Interim Rulemaking

This rule is promulgated pursuant to EESA, the purpose of which is to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States. Specifically, this rule implements certain provisions of section 111 of EESA, which sets forth executive compensation standards for financial institutions that sell troubled assets to the Treasury under EESA. The statute provides that the Secretary may issue guidance and regulations to carry out these provisions and that such guidance and regulations may be effective upon issuance.

In order to encourage financial institutions to choose to participate in the CPP, those institutions must have timely and reliable information with respect to the applicable executive compensation and corporate governance rules that will apply under the program. Accordingly, because EESA authorizes section 111 guidance to be immediately effective and because of exigencies in the financial markets, the Treasury finds that it would be contrary to the public interest, pursuant to 5 U.S.C. 553(b)(B), to delay the issuance of this rule pending an opportunity for public comment and good cause exists to dispense with this requirement. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), the Treasury has determined that there is good cause for the interim final rule to become effective immediately upon publication. While this regulation is effective immediately upon publication, the Treasury is inviting public comment on the regulation during a thirty-day period and will consider all comments in developing a final rule.

Regulatory Planning and Review

The rule does not meet the criteria for a ''significant regulatory action'' as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, this rule is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C chapter 6).

List of Subjects in 31 CFR Part 30

Executive compensation, Troubled assets.

■ For the reasons set out in the preamble, Title 31 of the CFR is amended as follows:

PART 30—TARP CAPITAL PURCHASE PROGRAM

■ 1. Add part 30 to read as follows:

PART 30—TARP CAPITAL PURCHASE PROGRAM

Authority: Section 111(b) of the Emergency Economic Stabilization Act of 2008, Div. A of Public Law 110–343; 122 Stat 3765.

§ 30.0 Executive compensation and corporate governance.

The following questions and answers reflect the executive compensation and corporate governance requirements of section 111(b) of the Emergency Economic Stabilization Act of 2008, Div. A of Public Law No. 110–343 (EESA) with respect to participation in the Troubled Assets Relief Program (TARP) Capital Purchase Program (CPP) established by the Treasury thereunder:

§ 30.1 Q–1: To what financial institutions does this part apply?

(a) *General rule.* This part applies to any financial institution that participates in the CPP.

(b) *Controlled group rules.* For purposes of section 111(b) of EESA, two or more persons who are treated as a single employer under section 26 U.S.C. 414(b) (employees of a controlled group of corporations) and section 26 U.S.C. 414(c) (employees of partnerships, proprietorships, etc., that are under common control) are treated as a single employer. However, for purposes of section 111(b) of EESA, the rules for brother-sister controlled groups and combined groups are disregarded (including disregarding the rules in section 26 U.S.C. 1563(a)(2) and (a)(3) with respect to corporations and the parallel rules that are in section 26 CFR 1.414(c)–2(c) with respect to other organizations conducting trades or businesses). See § 30.11 (Q–11) of this part for special rules where a financial institution is acquired.

§ 30.2 Q–2: Who is a senior executive officer (SEO) under section 111 of EESA?

(a) *General definition.* A SEO means a ''named executive officer'' as defined in Item 402 of Regulation S–K under the federal securities laws (17 CFR 229.402) who:

(1) Is employed by a financial institution that is participating in the CPP while the Treasury holds an equity or debt position acquired under the CPP; and

(2)(i) Is the principal executive officer (PEO) (or person acting in a similar capacity) of such financial institution (or, in the case of a controlled group, of the parent entity);

(ii) The principal financial officer (PFO) (or person acting in a similar capacity) of such financial institution (or, in the case of a controlled group, of the parent entity); or

(iii) One of the three most highly compensated executive officers of such financial institution (or the financial institution's controlled group) other than the PEO or the PFO.

(b) *Determination of three most highly compensated executive officers.* For financial institutions with securities registered with the Securities and Exchange Commission (SEC) pursuant to the federal securities law, the three most highly compensated executive officers are determined according to the requirements in Item 402 of Regulation S–K under the federal securities laws (17 CFR 229.402). The term ''executive officer'' has the same meaning as defined in Rule 3b–7 of the Securities Exchange Act of 1934 (Exchange Act) (17 CFR 240.3b–7). For purposes of determining the three most highly compensated executive officers, compensation is determined as it is in Item 402 of Regulation S–K to include total compensation for the last completed fiscal year without regard to whether the compensation is includible in the executive officer's gross income. Until the compensation data for the current fiscal year are available, the financial institution should make its best efforts to identify the three most highly compensated executive officers for the current fiscal year.

(c) *Application to private employers.* Rules analogous to the rules in paragraphs (a) and (b) of this section apply to financial institutions that are not subject to the federal securities laws, rules, and regulations, including financial institutions that do not have securities registered with the SEC pursuant to the federal securities laws.

§ 30.3 Q–3: What actions are necessary for a financial institution participating in the CPP to comply with section 111(b)(2)(A) of EESA?

(a) In order to comply with section 111(b)(2)(A) of EESA for purposes of participation in the CPP, a financial institution must comply with the following rules:

(1) Promptly, and in no case more than 90 days, after the purchase under the CPP, the financial institution's compensation committee, or a committee acting in a similar capacity, must review the SEO incentive

compensation arrangements with such financial institution's senior risk officers, or other personnel acting in a similar capacity, to ensure that the SEO incentive compensation arrangements do not encourage SEOs to take unnecessary and excessive risks that threaten the value of the financial institution;

(2) Thereafter, the compensation committee, or a committee acting in a similar capacity, must meet at least annually with senior risk officers, or individuals acting in a similar capacity, to discuss and review the relationship between the financial institution's risk management policies and practices and the SEO incentive compensation arrangements; and

(3) The compensation committee, or a committee acting in a similar capacity, must certify that it has completed the reviews of the SEO incentive compensation arrangements required under paragraphs (a)(1) and (2) of this section.

