



## **SMALL BUSINESS SECURITIES BULLETIN - FEBRUARY 2010**

February 2010

By: [Penny Somer-Greif](#)

### **Corp. Fin CDIs on New Proxy Disclosure Requirements**

The U.S. Securities and Exchange Commission's (SEC) Division of Corporation Finance has issued new Compliance Disclosure & Interpretations (CDIs) with respect to its new proxy disclosure rules applicable for this proxy season, which we discussed in our January Bulletin. Among other things, the CDIs provide that the new disclosure regarding the "specific experience, qualifications, attributes or skills" that led the board to conclude such person should serve as a director must be made (i) for each individual director or nominee and may not be made on a group basis, and (ii) for each director serving on the board including, such as is the case for a company with a classified board, for directors not up for re-election. In addition, this disclosure (and the related business experience disclosure) need not be provided with respect to a director whose term will not continue after the meeting to which the proxy statement relates.

With respect to executive compensation, the CDIs also clarify that the grant date fair value of an equity award that is granted and forfeited during the same year (in this case, because the officer leaves the company) should be included for determining total compensation and the named executive officers for that year, and that the grant date fair value reported in the Stock Awards and Option Awards columns of the summary compensation table should exclude the effect of estimated forfeitures, whether the awards are subject to performance conditions or time-based vesting.

### **Say-on-Pay for TARP Recipients – No Preliminary Proxy Filing Required**

The SEC has adopted substantially as proposed new Rule 14a-20 under the Securities Exchange Act of 1934 (Exchange Act) and amendments to Item 20 of Schedule 14A requiring participants in the Treasury Department's Troubled Asset Relief Program (TARP) to provide the separate stockholder vote on the compensation of executives required by Section 111(e) of the Emergency Economic Stabilization Act of 2008 (EESA), in proxies solicited "during the period in which any obligation from financial assistance provided under the TARP remains outstanding." The rule clarifies that the say on pay vote is only required with respect to an annual meeting (or special meeting in lieu thereof) at which directors will be elected.

An instruction to Rule 14a-20 clarifies that smaller reporting companies are not required to provide a compensation discussion and analysis section in order to comply with the Rule.

The SEC has also, as proposed, adopted an amendment to Rule 14a-6 under the Exchange Act that provides that TARP recipients need not file a preliminary proxy statement as a result of providing the required say-on-pay vote. Companies that provide a say-on-pay vote voluntarily, however, are not covered by the amendment and as such will be required to file a preliminary proxy statement as a result of providing such a vote.

### **Proposed Revisions to Rule 10b-18 Regarding Issuer Repurchases**

On January 26, 2010 the SEC released proposed amendments to Rule 10b-18 under the Exchange Act. Rule 10b-18 provides a safe harbor from liability for manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act when companies repurchase their own securities in accordance with the Rule's manner, timing, price and volume conditions.

Currently, companies wishing to utilize the safe harbor may not make the opening (regular way) purchase in the consolidated system, but can make the opening purchase in both the principal market for the security and in the market where the purchase is effected, as long as a purchase has been reported in the consolidated system. The amendment would extend the opening purchase prohibition to both the principal market for the security and the market in which the purchase is made.

With respect to price, Rule 10b-18 provides that a company repurchasing its own securities may not buy the security at a price that is higher than the highest independent bid or last independent transaction price, whichever is higher, quoted or reported in the consolidated system. The amendment would allow repurchases based on volume-weighted average prices, which are often priced without reference to quoted prices, providing certain conditions are met, including that the security is "actively traded" as defined in SEC Regulation M.

The proposed amendments would also provide that the safe harbor is unavailable for a special purpose acquisition company (SPAC) acquisition until completion of the required vote by the SPAC stockholders. The Rule 10b-18 proposing release is available at <http://www.sec.gov/rules/proposed/2010/34-61414.pdf>.

**About Me.** I am a former SEC attorney who also has prior "big firm" experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, and general corporate matters, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you.

Visit my bio at [www.ober.com/attorneys/penny-somer-greif](http://www.ober.com/attorneys/penny-somer-greif)

**About Ober|Kaler.** Ober|Kaler is a national law firm that provides integrated regulatory, transaction and litigation services to financial, health care, construction and other business organizations. The firm has more than 120 attorneys in offices in Baltimore, MD, Washington, DC and Falls Church, VA. For more information, visit [www.ober.com](http://www.ober.com).

---

This Bulletin contains only a general overview of the matters discussed herein and should not be construed as providing legal advice. If you have any questions about the information in this Bulletin or would like additional information with respect to these matters, please contact me at 410-347-7341 or via e-mail at [psomergreif@ober.com](mailto:psomergreif@ober.com).

Feel free to – and please do – forward this Bulletin to anyone that you think might be interested in it. If you did not receive this Bulletin from Ober|Kaler directly, you may sign up to receive future Bulletins like this via e-mail at: [marketing@ober.com](mailto:marketing@ober.com).

© 2010 Ober|Kaler All Rights Reserved.