(b) These rules apply while the Treasury holds an equity or debt position acquired under the CPP.

§ 30.4 Q–4: How should the financial institution comply with the standard under § 30.3 that the compensation committee, or a committee acting in a similar capacity, review the SEO incentive compensation arrangements to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of the financial institution?

Because each financial institution faces different material risks given the unique nature of its business and the markets in which it operates, the compensation committee, or a committee acting in a similar capacity, should discuss with the financial institution's senior risk officers, or other personnel acting in a similar capacity, the risks (including long-term as well as short-term risks) that such financial institution faces that could threaten the value of the financial institution. The compensation committee, or a committee acting in a similar capacity, should identify the features in the financial institution's SEO incentive compensation arrangements that could lead SEOs to take such risks. Any such features should be limited in order to ensure that the SEOs are not encouraged to take risks that are unnecessary or excessive.

§ 30.5 Q–5: How should the financial institution comply with the certification requirements under § 30.3?

(a) *Certification.* The compensation committee, or a committee acting in a similar capacity, of the financial institution must provide the certifications required by § 30.3 (Q–3) stating that it has reviewed, with such financial institution's senior risk officers, the SEO incentive compensation arrangements to ensure that the incentive compensation arrangements do not encourage SEOs to take unnecessary and excessive risks. Providing a statement similar to the following and in the manner provided in paragraphs (b) and (c) of this section, as applicable, would satisfy this standard: ''The compensation committee certifies that it has reviewed with senior risk officers the SEO incentive compensation arrangements and has made reasonable efforts to ensure that such arrangements do not encourage SEOs to take unnecessary and excessive risks that threaten the value of the financial institution.''

(b) *Location.* For financial institutions with securities registered with the SEC pursuant to the federal securities law, the compensation committee, or a committee acting in a similar capacity, should provide this certification in the Compensation Discussion and Analysis required pursuant to Item 402(b) of Regulation S–K under the federal securities laws (17 CFR 229.402).

(c) *Application to private financial institutions.* The rules provided in this section are also applicable to financial institutions that are not subject to the federal securities laws, rules, and regulations, including financial institutions that do not have securities registered with the SEC pursuant to the federal securities laws. A private financial institution should file the certification of the compensation committee, or a committee acting in a similar capacity, with its primary regulatory agency.

§ 30.6 Q–6: What actions are necessary for a financial institution participating in the CPP to comply with section 111(b)(2)(B) of EESA?

In order to comply with section 111(b)(2)(B) of EESA for purposes of participation in the CPP, a financial institution must require that SEO bonus and incentive compensation paid during the period that the Treasury holds an equity or debt position acquired under the CPP are subject to recovery or ''clawback'' by the financial institution if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria.

§ 30.7 Q–7: How do the standards under section 111(b)(2)(B) of EESA differ from section 304 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (Pub. Law No. 107–204)?

Section 304 of Sarbanes-Oxley requires the forfeiture by a public company's chief executive officer and the chief financial officer of any bonus, incentive-based compensation, or equity-based compensation received and any profits from sales of the company's securities during the twelve-month period following a materially non-compliant financial report. Section 111(b)(2)(B) of EESA differs from section 304 of Sarbanes-Oxley in several ways. The standard under section 111(b)(2)(B) of EESA: Applies to the three most highly compensated executive officers in addition to the PEO and the PFO; applies to both public and private financial institutions; is not exclusively triggered by an accounting restatement; does not limit the recovery period; and covers not only material inaccuracies relating to financial reporting but also material inaccuracies relating to other performance metrics used to award bonuses and incentive compensation.

§ 30.8 Q–8: What actions are necessary for a financial institution participating in the CPP to comply with section 111(b)(2)(C) of EESA?

In order to comply with section 111(b)(2)(C) of EESA for purposes of participation in the CPP, a financial institution must prohibit any golden parachute payment to a SEO during the period the Treasury holds an equity or debt position acquired under the CPP.

§ 30.9 Q–9: What is a golden parachute payment under section 111(b) of EESA?

(a) *Definition.* As provided under 26 U.S.C. 280G(e), a ''golden parachute payment'' means any payment in the nature of compensation to (or for the benefit of) a SEO made on account of an applicable severance from employment to the extent the aggregate present value of such payments equals or exceeds an amount equal to three times the SEO's base amount. The term ''base amount'' for a SEO has the meaning set forth in 26 U.S.C. 280G(b)(3) and 26 CFR 1.280G–1, Q&A–34, except that references to ''change in ownership or control'' are treated as referring to an ''applicable severance from employment.''

(b) *Applicable severance from employment.* (1) *Definition.* An applicable severance from employment means any SEO's severance from employment with the financial institution.

(i) By reason of involuntary termination of employment with the financial institution or with an entity that is treated as the same employer as the financial institution under § 30.1 (Q–1) of this part; or

(ii) In connection with any bankruptcy filing, insolvency, or receivership of the financial institution or of an entity that is treated as the same employer as the financial institution under § 30.1 (Q–1) of this part.

(2) *Involuntary termination.* (i) An involuntary termination from employment means a termination from employment due to the independent exercise of the unilateral authority of the employer to terminate the SEO's services, other than due to the SEO's implicit or explicit request to terminate employment, where the SEO was willing and able to continue performing services. An involuntary termination from employment may include the financial institution's failure to renew a contract at the time such contract expires, provided that the SEO was willing and able to execute a new contract providing terms and conditions substantially similar to those in the expiring contract and to continue providing such services. In addition, a SEO's voluntary termination from employment constitutes an involuntary termination from employment if the termination from employment constitutes a termination for good reason due to a material negative change in the SEO's employment relationship. See 26 CFR 1.409A–1(n)(2).

(ii) A severance from employment by a SEO is by reason of involuntary termination even if the SEO has voluntarily terminated employment in any case where the facts and circumstances indicate that absent such voluntary termination the financial institution would have terminated the SEO's employment and the SEO had knowledge that he or she would be so terminated.

(c) *Payments on account of an applicable severance from employment.* (1) *Definition.* A payment on account of an applicable severance from employment means a payment that would not have been payable if no applicable severance from employment had occurred (including amounts that would otherwise have been forfeited if no applicable severance from employment had occurred) and amounts that are accelerated on account of the applicable severance from employment. See 26 CFR 1.280G–1, Q&A–24(b), for rules regarding the determination of the amount that is on account of an acceleration.

(2) *Excluded amounts.* Payments on account of an applicable severance from employment do not include amounts paid to a SEO under a tax qualified retirement plan.

§ 30.10 Q–10: Are there other conditions that are required under the executive compensation and corporate governance standards in section 111(b)(1) of EESA?

The financial institution must agree, as a condition to participate in the CPP, that no deduction will be claimed for federal income tax purposes for remuneration that would not be deductible if 26 U.S.C. 162(m)(5) were to apply to the financial institution. For this purpose, during the period that the Treasury holds an equity or debt position in the financial institution acquired under the CPP:

(a) The financial institution (including entities in its controlled group) is treated as an ''applicable employer,''

(b) Its SEOs are treated as ''covered executives,'' and

(c) Any taxable year that includes any portion of that period is treated as an ''applicable taxable year,'' each as defined in 26 U.S.C. 162(m)(5), except that the dollar limitation and the remuneration for the taxable year are prorated for the portion of the taxable year that the Treasury holds an equity or debt position in the financial institution under the CPP.

§ 30.11 Q–11: How does section 111(b) of EESA operate in connection with an acquisition, merger, or reorganization?

(a) *Special rules for acquisitions, mergers, or reorganizations.* In the event that a financial institution (target) that had sold troubled assets to the Treasury through the CPP is acquired by an entity that is not related to target (acquirer) in an acquisition of any form, acquirer will not become subject to section 111(b) of EESA merely as a result of the acquisition. For this purpose, an acquirer is related to target if stock or other interests of target are treated (under 26 U.S.C. 318(a) other than paragraph (4) thereof) as owned by acquirer. With respect to the target, any employees of target who are SEOs prior to the acquisition will be subject to section 111(b)(2)(C) of EESA until after the first anniversary following the acquisition.

(b) Example. In 2008, financial institution A sells $100 million of troubled assets to the Treasury through the CPP. In January 2009, financial institution B, which is not otherwise subject to section 111(b) of EESA, acquires financial institution A in a stock purchase transaction, with the result that financial institution A becomes a wholly owned subsidiary of financial institution B. Based on the rules in paragraph (a) of this § 30.11 (Q–11), the SEOs of financial institution B are not subject to section 111(b) of EESA solely as a result of the acquisition of financial institution A in January 2009. The SEOs of financial institution A at the time of the acquisition are subject to section 111(b)(2)(C) of EESA until January 2010, the first anniversary following the acquisition.

Dated: October 14, 2008.

Neel Kashkari,

Interim Assistant Secretary for Financial Stability.

[FR Doc. E8–24781 Filed 10–15–08; 11:15 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

42 CFR Part 34

[Docket No. CDC–2008–0002]

RIN 0920–AA20

Medical Examination of Aliens—Revisions to Medical Screening Process

AGENCY: Centers for Disease Control and Prevention, U.S. Department of Health and Human Services.

ACTION: Correcting amendments.

SUMMARY: The Centers for Disease Control and Prevention (CDC), within the U.S. Department of Health and Human Services (HHS), published an Interim Final Rule in the **Federal Register** on October 6, 2008 (73 FR 58047), updating regulations that govern medical examinations that aliens must undergo before they may be admitted to the United States. This document corrects an omission contained in the rule.

DATES: Effective on October 20, 2008.

FOR FURTHER INFORMATION, CONTACT: Stacy M. Howard, Division of Global Migration and Quarantine, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, 1600 Clifton Road, NE., E03, Atlanta, GA 30333; telephone 404–498–1600.

SUPPLEMENTARY INFORMATION: The Centers for Disease Control and Prevention (CDC), within the U.S. Department of Health and Human Services (HHS), published an Interim Final Rule in the **Federal Register** of October 6, 2008, FR Doc. E8–23485, (73 FR 58047) updating regulations that govern medical examinations that aliens must undergo before they may be

Billing Code 4810-25-P

DEPARTMENT OF THE TREASURY

31 CFR Part 30

RIN 1505-AC09

TARP CAPITAL PURCHASE PROGRAM

AGENCY: Domestic Finance, Treasury.

ACTION: Interim final rule.

SUMMARY: This interim final rule, promulgated pursuant to sections 101(a)(1), 101(c)(5), and 111(b) of the Emergency Economic Stabilization Act of 2008, Division A of Public Law 110-343 (EESA), provides further guidance on the executive compensation provisions applicable to participants in the Troubled Asset Relief Program (TARP) Capital Purchase Program (CPP). The Department of the Treasury published an interim final rule in 31 CFR Part 30 on October 20, 2008 (October Interim Final Rule) providing guidance on section 111(b) of EESA, which requires financial institutions from which the Treasury is purchasing troubled assets through direct purchases to meet appropriate standards for executive compensation and corporate governance. This interim final rule provides one technical amendment and two clarifications to the October Interim Final Rule and provides reporting and recordkeeping requirements regarding the

executive compensation requirements in the October Interim Final Rule and this interim final rule.

DATES: Effective Date: These regulations are effective on [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. Comment due date: [**INSERT DATE THAT IS THIRTY DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: The Treasury requests comments on the topics addressed in this interim final rule. Comments may be submitted to the Treasury by any of the following methods: Submit electronic comments through the federal government e-rulemaking portal, www.regulations.gov or by email to executivecompensationcomments@do.treas.gov or send paper comments in triplicate to Executive Compensation Comments, Office of Financial Institutions Policy, Room 1418, Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

In general, the Treasury will post all comments to www.regulations.gov without change, including any business or personal information provided such as names, addresses, e-mail addresses, or telephone numbers. The Treasury will also make such comments available for public inspection and copying in the Treasury's Library, Room 1428, Main Department Building, 1500 Pennsylvania Avenue, NW, Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect comments by telephoning (202) 622-0990. All comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: For further information regarding this interim rule contact the Office of Domestic Finance, the Treasury, at (202) 927-6618.

SUPPLEMENTARY INFORMATION:

I. Background.

In general, section 111(b) of the Emergency Economic Stabilization Act of 2008, Div. A of Pub. Law No. 110-343 (EESA) requires financial institutions from which the Treasury is purchasing troubled assets through direct purchases to meet appropriate standards for executive compensation and corporate governance. On October 20, 2008 (73 FR 62205), the Department of the Treasury (Treasury) published an interim final rule (October Interim Final Rule) in 31 CFR Part 30, promulgated pursuant to sections 101(a), 101(c)(5), and 111(b) of EESA, providing guidance on the executive compensation provisions applicable to participants in the Troubled Asset Relief Program (TARP) Capital Purchase Program (CPP).

Section 111(b)(2)(A) of EESA requires "limits on compensation that exclude incentives for senior executive officers of a financial institution to take unnecessary and excessive risks that threaten the value of the financial institution during the period that the Secretary holds an equity or debt position in the financial institution." With respect to section 111(b)(2)(A) of EESA for purposes of participation in the CPP, the October Interim Final Rule requires the financial institution's compensation committee to identify the features in the financial institution's senior executive officer (SEO) incentive compensation arrangements that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the financial institution. The October Interim Final Rule requires that the compensation committee review the SEO incentive compensation arrangements with the financial institution's senior risk officers, or other personnel acting in a similar capacity, to ensure that SEOs are not encouraged to take such risks. The October Interim Final Rule requires such review promptly, and in no case more than 90 days, after the purchase under the CPP.

The October Interim Final Rule also requires that the compensation committee meet at least annually with the financial institution's senior risk officers to discuss and review the relationship between the financial institution's risk management policies and practices and the SEO incentive compensation arrangements.

In addition, the October Interim Final Rule requires the compensation committee to certify that it has completed the reviews of the SEO incentive compensation arrangements as outlined above. The October Interim Final Rule also provides that financial institutions with securities registered with the Securities and Exchange Commission (SEC) pursuant to the federal securities laws should provide these certifications in the Compensation Discussion and Analysis required pursuant to Item 402(b) of Regulation S-K under the federal securities laws (17 CFR 229.402). Those financial institutions that do not have securities registered with the SEC pursuant to the federal securities laws are required to provide the certifications to their primary regulatory agency.

Section 111(b)(2)(B) of EESA requires "a provision for the recovery by the financial institution of any bonus or incentive compensation paid to a senior executive officer based on statements of earnings, gains, or other criteria that are later proven to be materially inaccurate." With respect to section 111(b)(2)(B) of EESA for purposes of participation in the CPP, the October Interim Final Rule provides that the SEO bonus and incentive compensation paid during the period that the Treasury holds an equity or debt position acquired under the CPP must be subject to recovery or "clawback" by the financial institution if the payments were based on materially inaccurate financial statements and any other materially inaccurate performance metric criteria.

Section 111(b)(2)(C) of EESA requires "a prohibition on the financial institution making any golden parachute payment to its senior executive officer during the period that the Secretary holds an equity or debt position in the financial institution." With respect to section 111(b)(2)(C) of EESA for purposes of participation in the CPP, the October Interim Final Rule prohibits a financial institution from making any golden parachute payment to a SEO during the period the Treasury holds an equity or debt position acquired under the CPP. A golden parachute payment means any payment in the nature of compensation to (or for the benefit of) a SEO made on account of an applicable severance from employment to the extent the aggregate present value of such payments equals or exceeds an amount equal to three times the SEO's base amount.

The October Interim Final Rule sets forth an additional standard for executive compensation and corporate governance under section 111(b)(1) of EESA. Under this standard, the financial institution must agree, as a condition to participate in the CPP, that no deduction will be claimed for remuneration for federal income tax purposes in excess of $500,000 for each SEO that would not be deductible if section 162(m)(5) of the Internal Revenue Code applied to the financial institution.

II. This Interim Rule.

This interim final rule provides further guidance on the executive compensation and corporate governance provisions of section 111(b) of EESA with respect to the CPP.

Specifically, this interim final rule provides a technical amendment and two clarifications to the October Interim Final Rule and provides reporting and recordkeeping requirements regarding the executive compensation requirements in the October Interim Final Rule and this interim final rule. They are written in question and answer format.

This interim final rule amends § 30.5(b) of the October Interim Final Rule to require that the certifications required under the October Interim Final Rule of the compensation committee of a financial institution whose securities are registered with the SEC under the federal securities laws be provided in the Compensation Committee Report required pursuant to Item 407(e) of Regulation S-K under the federal securities laws (17 CFR 229.407). The October Interim Final Rule had required that these certifications be provided in the Compensation Discussion and Analysis required pursuant to Item 402 of Regulation S-K under the federal securities laws (17 CFR 229.402). Two comments on the October Interim Final Rule suggested that these certifications be provided in the Compensation Committee Report rather than the Compensation Discussion and Analysis. The Treasury believes this amendment is appropriate because the compensation committee prepares the Compensation Committee Report and is making the required certifications. Management of the financial institution prepares the Compensation Discussion and Analysis, which does not directly address the operations and functions of the compensation committee.

This interim final rule clarifies § 30.6, which requires that SEO bonus and incentive compensation paid during the period that the Treasury holds an equity or debt position acquired under the CPP be subject to recovery or “clawback” by the financial institution if the payments were based on materially inaccurate financial statements and any other materially inaccurate performance metric criteria. One comment on the October Interim Final Rule sought clarification on the application of this provision to SEO bonus and incentive compensation earned, but not paid, during the Treasury holding period. The Treasury believes that it is appropriate that any bonus and incentive compensation earned during the Treasury holding period should be subject to clawback and this interim final rule clarifies that bonus and incentive compensation is considered paid to a SEO during the Treasury holding period when the SEO obtains a legally binding right to that payment during the Treasury holding period.

This interim final rule clarifies § 30.7, which compares the clawback provision under section 111(b)(2)(B) of EESA with the clawback provision in section 304 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (Pub. Law No. 107-204). This interim final rule clarifies that the comparison to the Sarbanes-Oxley provision includes both the statutory provision under EESA as well as the regulations issued under this statutory provision in the October Interim Final Rule.

In addition, this interim final rule establishes a compliance reporting regime relating to the executive compensation requirements set forth in the October Interim Final Rule and this interim final rule. Under this interim final rule, the principal executive officer of the financial institution must provide the following certifications to the Chief Compliance Officer (CCO) of the TARP, with copies to the applicable transfer agent under the CPP. First, within 120 days of the closing date of the Securities Purchase Agreement between the financial institution and the Treasury, the principal executive officer of the financial institution is required to certify that the compensation committee of the financial institution has reviewed the SEO incentive compensation arrangements with the senior risk officers of the financial institution to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that could threaten the value of the financial institution.

Second, within 135 days of the completion of each fiscal year during any part of which the financial institution has participated in the CPP, the principal executive officer of the financial institution is required to certify that the compensation committee has met at least once during the prior fiscal year with the senior risk officers of the financial institution to discuss and review the relationship between the risk management policies and practices of the financial institution and the SEO incentive compensation arrangements; the compensation committee has certified to this review; the financial institution has required that SEO bonus and incentive compensation be subject to recovery or “clawback” by the financial institution if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria; the financial institution has prohibited any golden parachute payment to a SEO; the financial institution has instituted procedures to limit the deduction for remuneration for federal income tax purposes to $500,000 for each SEO for the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to the financial institution; and certain named individuals are the SEOs for the current fiscal year based on the compensation of such individuals during the prior fiscal year.

Third, in addition to the certification required in the paragraph above, within 135 days of the completion of each annual fiscal year of the financial institution after the first fiscal year during any part of which the financial institution has participated in the CPP, the principal executive officer of the financial institution is required to certify that the financial institution in fact has limited the deduction for remuneration for federal income tax purposes to $500,000 for each SEO for the fiscal year prior to the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to the financial institution.

If the principal executive officer is unable to provide any of these certifications in a timely manner, the principal executive officer is required to provide the CCO an explanation of the reason such certification has not been provided.

This interim final rule also provides that the financial institution is required to preserve appropriate documentation and records to substantiate each certification for no less than six years after the date of the certification, the first two years in an easily accessible place. This interim final rule provides that the financial institution is required to furnish promptly to the CCO such documentation and records as requested by the representative of the CCO.

This interim final rule also affirms that any individual or entity making or providing false information or certifications to the Treasury relating to a purchase under section 111 of EESA or required under the October Interim Final Rule or this interim final rule is subject to the criminal penalties under title 18 of the U.S. Code or other provision of federal criminal law.

This interim final rule amends and supplements the provisions of the October Interim Final Rule. As such, this rule applies to all financial institutions participating in the CPP.

III. Procedural Requirements.

Justification for Interim Rulemaking

This interim final rule is promulgated pursuant to EESA, the purpose of which is to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States. Specifically, this interim final rule implements certain provisions of section 111 of EESA, which sets forth executive compensation standards for financial institutions that sell troubled assets to the Treasury under EESA. The statute provides that the Secretary may issue guidance and regulations to carry out these provisions and that such guidance and regulations may be effective upon issuance.

Financial institutions must have timely and reliable information with respect to the applicable executive compensation and corporate governance rules that apply under EESA programs. Accordingly, because EESA authorizes section 111 guidance to be immediately effective and because of exigencies in the financial markets, the Treasury finds that it would be contrary to the public interest, pursuant to 5 U.S.C. 553(b)(B), to delay the issuance of this interim final rule pending an opportunity for public comment, and good cause exists to dispense with this requirement. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), the Treasury has determined that there is good cause for the interim final rule to become effective immediately upon publication. While this regulation is effective immediately upon publication, the Treasury is inviting public comment on the regulation during a 30-day period and will consider all comments in developing a final rule.

Regulatory Planning and Review

The interim final rule does not meet the criteria for a "significant regulatory action" as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, this interim final rule is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C chapter 6).

Paperwork Reduction Act

The information collection contained in this interim final rule has been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35) and assigned OMB control number 1505-0211. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number. Comments on the collection of information should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 (or by e-mail to oira_submission@omb.eop.gov) with a copy to Executive Compensation Comments, Office of Financial Institutions Policy, Room 1418, Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

List of Subjects in 31 CFR Part 30

Executive compensation, Troubled assets.

For the reasons set out in the preamble, Title 31 of the CFR is amended as follows:

PART 30 – TARP CAPITAL PURCHASE PROGRAM

1. The authority citation for Part 30 continues to read as follows:
Authority: Section 111(b) of the Emergency Economic Stabilization Act of 2008, Div. A of Pub. L. 110-343; 122 Stat 3765.

2. Revise § 30.5(b) to read as follows:

§ 30.5 Q-5: How should the financial institution comply with the certification requirements under Q-3 of this section?

* * * * *

(b) Location. For financial institutions with securities registered with the SEC pursuant to the federal securities laws, the compensation committee, or a committee acting in a similar capacity, should provide the certifications in the Compensation Committee Report required pursuant to Item 407(e) of Regulation S-K under the federal securities laws (17 CFR 229.407).

* * * * *

3. Revise § 30.6, by adding the following sentence at the end of the paragraph to read as follows:

§ 30.6 Q-6: What actions are necessary for a financial institution participating in the CPP to comply with section 111(b)(2)(B) of EESA?

* * * . For this purpose, bonus and incentive compensation is paid to a SEO when the SEO obtains a legally binding right to that payment if the legally binding right occurs during any period that the Treasury holds an equity or debt position under the CPP.

4. Revise the section heading of §30.7 to read as follows:

<u>§ 30.7 Q–7: How do the standards and regulations under section 111(b)(2)(B) of EESA differ from section 304 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (Pub. Law No. 107–204)?</u>

* * * * *

5. Add § 30.12 to read as follows:

<u>§ 30.12 Q-12: What actions are necessary for a financial institution participating in the CPP to comply with the executive compensation reporting and recordkeeping requirements?</u>

(a) <u>Reporting Requirements</u>. (1) <u>General</u>. The PEO (or person acting in a similar capacity) of the financial institution participating in the CPP is required to provide to the Chief Compliance Officer (CCO) of TARP, the following certifications with respect to the compliance of the financial institution with section 111(b) of EESA as implemented under this part. The PEO of the financial institution is also required to provide copies of these certifications to the transfer agent under the CPP. To the extent that the PEO (or person acting in a similar capacity) of the financial institution is unable to provide any of these certifications in a timely manner, the PEO is required to provide the CCO an explanation of the reason such certification has not been provided. These certifications are in addition to the compensation committee certifications required by § 30.3 (Q-3).

(2) <u>120 Day Certification</u>. Within 120 days of the closing date of the agreement between the financial institution and the Treasury under the CPP, the PEO (or person acting in a similar capacity) of the financial institution is required to provide a certification similar to the following to the CCO:

“I, [identify the principal executive officer of the financial institution], certify, based on my knowledge, that the compensation committee of [identify financial institution] reviewed within 90 days of the Department of the Treasury’s purchase of the [identify financial instrument] of [identify financial institution] under the Capital Purchase Program the incentive compensation arrangements of the senior executive officers, as defined in subsection 111(b)(3) of the Emergency Economic Stabilization Act of 2008 and regulations and guidance issued thereunder (SEOs), of [identify financial institution] with senior risk officers of [identify financial institution] to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of [identify financial institution].”

(3) <u>First Fiscal Year Certification</u>. Within 135 days of the completion of the first annual fiscal year of the financial institution during any part of which the financial institution has participated in the CPP, the PEO (or person acting in a similar capacity) of the financial institution is required to provide a certification similar to the following to the CCO:

“I, [identify the principal executive officer of the financial institution], certify, based on my knowledge, that:

(i) The compensation committee of [identify financial institution] has met at least once during the most recently ended fiscal year with senior risk officers to discuss and review the relationship between the risk management policies and practices of [identify financial institution] and the incentive compensation arrangements of the senior executive officers, as defined in subsection 111(b)(3) of the Emergency Economic Stabilization Act of 2008 (EESA) and regulations and guidance issued thereunder (SEOs), to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of [identify financial institution];

(ii) The compensation committee of [identify financial institution] has certified to the review of the SEO incentive compensation arrangements required under (i) above;

(iii) [Identify financial institution] has required that SEO bonus and incentive compensation be subject to recovery or "clawback" by [identify financial institution] if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria;

(iv) [Identify financial institution] has prohibited any golden parachute payment, as defined in the regulations and guidance issued under section 111(b) of EESA, to a SEO;

(v) [Identify financial institution] has instituted controls and procedures to limit the deduction for remuneration for federal income tax purposes to $500,000 for each SEO for the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to [identify financial institution]; and

(vi) The following individuals are the SEOs for the current fiscal year: [identify names and titles of SEOs of financial institution]."

(4) <u>Years Following First Fiscal Year Certification</u>. Within 135 days of the completion of each annual fiscal year of the financial institution after the first fiscal year during any part of which the financial institution has participated in the CPP, the PEO (or

person acting in a similar capacity) of the financial institution is required to provide a certification similar to the following to the CCO:

"I, [identify the principal executive officer of the financial institution], certify, based on my knowledge, that:

(i) The compensation committee of [identify financial institution] has met at least once during the most recently ended fiscal year with senior risk officers to discuss and review the relationship between the risk management policies and practices of [identify financial institution] and the incentive compensation arrangements of the senior executive officers, as defined in subsection 111(b)(3) of the Emergency Economic Stabilization Act of 2008 (EESA) and regulations and guidance issued thereunder (SEOs), to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of [identify financial institution];

(ii) The compensation committee of [identify financial institution] has certified to the review of the SEO incentive compensation arrangements required under (i) above;

(iii) [Identify financial institution] has required that SEO bonus and incentive compensation be subject to recovery or "clawback" by [identify financial institution] if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria;

(iv) [Identify financial institution] has prohibited any golden parachute payment, as defined in the regulations and guidance issued under section 111(b) of EESA, to a SEO;

(v) [Identify financial institution] has instituted controls and procedures to limit the deduction for remuneration for federal income tax purposes to $500,000 for each SEO for the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to [identify financial institution];

(vi) [Identify financial institution] has limited the deduction for remuneration for federal income tax purposes to $500,000 for each SEO for the fiscal year prior to the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to [identify financial institution]; and

(vii) The following individuals are the SEOs for the current fiscal year: [identify names and titles of SEOs of financial institution]."

(b) Recordkeeping Requirements. The financial institution is required to preserve appropriate documentation and records to substantiate each certification required under paragraph (a) of this § 30.12 (Q-12) for a period of not less than six years after the date of the certification, the first two years in an easily accessible place. The financial institution is required to furnish promptly to the TARP CCO legible, true, complete, and current copies of the documentation and records that are required to be preserved under paragraph (b) of this § 30.12 (Q-12) that are requested by the representative of the TARP CCO.

(c) Penalties for Making or Providing False or Fraudulent Statements. Any individual or entity which provides information or makes a certification to the Treasury that is relating to purchases under section 111 of EESA or required pursuant to 31 CFR Part 30 is subject to 18 U.S.C. 1001, which generally prohibits the making of any false or fraudulent statement to a federal officer. Upon receipt of information indicating that any individual or entity has violated any provision of title 18 of the U.S. Code or other provision of federal law, the Treasury shall refer such information to the Department of Justice and the Special Inspector General provided for under EESA.

Dated: _______________

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Neel Kashkari
Interim Assistant Secretary for Financial Stability

PRESS ROOM
U.S. DEPARTMENT OF THE TREASURY

February 4, 2009
TG-15

Treasury Announces New Restrictions On Executive Compensation

Today, the Treasury Department is issuing a new set of guidelines on executive pay for financial institutions that are receiving government assistance to address our current financial crisis. These measures are designed to ensure that public funds are directed only toward the public interest in strengthening our economy by stabilizing our financial system and not toward inappropriate private gain. The measures announced today are designed to ensure that the compensation of top executives in the financial community is closely aligned not only with the interests of shareholders and financial institutions, but with the taxpayers providing assistance to those companies.

The Treasury guidelines on executive pay seek to strike the correct balance between the need for strict monitoring and accountability on executive pay and the need for financial institutions to fully function and attract the talent pool that will maximize the chances of financial recovery and taxpayers being paid back on their investments. The proposals below, such as emphasizing restricted stock that vests as the government is repaid with interest, seek to strike exactly that balance.

The guidelines distinguish between banks participating in any new generally available capital access program and banks needing "exceptional assistance." Generally available programs have the same terms for all recipients, with limits on the amount each institution may receive and specified returns for taxpayers. The goal of these programs is to help ensure the financial system as a whole can provide the credit necessary for recovery, including providing capital to smaller community banks that play a critical role in lending to small businesses, families and others. The previously announced Capital Purchase Program is an example of a generally available capital access program.

If a firm needs more assistance than is allowed under a widely available standard program, then that is exceptional assistance. Banks falling under the "exceptional assistance" standard have bank-specific negotiated agreements with Treasury. Examples include AIG, and the Bank of America and Citi transactions under the Targeted Investment Program.

As part of President Obama's efforts to promote systemic regulatory reform, the standards today mark the beginning of a long-term effort to examine both the degree that executive compensation structures at financial institutions contributed to our current financial crisis and how corporate governance and compensation rules can be reformed to better promote long-term value and growth for shareholders, companies, workers and the economy at large and to prevent such financial crises from occurring again.

I. COMPLIANCE AND CERTIFICATION:

All Companies Receiving Government Assistance Must Ensure Compliance with Executive Compensation Provisions: The chief executive officers of all companies that have to this point received or do receive any form of government assistance must provide certification that the companies have strictly complied with statutory, Treasury, and contractual executive compensation restrictions. Chief executive officers must re-certify compliance with these restrictions on an annual basis. In addition, the compensation committees of all companies receiving government assistance must provide an explanation of how their senior executive compensation arrangements do not encourage excessive and unnecessary risk-taking.

II. ENHANCED CONDITIONS ON EXECUTIVE COMPENSATION GOING FORWARD:

A. **Companies Receiving Exceptional Financial Recovery Assistance:**

- **Limit Senior Executives to $500,000 in Total Annual Compensation – Other than Restricted Stock:** Current programs providing exceptional assistance to financial institutions forbid recipients of government funds from taking a tax deduction for senior executive compensation above $500,000. Today's guidance takes this restriction further by limiting the total amount of compensation to no more than $500,000 for these senior executives except for restricted stock awards.
- **Any Additional Pay for Senior Executives Must Be in Restricted Stock that Vests When the Government Has Been Repaid with Interest:** Any pay to a senior executive of a company receiving exceptional assistance beyond $500,000 must be made in restricted stock or other similar long-term incentive arrangements. The senior executive receiving such restricted stock will only be able to cash in either after the government has been repaid – including the contractual dividend payments that ensure taxpayers are compensated for the time value of their money – or after a specified period according to conditions that consider among other factors the degree a company has satisfied repayment obligations, protected taxpayer interests or met lending and stability standards. Such a restricted stock strategy will help assure that senior executives of companies receiving exceptional assistance have incentives aligned with both the long-term interests of shareholders as well as minimizing the costs to taxpayers.
- **Executive Compensation Structure and Strategy Must be Fully Disclosed and Subject to a "Say on Pay" Shareholder Resolution:** The senior executive compensation structure and the rationale for how compensation is tied to sound risk management must be submitted to a non-binding shareholder resolution. There are no "Say on Pay" provisions in the existing programs.
- **Require Provisions to Clawback Bonuses for Top Executives Engaging in Deceptive Practices:** Under the existing programs providing exceptional assistance, only the top five senior executives were subject to a clawback provision. Going forward, a company receiving exceptional assistance must have in place provisions to claw back bonuses and incentive compensation from any of the next twenty senior executives if they are found to have knowingly engaged in providing inaccurate information relating to financial statements or performance metrics used to calculate their own incentive pay.
- **Increase Ban on Golden Parachutes for Senior Executives:** The existing programs providing exceptional assistance to financial institutions prohibited the top five senior executives from receiving any golden parachute payment upon severance from employment, a ban that will be expanded to include the top ten senior executives. In addition, and at a minimum, the next twenty-five executives will be prohibited from receiving any golden parachute payment greater than one year's compensation upon severance from employment.
- **Require Board of Directors' Adoption of Company Policy Relating to Approval of Luxury Expenditures:** The boards of directors of companies receiving exceptional assistance from the government must adopt a company-wide policy on any expenditures related to aviation services, office and facility renovations, entertainment and holiday parties, and conferences and events. This policy is not intended to cover reasonable expenditures for sales conferences, staff development, reasonable performance incentives and other measures tied to a company's normal business operations. These new rules go beyond current guidelines, and would require certification by chief executive officers for expenditures that could be viewed as excessive or luxury items. Companies should also now post the text of the expenditures policy on their web sites.

B. **Financial Institutions Participating in Generally Available Capital Access Programs:**

<u>The Treasury intends to issue proposed guidance subject to public comment on the following executive compensation requirements relating to future *generally available* capital access programs.</u>

- **Limit Senior Executives to $500,000 in Total Annual Compensation Plus Restricted Stock – U*n*less Waived with Full Public Disclosure and Shareholder Vote:** Companies that participate in generally available capital access programs may waive the $500,000 plus restricted stock rule only by disclosure of their compensation and, if requested, a non-binding "say on pay" shareholder resolution. All firms participating in a future capital access program must review and disclose the reasons that compensation arrangements of both the senior executives and other employees do not encourage excessive and unnecessary risk taking. Under the current Capital Purchase Program, the companies were only required to review and certify that the top five executives' compensation arrangements did not encourage excessive and unnecessary risk-taking.
- **Require Provisions to Clawback Bonuses for Top Executives Engaging in Deceptive Practices:** The same clawback provision that applies to companies receiving exceptional assistance will apply to those in generally available capital access programs. Thus, in addition to the clawback provision applicable to the top five executives as under the Capital Purchase Program, a company receiving assistance must have in place provisions to claw back bonuses and incentive compensation from any of the next twenty senior executives if they are found to have knowingly engaged in providing inaccurate information relating to financial statements or performance metrics used to calculate their own incentive pay.
- **Increase Ban on Golden Parachutes for Senior Executives:** Even under generally available capital access programs, the golden parachute ban will be strengthened: Upon a severance from employment, the top five senior executives will not be allowed a golden parachute payment greater than one year's compensation, as opposed to three years under the current Capital Purchase Program.
- **Require Board of Directors' Adoption of Company Policy Relating to Approval of Luxury Expenditures:** This policy will be the same for companies accessing generally available capital programs as it is for those receiving exceptional assistance. There are no guidelines on luxury expenditures under the current Capital Purchase Program.

[*These new standards will not apply retroactively to existing investments or to programs already announced such as the Capital Purchase Program and the Term Asset-Backed Securities Loan Facility*.]

III. LONG-TERM REGULATORY REFORM: COMPENSATION STRATEGIES ALIGNED WITH PROPER RISK MANAGEMENT AND LONG-TERM VALUE AND GROWTH:

Even as we work to recover from current market events, it is not too early to begin a serious effort to both examine how company-wide compensation strategies at financial institutions – not just those related to top executives – may have encouraged excessive risk-taking that contributed to current market events and to begin developing model compensation policies for the future. Such steps should include:

- ***Requiring all Compensation Committees of Public Financial Institutions to Review and Disclose Strategies for Aligning Compensation with Sound Risk-Management:*** The Secretary of the Treasury and the Chairman of the Securities and Exchange Commission should work together to require compensation committees of all public financial institutions – not just those receiving government assistance – to review and disclose executive and certain employee compensation arrangements and explain how these compensation arrangements are consistent with promoting sound risk management and long-term value creation for their companies and their shareholders.
- C***ompensation of Top Executives Should Include Incentives That Encourage a Long-Term Perspective:*** Over the last decade there has

been an emerging consensus that top executives should receive compensation that encourages more of a long-term perspective on creating economic value for their shareholders and the economy at large. One idea worthy of serious consideration is requiring top executives at financial institutions to hold stock for several years after it is awarded before it can be cashed-out as this would encourage a more long-term focus on the economic interests of the firm.

- ***Pass Say on Pay Shareholder Resolutions on Executive Compensation:*** Even beyond companies receiving financial recovery assistance, owners of financial institutions – the shareholders – should have a non-binding resolution on both the levels of executive compensation as well as how the structure of compensation incentives help promote risk management and long-term value creation for the firm and the economy as a whole.
- ***White House -Treasury Conference on Long-Term Executive Pay Reform:*** The Secretary of the Treasury will host a conference with shareholder advocates, major public pension and institutional investor leaders, policy-makers, executives, academics, and others on executive pay reform at financial institutions. Treasury will seek testimony, comment, and white papers on model executive pay initiatives in the cause of establishing best practices and guidelines on executive compensation arrangements for financial institutions.

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